ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672
4681 HJUD HB 198

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

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

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

22 See Franklin v. Arkansas Fuel Oil Co. 218 La. 987, 51 So. 2d 600 (1951) (exploration right is a proper element to be considered in the award of damages): Holcombe v. Superior Oil Co., 213 La. 584, 35 So. 2d 457 (1948)(compensatory damages available for appropriation of the exploration right), Layne Louisiana Co. v. Superior Oil Co., 209 La. 1014, 26 So. 2d 20 (1946) (exclusive right to explore for minerals entitles landowner to recover compensatory damages for disregard of the right); Angelloz v. Humble Oil & Ref. Co. 196 La. 604, 199 So. 656 (1940) the right to explore is a valuable property right and may be considered in assessing damages).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

36 See note 24.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Every person who willfully commits any trespass, by either:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

47 State of California §554.1 Method of posting

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

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

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

48 State of New Mexico §30-14-6.

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

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

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

50 Code of Virginia §18.2-135.

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

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

Ahtna, Inc.

MAR 25 1988

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DRAWER G
COPPER CENTER, AK 99573
PHONE: (907) 822-3476

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406 W FIREWEED LANE, NO 101
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ST-24

March 18, 1988

Peter Goll
Alaska State Legislature
P.O. Box V (M.S. 3100)
Juneau, Alaska 99811

RE: Support of H.B. 198

Dear Peter:

By virtue of this letter, I am hereby expressing my support for House Bill 198. This bill, if passed into law, would be of great benefit to the private property owner. It comes at time when problems related to trespass are at a upsurge, and unauthorized usage of one's private property are ever-the-more increasing. The issue and consequences of trespass have never been openly discussed, but rather set aside. As a result, trespass problems have grown out of proportion and furthermore, have been interpreted by many to mean permissiveness rather than the opposite.

As a Native Corporation in charge of the management of many acres of land, we find, in many instances, unauthorized uses of our lands by users who couldn't care less who owns what lands. The users seem to know that since the current trespass laws are so vague, and can be interpreted differently, that enforcement will be to a minimum or not at all. Even the State Troopers in charge of enforcement are reluctant to pursue instances of trespass. They find themselves caught between the individual(s) and the private property owners, where the latter must prove beyond a reasonable doubt that trespass did occur. Until the proof is conveyed, it is either forgotten, neglected or ignored...but the damage is already done. These problems associated with trespass will continue to arise until something is done. It will never go away!

Again, for a private property owner with the management responsibility of many acres of land, trespass confrontations can become very serious. Although H.B. 198 is a long way from ideal, we feel it is the most reasonable first step toward rectifying the prob-

lem. Although there are other desired features in this legislation, the most important part of this bill is the elimination of the legal liability of landowners for users who use other "open lands" for recreational purposes. It really helps corporations in reducing their liability!

Let me say, in closing, that Ahtna, Inc., as a landowner, desires to have a bill such as H.B. 198 become law, as it does clarify to some degree what constitutes trespass along with other sections that clearly assist private landowners in protecting their lands.

Respectfully submitted,

Roy S. Ewan
President

cc: Land Committee
Ray Craig, Land Protection Officer
Shareholder Committee Chairmen
Village Council Presidents

HB198
Mike
Schneider
Anc.

HYPOTHETICAL FACT SITUATIONS UNDER C: FOR SPONSOR
SUBSTITUTE FOR HB 198

05.40.010(a)

A, owner of land open to public, conducts a small mining operation and inadvertently drops a blasting cap on the ground. B, an eleven year old boy, plays with the cap, which explodes and blinds him. No liability.

A, who rents a house on land open to public, digs a trench to pipe water from a lake to his home. The ditch crosses a jeep road frequently used by village children on three wheelers, and is unmarked. B, an eleven year old, rounds a curve, drives into the ditch, and is paralyzed. No liability.

05.40.010(b)(2)

A, owner of land open to the public, sees movement in a bush, thinks it is a moose, and shoots, killing a berrypicker. No liability.

09.45.795(1)(A)

A owns a lake. Village children frequently jump from a ten foot high rock into the lake. As A knows, there is a submerged boulder in the area where children jump, but he posts no warning. B, an eleven year old boy, strikes the boulder with his head and is paralyzed. No liability.

A owns a quarter acre unimproved lot in Anchorage. A large tree has rotted and is about to fall, as A knows. B and C are two children playing in the neighborhood. The tree falls, killing B, who is on A's land, and C, who is off A's land. A is liable to C, but not to B.

09.45.795(B)

A buys a lot in downtown Anchorage. He notices the ground is beginning to slump over a cesspool pit created by a prior owner 30 years before. The ground gives way under the car of B, an invited guest, and B is injured. No liability.

09.45.795

A, owner of land, posts no trespassing signs. B sees the signs, but because he is lost drives his auto onto A's land to seek

directions, in violation of [illegible] shoots and kills B. No civil liability.

00.45.705

A owns a cabin at Big Lake near Wasilla. To guard it, he installs a spring gun, so that anyone opening the door will be shot. A's brother B knows the key is hidden on a nail, and drops by to borrow A's chainsaw, without first getting permission, in violation of AS 11.46.330 (6). B is killed by the spring gun. A incurs no liability.

A is infuriated because villagers use a jeep road across his land to reac another village. One night, knowing that snowmobilers will be returning from a bingo game, he stretches a steel cable across the road. Snowmobiler B is decapitated. No liability.

A, an Anchorage resident, has a swing set in his fenced backyard. He also keeps a vicious pitbull there. B, a three year old boy, opens the gate to use the swing set, in violation of AS 11.46.330(c)(6). B is severely mauled by the pitbull. No liability.

ALASKA FEDERATION OF NATIVES, INC.

411 W. 4th Avenue, Suite 301 • Anchorage, Alaska 99501 • Phone (907) 274-3611

April 11, 1988

APR 13 1988

Representative Lyman Hoffman
Alaska State Legislature
P. O. Box V
Juneau, Alaska 99811

Dear Representative Hoffman:

Recently there has been increased activity to develop a version of HB-198 that will satisfy the concerns of the House Judiciary Committee while not diluting, beyond reason, the intent of the bill. Mr. Steve Sorensen, representing Sealaska, has been instrumental in working with House Judiciary staff to facilitate the redrafting.

For the record, Mr. Sorensen has been working closely with Alaska Federation of Natives staff Larry Kimball on the redrafting. Thus, the current draft of HB-198 has Federation support.

Thank you.

Sincerely,

Janie Leask

Janie Leask
President

cc: Representative John Sund
Representative Kay Wallis
Steve Sorensen

ALASKA FEDERATION OF NATIVES, INC.
1987 ANNUAL CONVENTION

RESOLUTION NO. 87-12

TITLE: ANCSA LANDS TRESPASS

WHEREAS, the United States Congress recognized and transferred land ownership of specific land holding under the 1971 ANCSA Legislation; and

WHEREAS, sixteen (16) years have passed and interim conveyance has not yet been completed by the Department of Interior, to those ANCSA LANDS to this day; and

WHEREAS, trespass by U.S. citizens, tourists, developers and the general public occurs in and about the Native Corporation regions on a daily basis for many different reasons unknown to those Alaska Native landowners and as time progresses this inadvertant passage over and use of those private ANCSA LANDS causes concern to all involved.

NOW THEREFORE BE IT RESOLVED by the delegates to the 1987 annual convention of the Alaska Federation of Natives, Inc. that enforcement and compliance of trespass laws by the state and federal government on those ANCSA private lands begin today, and to support HB 198 in the forthcoming legislative session.

CONVENTION ACTION: PASSED

ALASKA RAILROAD CORPORATION

P.O. Box 7-2111 • Anchorage, Alaska 99510-7069

February 3, 1988

The Honorable John Sund
Chairman, House Judiciary Committee
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: CSSSHB 198: An Act Relating to the Permissive and Nonpermissive Use of Land

Dear Chairman Sund,

Yesterday, we sent you some comments concerning SSBH 198. Unfortunately, we had not received the committee substitute by that time. We find in reviewing CSSSHB 198 that a modification proposed in our letter has already been made. In addition, it may be difficult to track our other recommendations because page and line numbers have also changed. Consequently, I have amended the comments section of our letter to follow the committee substitute. We hope that this new format will be helpful. Please disregard our comments as expressed in yesterday's letter.

Section 05.40.010, page 2, lines 12 and 13.

.....DELETE "private."

If "land" is defined only as private land, it is likely that ARRC and other large public landowners would not be protected by the limitation of liability provisions of this statute. None of the other recreational use statutes we studied here limit the protection of recreational use statutes to private land owners. For example, the Washington statute covers "public or private landowners," and courts interpreting the Washington law have interpreted that language to include all public and private landowners. By way of example, the State purchased some 38,000 acres of land with The Alaska Railroad. We believe that recreational use of all public lands in Alaska should be encouraged by a clearer definition here. So far as ARRC is concerned, this change is critical and would bring the statute in line with other state statutes.

Section 11.46.320, page 4, line 3.

.....ADD "or any instrumentality thereof" after "by the state."

For the reasons expressed above, the trespass statute should also be clarified to insure that lands of public corporations are also included as well as state and municipal lands. Like many other public corporations, ARRC has been established as a legal entity separate from the state. This clarification will insure that these public lands are also protected. Otherwise, uncertainty concerning the meaning of "state" will persist.

Section 05.40.010, page 1, line 16.

.....ADD "directly or indirectly" after "who."

This language makes it clear that the invitation or permission to use one's land need not be made expressly. It will eliminate potential legal arguments to the contrary.

Section 05.40.010, page 1, line 15.

.....ADD "Unless otherwise provided herein, all common law remedies against owners of land are replaced by this chapter." after end of sentence.

One commentator has stated that where recreational use legislation is silent as to common law remedies such as the attractive nuisance doctrine, and the statute is in derogation of the common law, the common law remedy still may have vitality in spite of the recreational use statute. This observation counsels placing a specific provision in the statute which establishes that the recreational use statute supersedes common law remedies so that the purposes for which the statute was enacted cannot be avoided by legal argument.

Section 05.40.010, page 1, line 15.

.....ADD "thereon" after "entering."

This is a technical change which will improve the sentence structure.

Section 05.40.010, page 1, line 21.

.....ADD "or individual" after "owner."

Both the Oregon and California statutes have almost identical provisions that protect the owner from liability for the acts or omissions of the persons who enter on their land. The language of CSSSHB 198, however, only protects the owner

from liability for his own acts or omissions. This is, of course, important, but we recommend that protection from liability for acts or omissions of individuals actually using the land be made clear.

Thank you again for your consideration of our comments.

Sincerely yours,

F. G. Turpin
President & CEO

cc: House Judiciary Committee Members
Mr. Rick Urion

5930L

ALASKA RAILROAD CORPORATION

P.O. Box 7-2111 • Anchorage, Alaska 99510-7069

February 2, 1988

The Honorable John Sund
Chairman, House Judiciary Committee
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: SSHB 198: An Act Relating to the Permissive and Nonpermissive Use of Land

Dear Chairman Sund,

Thank you for this opportunity to express our comments and support for SSHB 198. As you know, the legislation proposes a recreational use statute for Alaska. Legislative liaison for the Alaska Railroad Corporation ("ARRC"), Rick Union, is planning to attend this afternoon's hearing and will be available to field any questions concerning our comments.

In light of a growing list of troublesome court decisions, it is likely that ARRC and other large landowners will enforce the "no trespass" law in order to better manage their liabilities. Unfortunately, hikers, fishermen, hunters, canoeists, snowmachiners, skiers, and other recreationalists will bear the brunt of these closed opportunities. We believe the bill is important legislation for a traditionally open Alaska. We support it.

Representative Hoffman and his staff graciously considered our earlier comments concerning HB 198. We note with appreciation that several changes have consequently been suggested in SSHB 198 and in technical changes to SSBH 198 for a committee substitute. Unfortunately, we received an analysis of our comments and subsequent changes within the last few hours and have not had time to discuss the following thoughts with Representative Hoffman.

We respectfully offer these additional changes to SSHB 198 to you, to the committee, and to Representative Hoffman:

Section 05.40.010, page 2, lines 16 and 17.

.....DELETE "private."

If "land" is defined only as private land, it is likely that ARRC and other large public landowners would not be protected by the limitation of liability provisions of this statute. None of the other recreational use statutes we studied here limit the protection of recreational use statutes to private land owners. For example, the Washington statute covers "public or private landowners," and courts interpreting the Washington law have interpreted that language to include all public and private landowners. By way of example, the State purchased some 38,000 acres of land with The Alaska Railroad. Recreational use of such lands and other public lands in Alaska we believe should be encouraged by a clearer definition here. So far as ARRC is concerned, this change is critical and would bring the statute in line with other state statutes.

Section 11.46.320, page 4, line 9.

.....ADD "or any instrumentality thereof" after "by the state."

For the reasons expressed above, the trespass statute should be clarified to insure that lands of public corporations are also included as well as state and municipal lands. Like many other public corporations, ARRC has been set up with as a legal entity separate from the state. This clarification will insure that these public lands are also protected.

Section 05.40.010, page 1, line 17.

.....ADD "directly or indirectly" after "who."

This language makes it clear that the invitation or permission to use one's land need not be made expressly. It will eliminate one more potential legal argument.

Section 05.40.010, page 1, lines 14, 15.

.....DELETE "for recreational purposes."

Please see explanation below.

Section 05.40.010, page 1, line 16.

.....DELETE "for recreational purposes" and ADD "thereon."

The purpose of the statute is to reward landowners by limiting their liability when they "make land available to the public without compensation for recreational purposes." The

landowner who makes his land available, however, is unable to screen the users of his land to determine whether those users are on the land for recreational purposes or not. The statute should reward the landowner who opens his doors for recreational purposes regardless of whether or not the person entering upon the land actually uses it for recreational purposes.

We are concerned about courts which may refuse to grant defendant landowners the protection of the recreational use statute where the injured person's use was not in fact recreational. For example, the user may claim that his use was more related to a business or professional pursuit such as guiding.

Section 05.40.010, page 1, line 16.

.....ADD "All common law remedies against owners of land are replaced by this chapter unless specifically referenced herein." after end of sentence.

One commentator has stated that where recreational use legislation is silent as to common law remedies such as the attractive nuisance doctrine, and the statute is in derogation of the common law, the common law remedy still may have vitality in spite of the recreational use statute. This observation counsels placing a specific provision in the statute which establishes that the recreational use statute supersedes common law remedies so that the purposes for which the statute is created can truly be enforced.

Thank you for your consideration of our comments. Again, we appreciate the thought reflected in this legislation and remain hopeful that it will be favorably considered by the legislature.

Sincerely yours,

F.G. Turpin
President & CEO

cc: House Judiciary Committee Members
Mr. Rick Urion

5930L

ALASKA RAILROAD CORPORATION

P.O. Box 7-2111 • Anchorage, Alaska 99510-7069

December 2, 1987

The Honorable Lyman F. Hoffman
House of Representatives
Alaska State Legislature
3111 C Street, Suite 460
Anchorage, Alaska 99503

Re: Proposed Amendments to House Bill 198
"An Act Relating to the Permissive and Nonpermissive Use of Land"

Dear Representative Hoffman,

The hustle and bustle of last year's legislative session unfortunately delayed our review of several important bills. These included your HB 198 which, of course, proposes a recreational use statute for Alaska. The legislation will make it safer for a landowner to make his land available to the general public for recreational purposes.

In light of a growing list of troublesome court decisions, it is likely that the Alaska Railroad Corporation ("ARRC") and other large landowners will enforce the "no trespass" law in order to better manage their liabilities. Unfortunately, sportsmen, hikers, fishermen, canoeists, rafters, and other recreationalists will feel the brunt of these closed opportunities. Your bill is important legislation for a traditionally open Alaska. We intend to support it. Perhaps you've already received support from other landowners and sportsmen's groups.

We have carefully studied the current draft and have some amendments to offer to you. We believe the modifications are consistent with the bill's purposes and may help clarify its intent. Some proposed amendments may require a more detailed explanation. Should you or your staff have questions, please feel free to contact either myself or our General Counsel, Larry Wood, at 265-2461.

The most important recommended changes are: (a) the introductory phrase "except as provided in A.S. 09.45.795" should be eliminated from AS 05.40.010 because AS 09.45.795 is not, in fact, an exception to the limitation in AS 05.40.010; (b) the definition of "land" in AS 05.40.010 should be

modified to delete the modifier "private" and add "bridges." This will ensure that public corporate landowners will be protected by the statute and that public use of such things as railroad bridges will be covered by the Act; (c) the phrase "for recreational purposes" should be eliminated at various places in AS 05.40.010 so that a landowner who makes his land available for recreational use is protected by the statute even when the use is arguably not recreational. In studying cases decided under similar statutes elsewhere, we note that landowners frequently lose protection when public users claim that their activities were not "recreational." By example, they may claim that the use was more related to their own business or professional interests; and (d) AS 11.46.320(c)(2), the trespass statute, should be changed to include lands of a "public corporation" as well as state and municipal lands. As you know, public and Native landowners are principal landowners in Alaska and we believe that they should be encouraged to make their land available for public use. We have also made a number of other significant technical changes in the bill which should be beneficial. As noted, we would be most happy to provide additional explanation for these.

Thank you for your consideration of our comments.

Sincerely yours,

F. G. Turpin
President and Chief Executive Officer

cc: L. D. Wood, Esq.

5505L

HOUSE BILL NO. 198

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the permissive and non-permissive use of land."

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

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

CHAPTER 40. RECREATIONAL USE OF LAND.

Sec. 05.40.010. RECREATIONAL USE. (a) ~~Except as provided in AS 09.45.795,~~ An owner of land who makes land available to the public without compensation for recreational purposes owes no duty of care to keep the land safe for entry or use by others, ~~for recreational purposes~~ or to give a warning of a dangerous condition, use, structure, or activity on the land to persons entering thereon. ~~for recreational purposes.~~ All common law remedies against owners of land are replaced by this chapter unless specifically referenced herein.

(b) ~~Except as provided in AS 09.45.795,~~ An owner of land who directly or indirectly invites or permits without compensation ~~an individual~~ any person to use the land for any recreational purposes ~~does~~ does not thereby

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

(2) confer upon such perso.. ~~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; or

(3) Assume responsibility for or incur liability for injury, loss, or death to an individual or property caused by an act or omission of that person ~~the owner~~.

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

~~(d)~~(c) This section does not limit the liability of an owner of land (1) for a willful ~~and~~ and malicious failure to guard or warn against a dangerous condition, use, structure, or activity, or (2) for any injury suffered when the owner obtains compensation from the person who enters or goes upon the land for any recreational purpose.

~~(e)~~ (d) This section may not be construed to relieve a person using the land of another who has made that land available to the public for recreational purposes without compensation ~~for recreational purposes~~ 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)~~ (e) An individual who, with or without permission, uses ~~using~~ the land of another ~~for~~ who has made the land available for recreational purposes~~, with or without permission,~~ is liable for damages to the property caused while on the property.

~~(g)~~ (f) In this section

(1) "compensation" does not include a processing or application fee for a permit to use land for recreational purposes, an administrative fee of up to ten dollars for the cutting, gathering, or removing of firewood from the land, or the consideration for a lease entered into between an owner and the state, a political subdivision thereof, or a public corporation for any recreational purpose;

(2) "land" means ~~private~~ land, roads, water, watercourses, ~~private~~ ways and buildings, structures, bridges, 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;

(4) "recreational purposes" includes, but is not limited to, hunting, fishing, swimming, boating, bicycling, riding of horses or other animals, hiking, pleasure or off-road vehicle driving, nature study, water skiing, snowmobiling, winter or water sports, and viewing or enjoying historical, archaeological, scenic or scientific sites,

or cutting, gathering or removing of firewood by anyone for personal use, when done without ~~charge of~~ compensation to the owner.

Sec. 05.40.020. PERMISSIVE RECREATIONAL USE. (a) An owner of land who either directly or indirectly invites or permits a person to use land for recreational purposes without compensation does not give the person a right to continued ~~the~~ use of the land for a recreational purpose without consent and such use does not support any claim of adverse possession.

(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 dedicate or otherwise give over to the public the ~~a~~ right to continued use of 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 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 ~~IMPROVED OR UNIMPROVED~~ LAND. In addition to the liability limitation contained in AS 5.40.010, (a) An owner of land ~~[OF UNIMPROVED LAND]~~ as those terms are defined in AS 5.40.010(f) is not liable in tort for damages for the injury to or death of a person who, with or without permission, 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 ~~property~~ or a condition of a portion of the 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 ~~property~~.

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

(b) ~~A landowner~~ An owner of land, as those terms are defined in AS 5.40.010, is not liable in tort for damages for the injury to or death of a person who trespasses on the land of another in violation of AS 11.46. ~~whether the land is improved or unimproved.~~

~~(c) For the purposes of this section, "unimproved" means land foun in its natural condition or if improved, the improvement was placed on the land by a third party without the knowledge or permission of the owner.~~

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

(c) A person violates (a) of this section if the person

(1) willfully enters or remains unlawfully on the premises of another knowing that the consent to enter or remain on the premises has been denied or withdrawn by a person in charge of the premises;

(2) willfully enters on premises owned, operated, or controlled by the state or any political subdivision thereof or any public corporation ~~a municipality of the state~~ knowing that consent to enter the premises has been denied or withdrawn by the person in charge of the premises;

(3) without authority of law goes upon and remains on the premises of another, having been denied entry on the premises either orally or in writing by the person in charge of the premises or after having been forbidden to do so by signs posted under AS 11.46.350(b);

(4) enters enclosed premises of another or premises of another posted under AS 11.46.350(b) on foot or by a vehicle without the express or implied consent of the person

in charge of the premises, except through a road, airstrip, or other apparent way of access;

(5) hunts, fishes, traps or removes animal, vegetable, or mineral material on the premises of another without permission;

(6) enters the premises of another to remove or use the property of another without the permission of the person in charge of the premises;

(7) willfully enters on or crosses over private premises to gain access to a valid easement or navigable water;

(8) enters on the premises of another without permission and damages a part of the premises;

(9) knowingly or unlawfully enters or remains on the premises of another to acquire geotechnical, geological, geophysical, or geochemical data for the purpose of locating minerals;

(10) being a person engaged in business for profit, including, but not limited to, hunting or fishing guides river guides, recreation guides, air taxi operators, surveying, timber cruising, and commercial air carriers, enters and remains on the premises of another without the permission of the person in charge of the premises.

* 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 is given by posting in the manner described in (c) of this section [IN A REASONABLY CONSPICUOUS MANNER UNDER THE CIRCUMSTANCES].

* 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 apparent way of access onto the property; 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.

S7:AR1:05.3F

STATE OF ALASKA

DEPARTMENT OF NATURAL RESOURCES

OFFICE OF THE COMMISSIONER

STEVE COWPER, GOVERNOR

400 WILLOUGHBY AVE.
JUNEAU, ALASKA 99801-1796
PHONE: (907) 465-2400

February 2, 1988

The Honorable John Sund
Chairman
House Judiciary Committee
P.O. Box V
Juneau, Alaska 99811

Dear Representative Sund:

Subject: SSHB 198 - An act relating to the permissive and non permissive use of land.

Position: As the bill is currently written it does not affect the Department of Natural Resources. If it was amended to include an exemption from liability as outlined below, the Department of Natural Resources would enthusiastically support it.

Background: The Department has many concerns relating to liability on state land. If this exemption of liability was extended to state land it would resolve many of those concerns about recreational use of both developed and undeveloped land and concerns regarding injuries and damages when we issue leases and permits.

The state should not be liable if it leases land in its natural condition and others improve it, as long as it was in its natural condition when it was originally leased.

Recommendation: The Department of Natural Resources recommends that the bill include "state land" under the definition of land, Sec. 05.40.010(g)(2).

Sincerely,

Judith M. Brady
Commissioner

10-J9LH

cc: Sponsor (Hoffman)
Committee Members
Bob Evans
Rod Swope

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: SSHB 198
PUBLISH DATE: 4/29/87

FISCAL NOTE

REQUEST:

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

Agency Affected: DNR
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: Lennie Boston-Gronseth
Date: 2-2-88
Agency:

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

February 16, 1988

The Honorable Lyman Hoffman
Representative, District 25
The Honorable John Sund
Representative, District 1B
House of Representatives
c/o The House Judiciary Committee
P.O. Box V
Juneau, Alaska 99811

Re: House Bill 198 - "An Act Relating to the Permissive and Nonpermissive Use of Land"

Gentlemen:

Sealaska Corporation is the Regional Native corporation for southeast Alaska. Sealaska owns approximately 493,000 acres of land located throughout southeast Alaska. Almost all of Sealaska's land is remote, unimproved, but accessible by land, air and water. As the major private landowner for for southeast Alaska, Sealaska would like to express its support for this legislation and offer the following comments with regard to HB 198, "An Act Relating to the Permissive and Nonpermissive Use of Land."

Under the provision of the proposed Bill, Sealaska would not be liable for injury or death if permission were given for recreational use, nor would Sealaska be liable for any injury or death if the property were unimproved. However, much of our land contains logging roads used by Sealaska and others as part of its timber harvesting. Many of these logging roads have been put to bed, with culverts and bridges removed and natural vegetation permitted to grow over these roads. As you may know, Sealaska is required to do this under the Alaska State Forest Practices Act, AS 41.17. Though these roads are now abandoned, liability could attach. It is our impression that the intent of this legislation is to exclude liability under these circumstances, and Sealaska is offering some suggested amendments to cover those concerns.

The intent of HB 198 is to clarify for the landowner, the duty it owes to someone who enters upon its land. Section 1 of the current version of HB 198 (CS for Sponsor Substitute for HB 198 (Judiciary), Bradley 2/3/88) ("CSSSHB 198") provides ample protection to the landowner provided that the use of the land was recreational and without compensation. This encompasses permissive use of the land, but does not include someone who is using the land without permission.

The only protection afforded the landowner from liability to a trespasser is found in Section 4 of the current version of HB 198, which merely states that the landowner is not liable in tort to a trespasser. Sealaska would ask the Committee to compare this short provision with the provision found in Section 1 of that Bill. If no duty of care is owed to one using the land with permission, then no duty should be owed to one using the land without permission. This would be in accord with the common law principle that no duty of care is owed to a trespasser. Sealaska believes that this principle should be clearly established in this Bill. To that end, Sealaska has drafted a substitute for Section 3 to be used in place of the current Section 3 of CSSSHB 198 for this purpose. A copy of the proposed amending language is attached. The intent of the proposed language is to specifically provide that no liability will attach to a landowner if a trespasser enters upon the land and is injured or killed.

Some of Sealaska's lands are isolated tracts, either surrounded by water or by federal/state-owned land. In such situations, access to Sealaska's land could be obtained anywhere along the perimeter, through roads which pass through federal or state-owned lands but do not enter Sealaska's lands, or by an accessible landing beach. Under the proposed Section 7 of CSSSHB 198, Sealaska would be protected from trespassers if it takes the steps of posting the property "at each roadway or apparent way of access." However, it is physically impossible for Sealaska to post notice at every conceivable access point. A better rule would be to require posting at specific known access points or along the perimeter at specified cardinal directions. To that end, Sealaska offers a proposed substitute for Section 7 of CSSSHB 198, which is enclosed for this Committee's review and use.

In sum, the burden of liability should lie with the trespasser and not with the landowner. Therefore, it should be an act of trespass if entry if made upon the land of another without permission regardless of posting and

liability should not be contingent upon providing notice of some prohibitive act. HB 198 goes far to address these concerns. However, Sealaska believes that the enclosed substituted sections would further clarify the legislature's intent regarding protection from unpermissive use of land and limiting liability for permissive use of land.

Sincerely,

SEALASKA CORPORATION

Robert W. Loescher
Senior Vice President
Resource Management

RWL/amt
s\rep.ltr
Attachments: Proposed substitute for Section 3
Proposed substitute for Section 7
cc/enc: Sen. Jim Duncan
Sen. Richard Eliason
Sen. Lloyd Jones
Rep. Peter Goll
Rep. Ben Grussendorf
Rep. Bill Hudson
Rep. Robin Taylor
Rep. Fran Ulmer
Byron I. Mallott
Sam Kito
Janie Leask
John Hartle
Larry Kimball
Stephen F. Sorensen, Esq.

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.

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 legisbly 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

TESTIMONY OF ROBERT W. LOESCHER
BEFORE THE HOUSE JUDICIARY COMMITTEE
ON HOUSE BILL 198
March 29, 1988

MY NAME IS ROBERT W. LOESCHER. I AM THE SENIOR VICE PRESIDENT RESOURCE MANAGEMENT FOR SEALASKA CORPORATION, THE NATIVE REGIONAL CORPORATION FOR SOUTHEAST ALASKA. SEALASKA PRESENTLY OWNS APPROXIMATELY 238,000 ACRES OF SURFACE AND 493,000 ACRES OF SUBSURFACE LOCATED THROUGHOUT SOUTHEAST ALASKA. SEALASKA WILL ALSO RECEIVE APPROXIMATELY 100,000 ACRES OF SURFACE AND SUBSURFACE AS PART OF ITS FINAL ENTITLEMENT UNDER THE ALASKA NATIVE CLAIMS SETTLEMENT ACT. ALMOST ALL OF SEALASKA'S LAND IS REMOTE, UNIMPROVED, BUT ACCESSIBLE BY LAND, AIR AND WATER. AS THE MAJOR PRIVATE LAND OWNER FOR SOUTHEAST ALASKA, SEALASKA WOULD LIKE TO EXPRESS ITS SUPPORT FOR HOUSE BILL 198.

SEALASKA CORPORATION, IN CONCERT WITH THE ALASKA FEDERATION OF NATIVES, HAVE REVIEWED THE COMMITTEE SUBSTITUTE FOR THE SPONSOR SUBSTITUTE OF HB 198. IN RESPONSE TO THE CONCERNS EXPRESSED BY MEMBERS OF THIS COMMITTEE, WE NOW OFFER THE PROPOSED DRAFT AS A SUBSTITUTE FOR THE PRESENT COMMITTEE SUBSTITUTE FOR HB 198. BOTH SEALASKA AND AFN FELT THAT HB 198 CONTAINED SOME AMBIGUITY AND DUPLICATION WHICH NEEDED TO BE ADDRESSED. OUR DRAFT, WHICH IS OFFERED TO THIS COMMITTEE, IS OUR EFFORT TO PROVIDE A MUCH CLEANER VERSION OF THIS BILL. THIS DRAFT, HOWEVER

STILL PRESERVES THE PROVISIONS WHICH PROTECT THE LANDOWNER FROM CERTAIN TYPES OF LIABILITY.

THE NEW DRAFT OF HB 198 HAS CONDENSED THE PROVISIONS CONCERNING RECREATIONAL USE IN SECTION 1 OF HB 198. ADDITIONALLY, WE PROPOSED THAT NEW SECTIONS BE ADDED TO INSURE THAT NO PROPERTY RIGHTS WILL BE CREATED OR CONVEYED THROUGH RECREATIONAL USE OF PROPERTY.

SECTION 2 OF HB 198 CONCERNING TREBLE DAMAGES FOR GEOLOGICAL TRESPASS REMAINS THE SAME IN OUR DRAFT. SECTION 3 OF HB 198, WHICH SOUGHT TO AMEND AS 09.45.795, HAS BEEN ALTERED TO ADDRESS THE CONCERNS OF THIS COMMITTEE AND TO BRING THE AMENDMENT INTO CONFORMITY WITH THE PROPOSED VERSION OFFERED BY SENATOR DUNCAN.

OUR RE-DRAFT OF HB 198 REDUCED THE SPECIFIC INSTANCES OF TRESPASS TO INCLUDE ONLY THOSE ACTS WHICH HAVE BEEN AMBIGUOUS AS TO WHETHER SUCH ACTS CONSTITUTED TRESPASS. UNDER OUR RE-DRAFT, THOSE ACTS WOULD NOW BE CONSIDERED TRESPASS. SECTION 7 OF HB 198 HAS BEEN ALTERED TO CLEARLY ESTABLISH THE REQUIREMENTS FOR POSTING OF SIGNS TO PROHIBIT TRESPASS. THIS LANGUAGE HAS BEEN PREVIOUSLY PROPOSED BY SEALASKA IN ITS EARLIER COMMENTS REGARDING HB 198.

WE FEEL THAT THIS NEW DRAFT OF HB 198 PRESERVES THE SAME CONCERNS ADDRESSED IN THE EARLIER VERSION OF HB 198. HOWEVER, WE

BELIEVE THAT THIS VERSION IS MORE SUCCINCT AND CLEARER. IT RESOLVES THE AMBIGUITIES WHICH EXISTED IN HB 198. WE ENCOURAGE THIS COMMITTEE TO REVIEW THIS NEW DRAFT AND ADOPTED IT AS THIS COMMITTEE'S SUBSTITUTE FOR HB 198.

THANK YOU FOR YOUR TIME AND INTEREST.

ALASKA FEDERATION OF NATIVES, INC.

411 W. 4th Avenue, Suite 301 • Anchorage, Alaska 99501 • Phone (907) 274-3611

August 11, 1987

Mr. John Sund
State House of Representatives
2504 Second Street
Ketchikan, Alaska 99901

Dear Representative Sund:

Enclosed for your review and use are copies of National Recreation and Park Association Law Review articles that address issues relevant to public recreational use of private land. I believe the material addresses several of the issues that were brought forward by the judiciary committee on House Bill 198.

I appreciate your interest in this issue. I am available to work with you or your staff on HB 198 at your convenience. I am hopeful that progress can be made on the bill early on in the coming session.

Thanks again. I hope your summer has been enjoyable.

Best regards,

Lawrence H. Kimball, Jr.
Land Manager

cc: Representative Lyman Hoffman

NRPA Law Review

President's Commission Examines Public Recreation on Private Lands

James C. Kozlowski, J.D.

On March 10, 1986, Senator Malcolm Wallop (R-WY) conducted a workshop in Washington, D.C. to examine recreation on private lands. The Task Force on Recreation on Private Lands, an ad hoc group of some twenty organizations and agencies including the President's Commission on Americans Outdoors, sponsored the workshop. The purpose of the workshop was described as follows:

> Private lands constitute nearly two-thirds of our nation and host many recreational activities. The potential for private lands to provide even more recreation opportunities is great. Yet many private landowners have concerns, ranging from liability to vandalism, which prevent them from opening their lands for recreational use. Incentives capable of counterbalancing these concerns are not well understood. This workshop seeks to explore the issues related to recreation on private lands. Topics addressed will include private lands ownership patterns and the availability of those lands for public recreation, problems that attempt to restrict access and incentives for increasing recreational access and opportunity.

By bringing together experts in the field, the Task Force on Recreation on Private Lands seeks to understand the concerns of private landowners, the actual issues which need to be confronted, and the possible solutions to these problems which will realize the potential contribution of these

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lands to America's recreation needs. The workshop will be conducted in conjunction with the President's Commission on Americans Outdoors and will be moderated by members of the Commission.

I was a member of a panel addressing "The Challenges" of recreation on private lands. Members of my panel included individuals representing small woodland owners, ranchers, the electric power industry, and the forest products industry. My assigned topic was "Legal Views on Liability." What follows is a summary of my remarks prepared for the workshop.

Look to Existing Recreational Use Statutes[1].

There is nothing new under the sun. We have been this way before. In 1965, *Suggested State Legislation* by the Council of State Governments advocated a model recreational use statute. This statute was designed to encourage private individuals to open their lands for public recreational use. Similarly, the stated purpose of this workshop, more than twenty years after the model recreational use statute was published, is to facilitate public recreational opportunities on private lands.

In jurisdictions where a recreational use statute exists, there is no landowner liability for recreational injuries attributable to ordinary negligence i.e. mere carelessness. To recover damages, the injured recreational user, who entered the premises free of charge, must prove willful or wanton misconduct. Unlike ordinary negligence, such misconduct is much more outrageous behavior demonstrating an utter disregard for the physical well-being of others.

At present, forty-seven jurisdictions have enacted recreational use statutes. Most of these laws are based upon the 1965 model act. The original intent of this model legislation was to provide limited immunity to private landowners. However, these state recreational use statutes have also been held applicable to public entities. Under the terms of the Federal Tort Claims Act, the federal government is liable for negligence "like a private individual" under the law of the state where the injury occurred. As a result, these recreational use statutes intended for private individuals have uniformly been held applicable to the federal government.

In addition, state recreational use statutes are applicable to the state and local governmental entities in approximately twelve jurisdictions. In some instances, these statutes are limited to recreational activities conducted on rural lands. However, some state courts have found the recreational use statute applicable to urban lands. For example, the cities of Omaha and Detroit have successfully raised the state recreational use statute as a defense to alleged ordinary negligence liability for injuries sustained in a public park.

Why is the applicability these state recreational use statutes to public entities relevant in a discussion of recreation on private lands? In my opinion, public recreational access to private land is more likely when viewed within the context of public recreational immunity. Specifically, a significant provision in the model recreational use statute adopted by

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The National Recreation and Park Association announces the

1986 Park and Recreation Series of Seminars

The National Recreation and Park Association, in conjunction with various universities and professional organizations, offers park and recreation administrators and managers the opportunity to advance their knowledge and job skills through intensified coursework in several specialized fields. The following summary outlines 1986 educational opportunities scheduled as of this date. Additional courses will be announced in future issues.

Executive Development Program for Park and Recreation Administrators
March 23-28, 1986
Indiana University, Bloomington, IN

An extensive advanced education course designed for park and recreation executives with general management responsibilities, and for specialists about to assume general managerial responsibilities. Sponsored by NRPA and Indiana University in cooperation with Indiana Graduate School of Business. Tuition: $575.00 double occupancy, $645.00 single occupancy (includes registration, housing, and meals). Contact James A. Peterson, School of HPER, Room 133, Indiana University, Bloomington, IN 47405. Tel. (812) 335-8037.

National Aquatics Management School
Tempe, Arizona—April 6-10, 1986

An NRPA-sponsored two-year education program for administrative and supervisory personnel responsible for managing swimming pool and aquatic programs and facilities. Tuition: TBA. Contact Jane Hipps Adams, Regional Director, 1400 K Street, Suite 302, Sacramento, CA 95814. Tel. (916) 441-0445.

TR Management School
Oglebay Park, Wheeling, WV
March 16-23, 1986

The TR Management School is co-sponsored by the Wheeling Park Commission and the University of Maryland in cooperation with the National Recreation and Park Association. The purpose of the school is to provide the participant with an overview of the contemporary issues affecting the therapeutic recreation profession from a management level perspective. Contact: Dr. Diana Richardson, University of Maryland, College Park, MD 20742. Tel. (301) 454-3290.

Fifth Leisure and Aging Management School
Oglebay Park, Wheeling, WV
March 16-23, 1986

The Leisure and Aging Management School is sponsored by the National Recreation and Park Association, the Wheeling Park Commission, and the University of Maryland Center on Aging and Department of Recreation. The two year curriculum is divided into a community tract and a clinical/extended care tract with some integration within the two tract framework. Contact: Fred Humphrey, Department of Recreation, University of Maryland, 2367 PERH Building, College Park, MD 20742. Tel. (301) 454-3290.

Pacific Revenue Sources Management School
University of California, San Diego, CA
July 12-16, 1986

A two-year education program for managerial personnel who administer or plan to administer revenue producing facilities and programs. A Graduate Forum is available for graduates of any of the NRPA Revenue Sources Management Schools. Tuition: TBA. Contact Jane Hipps Adams, Regional Director, 1400 K Street, Suite 302, Sacramento, CA 95814. Tel. (916) 441-0445.

Park Planning & Maintenance School
Colorado Springs, CO
August 17-20, 1986
NRPA Certificate & Diploma Program
CEU's Awarded

A two-year development program with a graduates institute. Here you will learn the latest techniques and methodologies being used in the field by those responsible for maintaining, developing and planning park and recreation facilities. Tuition: TBA. Sponsored by NRPA. Contact Frank D. Cosgrove, Regional Director, Western Service Center, P.O. Box 6900, Colorado Springs, CO 80934. Tel. (303) 632-7031.

Park and Recreation Safety School
Colorado Springs, CO
August 21-22, 1986
NRPA and National Safety Council
Certificate Program, CEU's Awarded

A one-year program. To teach you how to conduct safety audits of your park and recreation facilities and how to set up a safety program for your department. Tuition: TBA. Contact Frank D. Cosgrove, Regional Director, Western Service Center, P.O. Box 6900, Colorado Springs, CO 80934. Tel. (303) 632-7031

most states preserves limited immunity for lands leased to the state or local government for recreational purposes. Further, any payment received by the private landowner from the state or local government for leasing the land is not considered a charge or fee within the meaning of the recreational use statute. Thus, lease payments from public entities, unlike entry fees paid to the private landowner, would not deprive the landowner of limited immunity under the recreational use statute.

If the framework for providing private landowners with recreational immunity was developed more than twenty years ago, why is public access still an issue today? My own experience has been that most landowners as well as attorneys do not know that recreational use statutes exist. As a result, the statutes do not necessarily encourage private landowners to allow public access by limiting liability. On the contrary, if landowners become aware of the recreational use statute, it is after an injury occurs and counsel raises the statute as a defense to negligence liability.

In those few instances where landowners know about the statute, there is a perception that recreational use statutes do not provide sufficient immunity to act as an incentive for public access. Private landowners do not want to know if they will have a successful defense to a recreational injury lawsuit. Their concern is much more basic; they want to know: "Can I be sued?" Unfortunately, the answer invariably is "yes" with or without limited immunity provided by a recreational use statute. As a result, the lower landowner standard of care (from ordinary negligence to willful or wanton misconduct) imposed by the recreational use statute will not encourage most private individuals to open their lands to public recreational use.

I would, therefore, suggest that any solution to the private recreational lands issue must address the private landowners very real concerns about being sued. Whether you win or lose, it has been said that a lawsuit is the worst thing that can happen to an individual with the exception of death or serious illness. Therefore, the challenge to encouraging public recreational access to private lands is to somehow insulate the private landowner from the costs attendant to a lawsuit.

To encourage public access to private lands, public agencies must exhibit the same degree of commitment and fervor usually associated with land acquisition programs. As an alternative to fee simple acquisition, lease agreements with private landowners can provide public recreational land whereby the public agency agrees to defend and indemnify the private landowner. Therefore, the private landowner may still be sued, but the public will hold the private landowner harmless, absorbing the cost of defending the lawsuit. In this way, private landowners will feel less threatened by potential liability when they open their lands to public recreational use. Further, there needs to be a public awareness campaign to educate private landowners to the immunity available to them under existing recreational use statutes.

In my opinion, existing recrea-

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tional use statutes can adequately address the public access problem. We, therefore, do not need some type of inappropriate "silver bullet" legislation on the federal level, or a whole new set of statutes on the state level conferring some type of limited recreational immunity. We can work with what we already have on the books with little or no change to the existing statutory framework.

Where necessary, however, I would suggest that recreational use statutes be amended to make it clear that such immunity applies to public entities, as well as private individuals. In a recreational injury lawsuit involving private land leased to a public entity, the private landowner as well as the governmental agency may be sued. It would, therefore, be preferable that the lower standard of care associated with the recreational use statute be applicable to all potential defendants, public as well as private.

A uniform standard is desirable because the state or local agency will be more willing to enter into a lease agreement whereby the public entity agrees to defend and hold the private landowner harmless when liability must be based upon proof of willful or wanton misconduct. A lower standard of care requiring proof of willful/wanton misconduct for both the public and private parties in a lease of recreational land increases the likelihood of a summary judgment. A summary judgment dismisses or resolves a case prior to a full trial. This significantly lowers the costs attendant to litigation.

Coordinated Effort Needed

Attorneys defending recreational injury lawsuits tend to be jurisdiction specific. They are, therefore, not necessarily aware of the status of recreational immunity in other jurisdictions. As a result, recreational use statutes are being interpreted by state courts in various ways. Many of these judicial interpretations do nothing to encourage private landowners to open their lands to public recreational use.

History has taught us that it is not enough to get the statutes on the books. There are 47 recreational use statutes, but potential landowner liability for allowing public recreational access is still an issue. No doubt, we have come a long way since 1965. However, much needs to be done to ensure that these recreational use statutes are favorably interpreted by the courts.

In my opinion, the recreation field needs to coordinate its efforts in the area of recreational injury liability. Specifically, some sort of institutional base needs to be developed to share information and resources on the overall issue of recreational injury liability. For want of a better term, this proposed think tank has been referred to as the "Recreation Law Institute."

I am certainly not advocating another federal agency like the Bureau of Outdoor Recreation or a Heritage Conservation and Recreation Service. On the contrary, I think the proposed Institute would be better suited to a university environment supported by those agencies utilizing its services. One would expect that the insurance industry would be interested in supporting a coordinated effort by the recreation field to address the problem of recreational injury liability.

I would, therefore, hope that one of the recommendations by the President's Commission on Americans Outdoors would be for the private sector to create such a Recreation Law Institute. In so doing, the President's Commission can ensure that any momentum created in the area of recreational injury liability can continue beyond the life of the Commission. Absent a coordinated institutionalized approach to the issue of recreational injury liability, I would suggest that twenty years from now we will be back once again to explore the liability challenge, including public recreational access to private lands.

Mr. Kozlowski is an attorney in Springfield, VA. He is the author of the Recreation and Parks Law Reporter *and a member of the National Society for Park Resources Board of Directors.*

A "Cut and Paste" of Model Rec Use Law to Include Public

By James C. Kozlowski, J.D., Ph.D.

At its meeting in Anaheim, California on October 21, 1986, the Board of Trustees of the National Recreation and Park Association endorsed the following policy: "It is the policy of the Trustees of the National Recreation and Park Association to encourage and help promote the enactment of state recreational use statutes." This policy was one of several statements adopted regarding the perceived "liability crisis." Under a recreational use statute, the landowner owes no duty of care to a recreational user on the premises free of charge. Although there is no liability for ordinary negligence, liability will be imposed for willful or wanton misconduct. Willful or wanton misconduct, unlike ordinary negligence, goes beyond mere carelessness; it is more outrageous behavior which demonstrates an utter disregard for the physical well being of others.

Despite the NRPA policy statement, enactment of recreational use statutes is not the real issue. Forty-nine jurisdictions have already enacted recreational use statutes. My research on this topic identified the following state code citations for existing recreational use statutes. To the best of my knowledge, each of these statutes is still good law.

Alabama: Ala. Code § 15-1.

Arizona: Ariz. Rev. Stat. Ann. § 3351.

Arkansas: Ark. Stat. Ann. §§ 50-1101-1107 (1971).

California: Cal. Civil Code § 846 (West Supp. 1981).

Colorado: Col. Rev. Stat. §§ 33-41-101-105 (1974).

Connecticut: Conn. Gen. Stat. Ann. §§ 52-557f-557i (Supp 1981).

Delaware: Del. Code Ann. tit. 7, §§ 5901-5907 (1975).

Florida: Fla. Stat. Ann. § 375.251 (West 1974).

Georgia: Ga. Code Ann. §§105-403-409 (1968).

Hawaii: Haw. Rev. Stat. §§ 520-1 to -8.

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Idaho: Idaho Code § 36-1604 (Supp. 1981).

Illinois: Ill. Ann. Stat. ch. 70 §§ 31-37 (Smith-Hurd Supp. 1981).

Indiana: Ind. Code Ann. § 14-2-6-3.

Iowa: Iowa Code Ann. §§ 111C.1-111C.7 (West Supp. 1981).

Kansas: Kan. Stat. Ann. §§ 58-3201-3207 (1976).

Kentucky: Ky. Rev. Stat. Ann. § 150.645 (Baldwin Supp. 1980).

Louisiana: La. Rev. Stat. Ann. § 9:2795 (West Supp. 1981).

Maine: Me. Rev. Stat. Ann. tit. 12, §§ 3001-3005 (Supp. 1981).

Maryland: Md. Nat. Res. Code Ann. §§ 5-1102-1108 (1974).

Massachusetts: Mass. Gen. Laws Ann. ch. 21 § 17C (West 1973).

Michigan: Mich. Comp. Laws Ann § 300.201 (1967).

Minnesota: Minn. Stat. Ann. §§87.01-87.026 (1977).

Mississippi: Miss. Code Ann. § 89-2-1- et seq. (1985).

Missouri: Mo. Stat. Ann. §§ 537.345-537.347.

Montana: Mont. Code Ann. §§ 70-16-301-302.

Nebraska: Neb. Rev. Stat. §§ 37-1001-1008 (1978).

Nevada: Nev. Rev. Stat. § 41.510 (1979).

New Hampshire: N.H. Rev. Stat. Ann. § 212:34 (1978).

New Jersey: N.J. Stat. Ann. §§ 2A:42A-2-42A-5 (West Supp. 1981).

New Mexico: N.M. Stat. Ann. § 17-4-7 (1978).

New York: N.Y. Gen. Oblig. Law § 9-103 (McKinney Supp. 1981).

North Carolina: N.C. Gen. Stat. §§ 113-120.5-120.6 (1975).

North Dakota: N.D. Cent. Code §§53-08-01-06 (1974).

Ohio: Ohio Rev. Code Ann. 1533.181 (Page 1978).

Oklahoma: Okla. Stat. Ann. 76, §§ 10-15 (West 1976).

Oregon: Ore. Rev. Stat. §§105.655-105.680 (1979).

Pennsylvania: Pa. Stat. Ann. tit. 68, §§ 477-1-477-8 (Purdon Supp. 1981).

Rhode Island: R.I. Gen. Laws §, 32-6-1- to -7.

South Carolina: S.C. Code §§27-3-10-70 (1977).

South Dakota: S.D. Comp. Laws Ann. § 20-9-5 (Supp. 1979).

Tennessee: Tenn. Code Ann. §§ 51-801-805 (1977).

Texas: Tex. Rev. Civ. Stat. Ann. art. 16 (Vernon 1969).

Utah: Utah Code Ann. §§ 5714-1 to -7.

Vermont: Vt. Stat. Ann. tit. 10 § 5212 (1973).

Virginia: Va. Code § 29-130.2 (Supp. 1981).

Washington: Wash. Rev. Code Ann. §§ 4.24.200-210 (Supp. 1981).

West Virginia: W.Va. Code §§ 19-25-25-6 (1977).

Wisconsin: Wis. Stat. Ann. § 2968 (West 1973).

Wyoming: Wyo. Stat. § 34-19-101-106 (1977).

With minor variations, many of the above cited forty-nine laws

adhere to the format of a model statute described below. This model statute, entitled "Public Recreation on Private Lands: Limitations on Liability," appeared in the 1965 edition of *Suggested State Legislation* from the Council State Governments. To date, state courts in only nineteen jurisdictions have considered directly or indirectly the applicability of these statutes to public entities. Of this number, twelve jurisdictions have extended limited recreational use immunity to public entities. Under the terms of the Federal Tort Claims Act, these statutes are uniformly held applicable to the federal government. (For a further discussion of the applicability of recreational use statutes to public entities, see the "NRPA Law Review" for October and November 1986, and February 1987.)

Perhaps the real policy issue before the National Recreation and Park Association is, therefore, to encourage and help promote the modification of existing recreational use statutes to broaden existing immunity to include public park and recreation agencies. With this objective in mind, I have superimposed language from existing recreational use statutes in various jurisdictions. The purpose of this rather crude "cut and paste" endeavor is to illustrate the manner in which minor modifications to the 1965 model statute can broaden the immunity of this legislation to expressly include most public entities. Further, these suggested modifications would extend such immunity to most lands and activities involving public park and recreation agencies. (Modifications to the 1965 model statute appear in italicized capital letters. The state statutes from which this language is derived are also noted in parentheses.)

1965 Model Act as Modified

[Title should conform to state requirements. The following is a suggestion: "An act to encourage landowners to make land and water areas available to the public by limiting liability in connection therewith."]

(Be it enacted, etc.)

Section 1. The purpose of this act is to encourage owners of land to make the land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes.

Section 2. As used in this act:

(a) "Land" means *PRIVATE OR PUBLIC. (Idaho. Washington)* land, *IMPROVED OR UNIMPROVED (Maine). WHETHER URBAN OR RURAL. (Washington),* [including] roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to the realty.

(b) "Owner" means the possessor of a fee interest, a tenant, lessee, occupant or person in control of the

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premises, *including ANY PRIVATE CITIZEN, A MUNICIPALITY, THE STATE OR THE FEDERAL GOVERNMENT, AND ANY EMPLOYEE OR AGENT OF THE FOREGOING. (Wisconsin)*

, OR ANY PUBLIC ENTITY AS DEFINED IN THE (applicable provision of the state code) WHICH HAS AN INTEREST IN LAND. (Colorado)

"PERSON" INCLUDES ANY INDIVIDUAL REGARDLESS OF AGE, MATURITY OR EXPERIENCE, OR ANY CORPORATION, GOVERNMENT OR GOVERNMENTAL SUBDIVISION OR AGENCY, BUSINESS TRUST, ESTATE, TRUST, PARTNERSHIP, OR ASSOCIATION, OR ANY OTHER LEGAL ENTITY (Colorado).

(c) "Recreational Purpose" includes, but is not limited to, any *SPORTS OR RECREATIONAL ACTIVITY OF WHATEVER UNDERTAKEN BY A PERSON WHILE USING THE LAND, INCLUDING PONDS, LAKES, RESERVOIRS, STREAMS, PATHS, AND TRAILS APPURTENANT THERETO OF ANOTHER AND INCLUDES, BUT IS NOT LIMITED TO, ANY HOBBY, DIVERSION, OR OTHER SPORTS OR OTHER RECREATIONAL ACTIVITY SUCH (Colorado)* the following, or any combination thereof: hunting, fishing, CAMPING (Colorado), swimming, boating, camping, picnicking, hiking, *HORSEBACK RIDING, SNOWSHOEING, CROSS COUNTRY SKIING, BICYCLING, RIDING OR DRIVING MOTORIZED RECREATIONAL VEHICLES, SWIMMING, ROCK CLIMBING... OR ENGAGING IN ANY OTHER FORM OF SPORTS OR OTHER RECREATIONAL ACTIVITY (Colorado), INCLUDING PRACTICE AND INSTRUCTION IN ANY THEREOF (New Jersey),* pleasure driving, nature study, water skiing, winter sports, and viewing or enjoying historical, archaeological, scenic, or scientific sites, *OR OTHER SIMILAR ACTIVITIES UNDERTAKEN FOR RECREATION, EXERCISE, EDUCATION, RELAXATION, OR PLEASURE ON LAND OWNED BY ANOTHER (Missouri) IT SHALL INCLUDE ENTRY, USE OF AND PASSAGE OVER PREMISES IN ORDER OT PURSUE THESE ACTIVITIES. (Maine)*

(d) "Charge" means the admission price or fee asked in return for invitation or permission to enter or go upon the land. *However, charge or consideration DOES NOT INCLUDE ... THOSE ENTRANCE FEES PAID TO THE STATE, ITS AGENCIES OR DEPARTMENTS, MUNICIPALITIES, OR THE U.S GOVERNMENT. (Wisconsin)*

Section 3. Except as specifically recognized by or provided in Section 6 of this act, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes.

Section 4. Except as specifically

recognized by or provided in Section 6 of this act, 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.

(c) Assume responsibility for or incur liability for any injury to persons or property caused by an act or omission of such persons.

Section 5. Unless otherwise agreed in writing, the provisions of Section 3 and 4 of this act shall be deemed applicable to the duties and liability if an owner leases to the state or any subdivision thereof for recreational purposes.

Section 6. Nothing in this act limits in any way any liability which otherwise exists:

(a) For willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.

(b) For injury suffered in any case where the owner of land charges the person or persons who enter or go on the land for the recreational use thereof, except that in the case of land leased to the state or a subdivision thereof, any consideration received by the owner for such lease shall not be deemed a charge within the meaning of this section.

Section 7. Nothing in this act shall be construed to:

(a) Create a duty of care or ground of liability for injury to persons or property.

(b) Relieve any person using the land of another for recreational purposes from any obligation which he may have in the absence of this act to exercise care in his use of such land and in his activities thereon, or from the legal consequences of failure to employ such care.

Section 8. [Insert effective date

Remove Statute Ambiguity

It has been said that no one should witness how laws or hot dogs are made. Because if you do, you will not be able to stomach either. One of the ways laws are made is to adopt language from similar statutes in other jurisdictions. This is the approach taken in the "cut and paste" public immunity statute described above. In determining whether a particular recreational use statute applies to public entities in a given jurisdiction, state courts will look primarily to the expressed language of the statute. Consequently, the modifications described above are intended to remove any uncertainty or ambiguity that the state legislature intended to confer broad public immunity under an existing recreational use statute.

Expand "Land" definition: Expanding the definition of land to

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expressly include public land effectively rebuts the original presumption of the model statute that such statutory immunity was intended for private landowners, not governmental units. In addition, the inclusion of references to urban and improved land would reverse the interpretation by some state courts (e.g. New York, New Jersey, Louisiana) that this statutory immunity is limited to rural or unimproved land. Further, the statutory definitions of "owner" and "person" have been modified with language from recreational use laws in Wisconsin and Colorado to expressly include governmental units.

Expand Scope of "Recreational Purpose": Some jurisdictions, most notably Louisiana, have limited the scope of recreational use immunity to activities traditionally conducted in the "true outdoors," i.e. primarily rural in nature. Expanding the enumerated list of recreational activities to include sports, hobbies, diversions, and any other recreational activity with language from the Colorado effectively rejects this narrow construction of the statute.

Entrance Fees not a "Charge": Ordinarily, recreational use immunity is lost if a fee is charged for the use of the premises. Including language from the Wisconsin statute expressly excludes entrance fees from this statutory definition of "charge" as an exception to recreational use immunity.

Dr. Kozlowski is an attorney/consultant in recreational injury liability in Springfield, Virginia. He is the author of the Recreation and Parks Law Reporter.

NRPA Law Review

Minnesota Bill Provides Limited Public Recreational Immunity

James C. Kozlowski, J.D., Ph.D.

The January 1986 "NRPA Law Review" column described statutes in Kansas and Virginia which provide public entities with limited immunity for injuries occurring on land open to recreational use. Specifically, these statutes require the injured recreational user to prove gross negligence or willful/wanton misconduct, rather than ordinary negligence, to hold a public entity liable. Now, it appears that Minnesota has enacted similar legislation.

On January 30, 1986, the Minnesota Recreation and Park Association sponsored a professional development institute to discuss the liability and insurance problem. My

presentation at the institute explained the general principles of recreational injury liability. Referring to the January law review column, I advocated the enactment of a public recreational immunity statute based upon the Kansas model as one means of addressing the liability problem.

Another presentation at the institute included a description of proposed legislation for Minnesota which would also lower the standard of care for the recreational user to public lands. In an April 16 letter, Marty Jessen, Associate Superintendent, Suburban Hennepin Regional Park District, informed me that the proposed legislation had passed the state legislature. Jessen was one of the organizers of the January institute. He expressed the opinion that this new legislation "will help considerably in containing the costs of

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liability relating to parks and recreation."

Under the new Minnesota legislation, general tort liability for municipalities would not apply under the following circumstances:

> Any claim based upon the construction, operation, or maintenance of any property owned or leased by the municipality that is intended or permitted to be used as a park, as an open area for recreational purposes, or for the provision of recreational services, or for any claim based upon the clearing of land, removal of refuse, and the creation of trails or paths without artificial surfaces, if the claim arises from a loss incurred by a user of the park and recreation property or services. Nothing in this subdivision limits the liability of a municipality for conduct that would entitle a trespasser to damages against a private person.

As defined in the legislation, the term "municipality" includes cities, counties, towns, public authorities, special districts, school districts, and other political subdivisions. Generally, a private person is liable to a trespasser for injuries caused by willful or wanton misconduct. As a result, the trespasser standard adopted by Minnesota should have the same effect as the Kansas statute in providing limited recreational immunity to public entities.

Another presentor at the Minnesota institute was NRPA Trustee Don Jolley. Jolley is the Director of Community Services for, Salina, Kansas. In his presentation, Jolley described the impact of the Kansas recreational immunity statute on his liability insurance rates since the law was enacted in 1979. Unlike many other jurisdictions which are experiencing skyrocketing premiums and the unavailability of insurance coverage, Jolley noted that Salina has experienced minimal increases in its liability insurance coverage. In part, Jolley attributed this to the availability of limited public recreational immunity in Kansas.

To illustrate the effect this statute has had on recreational injury liability for public entities in Kansas, Jolley provided a copy of the most recent state supreme court case which interpreted the law. In this case, the Kansas Supreme Court reaffirmed limited recreational immunity for public entities.

This case followed the precedent of two earlier state supreme court decisions on point, *Bonewell v. City of Derby* and *Willard v. City of Kansas City*. Both of these decisions were reported in the *Recreation and Parks Law Reporter* (RPLR). Generally, cases reported in RPLR do not appear in this column. However, the significance of this line of Kansas cases in the area of public recreational immunity warrants presenting this latest state supreme court case in this column as well as its inclusion in a forthcoming edition of RPLR.

RPLR Report No. 86-13

In the case of *Lee v. City of Fort Scott*, 710 P.2d 689 (Kan. 1985), plaintiffs Frank and Mary Lee brought a wrongful death action against the defendant City of Fort Lee after this son, Frank Lee, Jr., was fatally injured in a municipal park. Frank Lee, Jr. was injured "when his motorcycle collided with steel cables strung between trees in Gunn Park in the City of Fort Scott." The circumstances surrounding the incident were as follows:

> In the mid-1970s Fort Scott was faced with a problem of vandalism on a golf course maintained by the City in Gunn Park. The City was concerned with persons driving their vehicles off the road and onto the fairways and greens. In response to this concern, in 1975 the City strung steel cables around the golf course. The cables were located off the road and posed no hazard to anyone properly using the roadway. As an additional restraint, the City enacted an ordinance prohibiting any motor vehicles from driving off of regularly traveled roadways. However, no notice of this prohibition was posted anywhere in Gunn Park.
>
> On April 10, 1982, eighteen-year-old Frank James Lee, Jr., while riding his motorcycle in Gunn Park, collided with steel cables strung between two trees. Frank, Jr. had ridden motorcycles for at least two years prior to the accident and about two months before the accident he had bought his own motorcycle. It is not known whether Frank Lee, Jr. had ever ridden a motorcycle in the area of Gunn Park where the accident occurred; however, he was familiar with the park.

As a result of the accident, Frank, Jr.

sustained lacerations of the liver. Seven surgical operations were conducted in a futile attempt to repair the damaged liver. On May 18, 1982, Frank, Jr. died of continued liver hemorrhage.

The trial court granted the City's motion for summary judgment because Lee "had failed to produce any evidence of 'gross and wanton negligence' as required by K.S.A. 75-6104(n)." Lee appealed to the state supreme court. The issue was, therefore, "whether the trial court erred in finding as a matter of law that defendant [City] was not guilty of gross and wanton negligence."

Section 75-6104(n) of the Kansas Tort Claims Act (KTCA) imposes governmental liability for wrongful conduct subject to the following exception:

> A governmental entity or an employee acting within the scope of the employee's employment shall not be liable for damages resulting from . . . any claim for injuries resulting from the use of any public property intended or permitted to be used as a park, playground or open area for recreational purposes unless the governmental entity or an employee thereof is guilty of gross and wanton negligence proximately causing injury.

Therefore, if the City was to be held liable for the wrongful death of Frank, Jr., the state supreme court found that Lee "must show the City's action in erecting steel cables constituted gross and wanton negligence" which caused the injuries resulting in death. As described by the court, "the test for gross and wanton negligence" was as follows:

> Proof of a willingness to injure is not necessary in establishing gross and wanton negligence. This is true because a wanton act is something more than ordinary negligence but it is something less than willful injury. To constitute wantonness the act must indicate a realization of the imminence of danger and a reckless disregard or a complete indifference or an unconcern for the probable consequences of the wrongful act.

Lee argued that the following facts established gross and wanton misconduct on the part of the City:

> [T]he City had posted no signs in Gunn Park warning of the presence of the cables, nor were there any signs prohibiting the operation of motorcycles off the roadway. Additionally, the City was aware motorcycles and other vehicles were operated off the roadway, since the City had issued a number of traffic citations for driving off the roadway in Gunn Park.

The state supreme court disagreed. In the opinion of the court, Lee had "failed to produce any evidence which would establish gross and wanton conduct, other than the fact the City strung cables between the trees in the park."

> The fact that the City had issued a number of traffic citations for driving off the roadway does not prove the City had notice of the potentially dangerous placement of the steel cables. Lee failed to offer any evidence which would establish that the City realized the

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WASHINGTON SCENE

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duced results.

There has been some concern that passage of this legislation would infringe on development plants for a New York hospital. The National Park Service evaluated the proposed legislation and confirmed that the bill contained no authority to prevent any development activities.

The Olmsted Heritage Landscape Act establishes an inventory process to commemorate the parks and public works of Federick Law Olmsted and his associates.

Bill Authorizing Establishment of "Risk Retention" Groups Passes Senate Committee: The Senate Commerce, Science and Transportation Committee passed legislation on March 27 that expands the scope of the Risk Retention Act of 1981. The bill, S. 2129, allows "risk retention" groups to be established to provide coverage for any of their liabilities. S. 2129 makes it possible for municipalities, businesses, and trade organizations to set up such a group and provides that it need only file in one state. This state would then regulate the group, except in extraordinary circumstances.

Proponents hope that having to file in just one state will enable them to start groups more quickly. Opposition forces are concerned that these groups will not have the financial requirements placed on them necessary to guarantee solvency and protect the consumer, also allowing unfair competition.

S. 2129 now goes to the Senate floor.

Executive Study Group on the Liability Crisis Issues Report: The Tort Policy Group established last October by the U.S. Attorney General to study the insurance crisis has delivered its recommendations to President Reagan. Among the eight recommendations made is a proposal to eliminate the doctrine of joint and several liability under which the plaintiff can recover the full amount of a judgment from a defendant which is minimally at fault. Moreover, the study group recommended that a $100,000 cap be put on all non-economic damages (pain and suffering, mental anguish, punitive damages, etc.).

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> imminence of danger and exhibited a complete disregard of the consequences. Rather, the evidence showed that at the time the accident occurred, the steel cables had been in place for approximately seven years. The cables were erected to deter vandalism to the golf course and were located off the roadway. No other accidents involving the steel cables had been reported to the City. There is no evidence of a reckless disregard of a known danger and thus no gross and wanton negligence.

The state supreme court, therefore, affirmed the judgment of the trial court in favor of defendant City of Fort Scott.

Mr. Kozlowski is an attorney in Springfield, VA. He is the author of the Recreation and Parks Law Reporter *and a member of the National Society for Park Resources Board of Directors.*

ASSESSING THE AVAILABILITY

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when we get farmers, ranchers, hunters, cyclists, and biologists in agreement as to how to best proceed in a given state or locality will we get the kind of political attention needed to take advantage of the great untapped reservoir of recreation potential on the private lands of America. □

NRPA Law Review

Rec Use Law Applies to Public Land in NY, NE, ID, OH, & WA

James C. Kozlowski, J.D., Ph.D.

Under a recreational use statute, the landowner owes no duty of care to recreational users to guard or warn against known or discoverable hazards on the premises. This statutory immunity is lost, however, where a fee is charged for the use of the premises or the landowner is guilty of willful or wanton misconduct. In other words, there is no landowner liability to the recreational user for ordinary negligence, only willful/wanton misconduct. Unlike mere carelessness constituting negligence, willful/wanton misconduct is more outrageous behavior demonstrating an utter disregard for the physical well being of others.

RPLR

To date, 47 jurisdictions have enacted recreational use statutes. Most of these recreational use statutes are based upon model legislation developed by the Council of State Governments in 1965 to encourage private landowners to open their land for public recreational use. At this point in time Alaska, Mississippi, Missouri, and the District of Columbia are the only jurisdictions which have not enacted recreational use statutes similar to the model act. Prior to 1965, only ten states had enacted legislation providing limited immunity to landowners who open their land free of charge for public recreational use.

Under the Federal Tort Claims Act (FTCA), the federal government is held liable like a private individual under the law of the jurisdiction where the injury occurred. Consequently, in those jurisdictions

Continued

where private landowners enjoy recreational use immunity, the federal government is provided similar protection under the terms of the FTCA. As a result, federal courts have uniformly held state recreational use statutes to be available to the United States as a defense to negligence liability. (Federal courts have exclusive jurisdiction over causes of action brought against the United States.)

Unlike federal courts, state courts have been divided as to whether these state recreational use statutes apply to state and local government landowners. The following paragraphs describe cases where state courts have found the recreational use statute applicable to public entities. The jurisdictions examined are: New York, Nebraska, Idaho, Ohio, and Washington. Future columns in the "NRPA Law Review" will look at case law from other jurisdictions which have considered the applicability issue, including those states which have found the statute inapplicable to public entities. At this point in time, state courts in approximately 19 jurisdictions have considered the applicability of the state recreational use statute to the state and local governments.

New York

In the case of *Sega v. State*, 60 N.Y.2d 183, 456 N.E.2d 1174 (1983), the state supreme court considered "the scope and application of section 9-103 of the General Obligations Law," the state recreational use statute. In its decision, the state supreme court reviewed two lower court opinions which had considered this issue. In one case, plaintiff was hiking in a state forest preserve. He was injured when the railing he was sitting on collapsed and he fell 18 to 20 feet from a bridge into the creek below. In the absence of a willful or intentional act, the lower court found no liability pursuant to the state recreational use statute.

In the other case, plaintiff was injured while riding a three-wheeled all-terrain vehicle in another state forest preserve when he struck a steel cable strung across a road. In this instance, the lower court found the state recreational use statute applicable. Despite the lack of wanton or malicious misconduct, the court found the cable "constituted a trap or an inherently dangerous structure and that the State should have posted a warning sign on the road" approaching the cable. As a result, the state was found liable for such negligence.

Specifically, the issue before the state supreme court was "whether the State may invoke section 9-103 in defense of claims for injuries occurring on State-owned lands." Since there was "nothing to the contrary in the law," the state supreme court found "this protection is available to the State itself when no fee is charged."

> On its face, section 9-103 unambiguously includes public property within its purview. By its terms, section 9-103 refers to *any* "owner, lessee or occupant of premises" without limiting the scope of that clause to private landowners. In addition, the statute refers to ECL 11-2111 [section of state environmental conservation law]. ECL 11-2111 pertains to posting lands as fishing and hunting preserves, including "any lands or waters, rights or interests therein owned, leased or otherwise acquired by the state. . ." This confirms that the Legislature intended to provide protection to the State as well as private landowners.

Having found that the state recreational use statute applicable to state-owned lands, the court concluded "defendant's negligence, if any, is immaterial." Plaintiffs in both instances would, therefore, have to prove that "defendant willfully or maliciously failed to guard or to warn against a dangerous condition, use, structure, or activity." In both instances, the state supreme court found "nothing to support a finding that the State acted willfully or maliciously." Consequently, these claims against the state were dismissed.

Nebraska

In the case of *Watson v. City of Omaha*, 209 Neb. 835, 312 N.W.2d 256 (1981), the state supreme court considered whether the state recreational use statute was applicable to the defendant city. Plaintiff, age 2 1/2 at the time of the accident, fractured her leg when she fell from a slippery slide with a missing handrail in a city park. In the opinion of the state supreme court, the recreational use statute had to be read within the context of the state tort claims act.

> [W]e must consider the language of the Political Subdivisions Tort Claims Act . . . which subjects a political subdivision to liability for the negligent acts or omissions of its employees "in the same manner, and to the same extent as a private individual under like circumstances . . . [T]he liability of a political subdivision under the Political Subdivisions Tort Claims Act is not an absolute liability, but consists of such liability as would exist in a private person or corporation without that immunity . . . Therefore, the public entity is entitled to assert the defenses that a private property owner has in like circumstances.

Applying this "liable like a private individual" reasoning of the tort claims act, the state supreme court rejected plaintiff's contention that recreational use statute immunity was necessarily limited to private landowners.

> Whatever the Legislature's intent was at the time of the enactment of the Recreational Liability Act, we believe that the definition of owner [in the Act]—"the term owner includes tenant, lessee, occupant, or person in control of

the premises"—is sufficiently broad to cover a public entity. . .

> The Legislature, in enacting the Political Subdivisions Tort Claims Act and thereby declaring a political subdivision responsible for its torts in the same manner as a private individual, is presumed to have knowledge of previous legislation, including the Recreation Liability Act. Having placed no limitation upon this declaration or upon the definition of "owner" in the Recreation Liability Act, we believe that the intent of the Legislature, as reflected by the clear language of both statutes, was to grant the same rights and privileges to governmental and private landowners alike.

The state supreme court, therefore, concluded that "the term 'owner of land,' as used in the Recreation Liability Act, includes a political subdivision." As a result, the state supreme court determined that under the facts of this case "no liability attached to the City of Omaha." The lower court judgment in favor of plaintiff was, therefore, reversed and the case dismissed.

Idaho

In the case of *Corey v. State*, Idaho, 703 P.2d 685 (1985), the state supreme court found that the State of Idaho was an "owner" within the meaning of the state recreational use statute. Corey was injured when he struck a cable strung across a path while snowmobiling in a state park.

> I.C. § 36-1604 [the state recreational use statute] specifically provides that an owner of land who permits recreational use of that land without charge does not owe a duty of care to keep the premises safe for such use. *The State of Idaho is an "owner" as defined by the statute.* Farragut State Park is "public land" open for recreational use. It is uncontroverted that at the time of the accident appellant Corey was in an area of the park open for snowmobiling. Additionally, Corey was engaged in snowmobiling, a recreational activity specifically mentioned in the statute. Thus, there can be no question that I.C. § 36-1604 is expressly applicable to the factual situation presented by this case.

The state supreme court, therefore, affirmed the judgment of the trial court in favor of the state.

Ohio

In the case of *McCord v. Ohio Division of Parks & Recreation*, 54 Ohio St.2d 72, 375 N.E.2d 50 (1978), the Supreme Court of Ohio considered for the first time whether the state recreational use statute, R.C. 1533.181(A), applied to the state. Plaintiff brought a wrongful death action after her nine-year-old son drowned in a lake within a state park. Plaintiff alleged that the state and its employees were negligent in failing to supervise the lake and properly train the lifeguards.

Prior to the enactment of the state tort claims act, the state enjoyed immunity from tort liability. The state tort claims act (R.C. 2743.02 (A)), however, provided injured parties with a cause of action subject to certain limitations. One such limitation was the "private party" rule:

> The state hereby waives its immunity from liability and consents to be sued, and have its liability, determined . . . in accordance with the same rules of law applicable to suits between private parties. . .

In the opinion of the state supreme court, "one such rule of law applicable to suits between private parties" was the state recreational use statute. Applying the state recreational use statute to the facts of this case, the state supreme court concluded that "the state, when viewed as if a private party, owes no duty to a recreational user of its land, such as appellee [McCord] who has paid no fee or valuable consideration." According to the state supreme court, the Ohio recreational use statute "does not create a new right of action against the state, but places the state upon the same level as a private party." Further, the state court refused to broaden the scope of state landowner liability for recreational use beyond the rules applicable to private parties. "If the immunity which the state has historically enjoyed is to be lifted further, it must be accomplished by the General Assembly and not by this court."

Washington

In the case of *McCarver v. Manson Park and Recreation District*, 92 Wash.2d 370, 597 P.2d 1362 (1979), the state supreme court considered the applicability of the state recreational use statute to a public swimming area. Plaintiff's daughter died as a result of a fall from a diving tower at the site. Plaintiff alleged that the defendant district was negligent in failing to supervise, maintain, and enforce reasonable rules in the area.

Continued on next page

The trial court granted defendant summary judgment based upon the state recreational use statute. McCarver appealed. The appeals court certified the applicability issue to the state supreme court.

Specifically, the issue before the state supreme court was "whether Manson Park is included in the class of protected landowners under the [state recreational use] statute." As noted by the court, the language of the statute expressly included "public or private landowners or others in lawful possession and control."

As described by the court, the state recreational use statute was first enacted in 1967. This statute was based upon model legislation proposed by the Council of State Governments. As noted by the court, this model legislation was "to encourage the availability of private lands by limiting the liability of owners."

In 1972, however, the Washington recreational use statute was amended and the words "public or private" were added before the word "landowners" in the statute. Further, snowmobiling and the driving of all-terrain vehicles (ATV) were added to the list of recreational activities covered by the statute. Plaintiff, therefore, argued that "limitations on the liability of *public* landowners under RCW 4.24.210 [state recreational use statute] should be restricted ATV and snowmobiling activities because of the purpose of the 1972 amendatory act is directed toward these activities. The state supreme court rejected this argument.

> Where the language of a statute is clear and unambiguous, there is no room for judicial construction. RCW 4.24.210 draws no distinctions between public and private landowners, vis-a-vis the designated recreational activities. The placement of the 1972 amendatory language ("public or private") before the term "landowners" encompasses *all* outdoor recreational activities subsequently delineated. If the legislature intended the liability limitations to apply to public owners only as to incidents arising from the use of ATV and snowmobiles, it should have used more precise language to establish such an intent. Clearly, the statute, as amended, includes public landowners and occupiers within the recreational use immunity from liability.

As noted by plaintiff, the expressed purpose of the state recreational use statute was to *encourage* landowners to open their land for public recreational use. Plaintiff, therefore, argued that "limitations on liability are not necessary 'to encourage' public landowners, such as Manson Park, to devote public land to recreational use." Once again, the state supreme court disagreed noting that the 1972 amendment expressly included public landowners at a time when public entities "were not otherwise immune from tort liability." In addition, the court acknowledged that "other courts have found similar recreational use liability limiting statutes applicable to public landowners in the *absence* of express statutory language covering publicly-owned lands."

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NRPA Law Review

Illinois Immunity for Negligent Supervision of Public Recreation

by James C. Kozlowski, J.D.

The January law review column described two recreational immunity statutes in Virginia and Kansas. This month's column continues the discussion of various types of statutes providing limited recreational immunity to public agencies. The *Ramos* decision described herein is the latest application of an Illinois statute which provides immunity for the negligent failure to supervise recreational activities on public property.

Bombs Away

In the case of *Ramos by Ramos v. City of Countryside,* Ill.App., 485 N.E.2d 418 (1985) plaintiff, Alfonso Ramos, Jr., was injured in a game of "bombardment" when struck in the eye by a "softball" thrown by defendant Steven Best.

In 1981, the city of Countryside sponsored and organized a summer recreation program for elementary aged children which was held on public property. The participants were charged a registration fee. Ramos and Best, who were 8 and 14 years old respectively, were participants in the program. The game of "bombardment" in which Ramos was injured was an activity in the program.

Ramos sought $15,000 in damages against defendants Best and the city of Countryside. Ramos alleged Best was negligent in failing to warn Ramos before throwing the ball and throwing the ball with excessive force.

Continued

Similarly, Ramos alleged that the City of Countryside was negligent or guilty of willful and wanton misconduct for allowing "children, regardless of the disparity of their age, strength and size, to participate together in the game." Considering these disparities, Ramos argued further that the game created an "inherently dangerous and hazardous" condition to "a child of plaintiff's tender years." In addition, Ramos contended that the City "failed to supervise said event so as to afford protection to younger participants therein."

The trial court dismissed these claims; Ramos appealed. In the opinion of the appeals court, the trial court properly dismissed Ramos' negligence claims against defendant Best. Since the game of bombardment was organized according to specific rules, the court applied the following rule governing sporting events.

> [A] participant is not liable for injuries to other participants if the gravamen of the action is simple negligence . . . [T]he law should not place unreasonable burdens on the free and vigorous participation in sports by our youth . . . [T]he participants in organized sporting events can only be held liable under the willful and wanton misconduct standard.

The appeals court also considered Ramos' claims against the city of Countryside. As noted by the Appeals court, the Illinois Local Governmental Employees Tort Immunity Act provided in pertinent part:

> Except as otherwise provided by this Act . . . neither a local public entity nor a public employee is liable for an injury caused by a failure to supervise an activity on or the use of any public property. (Ill.Rev.Stat. 1981, ch 85, par. 3-108(a))

Ramos, however, contended that this statute did "not shield the city of Countryside from liability because: (1) the Immunity Act does not shield municipalities from willful and wanton misconduct; (2) the complaint adequately alleged a 'special relationship' between Ramos and the municipality to establish potential liability; (3) the municipality waived its immunity through participation in the Intergovernmental Risk Management Agency (IRMA)."

In the opinion of the appeals court, this statute was applicable "to shield the city of Countryside from liability for the asserted failure to adequately supervise a summer recreation program held on public property." Further, the court found that Ramos had "failed to allege any conduct on the part of the municipality which can properly be characterized as willful and wanton misconduct." According to the court, Ramos' complaint contained "the bald assertion of willful and wanton misconduct on the part of the city of Countryside, [while] the facts alleged can only sustain a possible failure to adequately supervise activities on public property, for which the municipality is not liable.'"

The appeals court also considered Ramos' contention that "his payment of a registration fee to the city of Countryside created a 'special relationship' between himself and

the municipality upon which liability may be based." The appeals court rejected this argument.

> Although the city of Countryside charged Ramos a registration fee for his participation in the city's summer recreation program, that program is not analogous to the operation of a business enterprise . . . In its sponsorship of the summer recreation program the city was acting within its governmental capacity and was not acting in a business or proprietary capacity. We therefore, conclude that the city did not create a "special relationship" with Ramos and, thus, was subject to the general rule of non-liability of municipalities.

Finally, the appeals court considered Ramos' argument that the city of Countryside waived its immunity through its membership in the Intergovernmental Risk Management Agency (IRMA). The court provided the following description of IRMA:

> IRMA is an organization comprised of small municipalities. Under the provisions of IRMA, each municipality is responsible for the first $1,000 of liability that that municipality may incur. Any liability between $1,000 and $250,000 is paid by IRMA through a pool of money paid into the organization from revenues of the member municipalities. IRMA purchases insurance policies to cover any liability in excess of $250,000.

In the opinion of the appeals court, "membership in IRMA did not act to waive immunity granted to member municipalities under the Tort Immunity Act." The court distinguished "between the purchase of insurance from separate licensed insurance companies and self-insurance."

> The waiver of immunity provisions of section 9-103 (Ill.Rev.Stat.1983, ch. 85, par. 9-103) is applicable only when municipalities have purchased insurance from conventional insurance companies which pay judgments from non-public funds.

According to the court, providing immunity for self-insured municipalities served the "public policy interest of protecting public funds and property and preventing the diversion of tax monies from their intended purpose to payment of damage claims." Applying this rule to the facts of the case, the appeals court concluded that "the city of Countryside has not waived its immunity."

> IRMA constitutes a joint self-insurance venture by its members for liability between $1,000 and $250,000. In his complaint, Ramos seeks $15,000 in damages. Neither the city of Countryside nor IRMA has purchased insurance to cover Ramos' injury. If Ramos were to recover, the judgment would be paid from a reserve of public money.

The appeals court, therefore, affirmed the judgment of the trial court dismissing Ramos' claims against defendants Best and the city of Countryside.

Mr. Kozlowski is an attorney in Springfield, VA. He is the author of the Recreation and Parks Law Reporter *and a member of the National Society for Park Resources Board of Directors.*

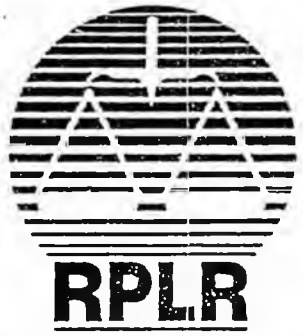
No Ordinary Negligence Liability Under Recreational Immunity Statutes

by James C. Kozlowski, J.D.

This month the "NRPA Law Review" enters its fifth year of publication. As reflected in many of the articles, recreational injury liability continues to be the overwhelming law-related concern of the recreation and parks field. During the recent Congress for Recreation and Parks in Dallas, I attended a portion of a session on recreational injury liability. The question and answer period which followed the presentations by two attorneys was characterized by the same sort of anxiety and hand wringing I have encountered following my lectures on this topic.

In my opinion, the recreation field moans and groans about "liability," but does little in the way of a concerted effort to alleviate the problem in a systematic fashion. In the face of the perceived crisis eyes turn hopefully, but mistakenly, toward Washington for the one piece of "silver bullet" legislation which will slay the liability monster once and for all. In Dallas, I voiced this concern to Roy Feuchter, president of the National Society for Park Resources. He suggested that I devote one of the law review columns to a discussion of the issue and any possible solutions. I do not think that there is any one solution to the problem. The following paragraphs, however, attempt to respond to this request by presenting existing legislation which may have an impact upon the situation.

The bad news is that there is no one grandiose federal solution that will resolve this situation in one fell swoop. The good news is that the wheel has already been invented in several state models to make the perceived crisis more manageable, i.e. recreational immunity statutes. Specifically, there is already legislation quietly at work in several jurisdictions which provides public agencies with limited immunity for injuries occurring on recreational



facilities. Most notably, Virginia and Kansas have statutes which require a plaintiff to allege gross negligence or willful/wanton misconduct, rather than mere negligence, to sustain a claim for an injury sustained on public park and recreational facilities.

Virginia Model

Section 15.1-291 of the Virginia Code entitled "Liability of counties, cities, and towns in the operation of recreational facilities" reads as follows:

> No city or town which shall operate any bathing beach, swimming pool, park, playground or other recreational facility shall be liable in any civil action or proceeding for damages resulting from any injury to the person or property of any person caused by any act or omission constituting simple or ordinary negligence on the part of any officer or agent of such city or town in the maintenance or operation of any such recreational facility. Every such city or town shall, however, be liable in damages for the gross or wanton negligence of any of its officers or agents in the maintenance or operation of any such recreational facility.
>
> The immunity created by this section is hereby conferred upon counties in addition to, and not limiting on, other immunity existing at common law or by statute.

In the case of *Town of Big Stone Gap v. Johnson*, 184 Va. 375, 35 S.E.2d 71 (1945), the 8-year-old plaintiff was injured while playing on an unattended road grader in a public park. This piece of equipment was being used to level a running track in the park. Plaintiff alleged gross and wanton negligence as required by the Virginia recreational immunity statute. The town argued that their conduct "if negligent at all, does not amount to 'gross or wanton negligence' within the meaning and intent of the statute." A jury returned a verdict against the town; the town appealed to the state supreme court.

The issue before the state supreme court was, therefore, "whether the act of the town's employee in leaving this machine in the public park near the children's playground measures up to the standard of 'gross or wanton negligence' required by the statute." The court defined the standard of gross or wanton negligence as follows:

> Gross negligence is substantially and appreciably higher in magnitude than ordinary negligence. It is very great negligence, or the absence of slight diligence, or the want of even scant care. It is a heedless and palpable violation of legal duty respecting the rights of others. The element of culpability which characterizes all negligence is in gross negligence magnified to a high degree as compared with that present in ordinary negligence. Gross negligence is that degree of negligence which shows an utter disregard of prudence amounting to complete neglect of the safety of another. Wanton negligence is of even a higher degree than gross negligence . . . manifesting arrogant recklessness or justice, of the rights or feelings of others, merciless, inhumane.

Applying this standard to the facts of the case, the state supreme court

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found that the conduct of the town through its employee did not constitute "gross or wanton" within the meaning of the statute.

> [T]here is no proof that the town officials or employee knew or ought to have known that the road scraper was attractive to children. While it had been left in the park over a long period, only on two previous occasions, so far as the record shows, had children been on it. Mrs. Barnett, who lived near the park, testified that about a wee. before the accident she saw some children playing on the machine. Ralph Smith, who was with Johnson at the time the plaintiff was hurt, testified that he had previously played on the scraper. But there is no showing that the town's employees knew of either of these incidents . . . [T]here is no proof that the machine was one which was dangerous to children . . . Not only was the machinery of the road scraper idle, but the blade was left on the ground in a safe position, and it was only by reason of the combined efforts of these two boys [Johnson and Smith] that it was hoisted in such a way as to become dangerous. Whether the act of the town employee in leaving this machine near the children's playground, under the circumstances stated, amounted to ordinary or simple negligence we need not decide. It is certain, we think, that it did not constitute "gross or wanton" negligence within the meaning of the statute.

The state supreme court, therefore, reversed the judgment of the lower court and entered judgment for the town.

Kansas Model

Similarly, section 75-6104 (n) of the Kansas Tort Claims Act provides:

> A governmental entity or employee acting within the scope of the employee's employment shall not be liable for damages resulting from: . . . (n) any claim for injuries resulting from the use of any public property intended or permitted to be used as a park playground or open area for recreational purposes, unless the governmental entity or an employee thereof is guilty of *gross and wanton negligence* proximately causing such injury.

In the case of *Willard v. City of Kansas City*, Kan., 681 P.2d 1067 (1984), plaintiff Willard was injured when he collided with a chain link fence around a baseball diamond in a city park in Kansas City." (This case was reported in the *Recreation and Parks Law Reporter* RPLR Report No. 84-35, Vol. 1, No. 4 at page 134.) Willard alleged that "the City was negligent in installing and maintaining a type of fencing with raw sharp cutting edges running along the top in an area where such accidents were likely to occur." The trial court found the City immune from liability under § 75-6104 (n) of the Kansas Tort Claims Act (KTCA), K.S.A.1983 Supp. 75-1601 et seq. Willard appealed to the Supreme Court of Kansas.

The state supreme court applied the following test for gross and wanton negligence:

> Proof of a willingness to injure is not necessary in establishing gross and wanton negligence. This is true because a wanton act is something more than ordinary

negligence but is something less than willful injury. To constitute wantonness the act must indicate a realization of the imminence of danger and a reckless disregard or a complete indifference or an unconcern for the probable consequences of the wrongful act.

According to the court, Kansas law defined wanton conduct as "an act performed with a realization of the imminence of danger and a reckless disregard or complete indifference to the probable consequences of the act." Since plaintiff Willard had provided no evidence of gross negligence or wanton misconduct on the part of the city in maintaining the ballfield, the state supreme court affirmed the summary judgment in favor of the city.

Effect on Plaintiff's Burden of Proof

The plaintiff in a civil (as opposed to criminal) suit has the burden of going forward with his claim. To sustain this burden, the plaintiff must allege the necessary facts to establish his claim. A recreational user injured on the premises would, most likely, allege negligence liability on the part of the public agency landowner.

To meet the burden of going forward with a negligence claim, plaintiff must allege facts demonstrating the following four elements: 1) a standard of care to which a duty is owed; 2) a violation or breach of the applicable standard of care; 3) causation, i.e. a foreseeable connection between the breach and the resulting injury; and 4) damages, actual (as opposed to purely speculative) injury to person or property. If plaintiff's complaint fails to allege sufficient facts to support the negligence claim, plaintiff has not met the burden of going forward. Under such circumstances, defendant may move the court to dismiss the suit for plaintiff's failure to state a claim. However, in reviewing the allegations in plaintiff's complaint, the court will resolve all doubt in favor of allowing the plaintiff an opportunity to go forward with his claim.

Having sustained the burden of going forward, the plaintiff has the burden of proof in a civil suit. In a civil suit, the plaintiff must establish or prove his claim by a preponderance of the evidence. A preponderance of the evidence means more likely than not, better than 50/50, that the credible facts support the claim.

A preponderance of the evidence is much lighter burden of proof than that applied in criminal cases, i.e. beyond a reasonable doubt. In criminal cases, the state must prove beyond a reasonable doubt that the accused committed the alleged crime. Any doubt whatsoever would, therefore, dictate a finding of innocence in a criminal case.

By changing the applicable standard of care from ordinary negligence to gross negligence or willful/wanton misconduct, a recreational immunity statute makes it much more difficult for the plaintiff to sustain his burden of going forward with his claim. As a result, it is more likely that recreational injury claims will be dismissed prior to trial. Furthermore, those claims that do go to trial will be less likely to sustain the burden of proof when the applicable standard of care is gross

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gligence or willful/wanton misnduct, rather than mere neglince.

As the term suggests, negligence is glect or carelessness. It is a slight viation from what the reasonable rson would, or would not do der the circumstances. On the her hand, gross negligence or illful/wanton misconduct is exeme conduct which demonstrates a ckless disregard for the physical ell-being of others.

There is a fine line between careful nd careless when the applicable tandard is ordinary negligence and he burden of proof is preponderance f the evidence (more likely than ot, better than 50/50). This is particularly true when all doubt is resolved n allowing the plaintiff an opportunity to prove his claim. It is, herefore, very difficult to have a ase dismissed prior to trial or prevail at trial when the recovery can be predicated upon ordinary negligence. However, when the burden of proof under a recreational immunity statute is gross negligence or willful/wanton misconduct, the likelihood of some wrongdoing on the part of the public entity has to be clear to sustain a claim. A momentary lapse or oversight by the public entity may constitute ordinary negligence, but not gross negligence or willful/wanton misconduct.

Faced with the burden of proving gross negligence or willful/wanton misconduct under the applicable recreational immunity statute, many plaintiffs' attorneys are less likely to even take the case, let alone proceed to trial. This is particularly true where the injury is relatively minor and the alleged negligence of the public park and recreation agency is less than outrageous. Therefore, it is easy to see that the recreational immunity statute, where available in a given jurisdiction, can be a powerful force limiting the number and success of recreational injury lawsuits against public agencies.

Statute Has the Effect of Waiver

A recreational immunity statute has the same legal effect as a valid waiver or signed release. In a valid waiver, the participant waives any claim he or she may have for mere negligence on the part of the provider of the recreational opportunity. A valid waiver, however, does not release any claim the participant may have based upon allegations of reckless misconduct or gross negligence by the provider of the recreational activity or facility. In similar fashion, the recreational immunity statute changes the applicable standard of care. It precludes recovery for ordinary negligence and requires allegations of gross negligence or other more extreme misconduct to sustain a claim.

In most instances, signed releases or waiver forms for public recreational activities are deemed to be against public policy and, therefore, void. On the other hand, a recreational immunity statute is a valid expression of public policy by the state legislature. Further, this statutory waiver is more comprehensive since it covers all recreational activities and/or participants within the scope of the recreational immunity statute, rather than a single individual who signs a release.

More Recreational Immunity

The Virginia and Kansas statutes described above are not the only laws providing recreational immunity for public entities. For example, an Illinois statute requires claims for injuries on playgrounds to be based upon willful/wanton misconduct. A South Dakota statute immunizes municipalities from "tort liability arising out of the construction and maintenance of public parks, recreation areas, and playgrounds." A California statute provides limited immunity to public entities for injuries occurring in hazardous recreational activities.

In addition, several jurisdictions have found state recreational use statutes applicable to states and political subdivisions. These statutes were originally enacted to encourage private landowners to open their land for public recreational use. These statutes provide that the landowner owes no duty of care to the recreational user who enters the premises free of charge. This immunity is lost, however, if the landowner is guilty of willful/wanton misconduct. On the other hand, a number of jurisdictions have denied that these statutes are applicable to public entities.

Under the Federal Tort Claims Act, the federal government is liable for negligence like a private individual under the law of the juris-

Continued on page 79

WI, NJ, & LA, Limit Public Rec Use Immunity to "True Outdoors"

By James C. Kozlowski, J.D., Ph.D.

Last month's "NRPA Law Review" presented case law from five jurisdictions (New York, Nebraska, Idaho, Ohio, and Washington) which had found the state recreational use statute applicable to public entities. This month's column continues the review of jurisdictions which have considered the applicability of the state recreational use statute to public entities. Specifically, case law from Wisconsin, New Jersey, and Louisiana is examined. In each instance, state courts in these jurisdictions have limited the scope of recreational use immunity to non-urban lands and activities which bespeak the "true outdoors."

Under a recreational use statute, the landowner who opens his land free of charge to public recreational use owes no duty of care to the user to guard or warn of hazards on the premises. As a result, the landowner will not be liable for ordinary negligence, i.e. mere carelessness, in failing to inspect and properly maintain the premises. The limited immunity referred by the recreational use statute, however, will not excuse liability for willful or wanton misconduct. Unlike ordinary negligence, willful or wanton misconduct is much more outrageous behavior demonstrating an utter disregard for the physical well-being of others.

Wisconsin

In the case of *Wirth v. Ehly*, 93 Wis.2d 433,287 N.W. 2d 140 (1980), plaintiff, a minor, was injured "when the trail bike on which he was riding struck a cable stretched across a roadway used by the public on recreational land owned by the state and operated by the Department of Natural Resources (DNR)." The trial court granted defendants motion for dismissal of plaintiff's negligence action based upon the state recreational use statute. "The defendants were all employees or agents of DNR at the time of the accident. Neither the State nor DNR was joined as a defendant. The defendants were sued in their individual capacities." Plaintiff appealed to the state supreme court.

As described by the state supreme court, the principal issue on appeal was whether the employee defendants named in the suit were "owners" as defined in the state recreational use statute. Plaintiff argued that "the state employees do not come within the statutory definition of owner in sec. 29.68,Stats., when sued in their individual capacities." The state supreme court rejected this argument. As described by the court, the "anticipated effect" of the 1975 amendment to the recreational use statute affording statutory protection for recreational lands owned by the State and local governments "would be to reduce the potential liability of these governmental units caused by employee negligence."

> The intent of the [1975] amendment to sec. 29.68, Stats. was to provide that in situations where previously a public officer or employee would be held liable for acts occurring within the scope of his employment or public land and for which the State would have been liable for payment. . .

The state supreme court, therefore, concluded that "the [public] employee now will be deemed an 'owner' for the purpose of sec. 29.68, Stats."

Plaintiff also argued that "the statute should only apply to remote and uncontrolled areas." Further, the plaintiff maintained that the public land where the injury occurred "was not remote and uncontrolled." The state supreme court also rejected this argument.

> Although the limits of the statutory definition of premises are not entirely clear, those limits have not been reached in this case. . . [T]he statute was initially proposed to protect owners of forest land from liability to deer hunters, the legislation was ultimately drafted to apply on a much broader scale. The intent was to encourage the use of forest and farm lands for many outdoor recreational sports by restricting the common-law liability of the landowner to such areas in various respects . . . The accident involved in this case did not occur in a densely populated residential area, but rather in a rural or semi-rural environment. Salmo Pond and the surrounding area clearly falls within the meaning of premises open for recreational use found in sec. 29.68, Stats.

Plaintiff also argued that "the duty from which the 'owner' of premises under sec. 29.68, Stats. is relieved, is only the affirmative obligation to inspect or post warning of dangerous conditions." As a result, plaintiff contended that "affirmative acts of negligence by individuals were never intended to be covered by the statute whether those acts of negligence were committed by an 'owner' or anyone else." The state supreme court disagreed.

> The statute does not contemplate that the land subject to public recreational use shall remain static. Since the purpose of the statute was to open land for recreational use, it would be inconsistent for

Continued

the statute to provide protection only if the owner or occupant does not perform any potentially negligent activities on the land. The statute contains an explicit reference to affirmative acts by providing that "owner . . . owes no duty to *keep* the premises safe for entry or use . . . or to give warning of any unsafe *condition or use of or structure or activity* on such premises. (Emphasis supplied by court.) The stringing of the cable was a condition or structure on the premises.

Given the terms of the recreational use statute, the state supreme court concluded that "there was no duty on the part of the state employees to keep the premises safe or to warn of the potential hazard created by the cable." The state supreme court, therefore, affirmed the judgment of the trial court dismissing plaintiff's claim.

In the case of *Quesenberry v. Milwaukee County*, 106 Wis.2d 685, 317 N.W.2d 468 (1982), plaintiff was injured when she stepped into a grassed covered drainage tile hole. Citing *Wirth*, the trial court dismissed plaintiff's claim against defendant county based upon the state recreational use statute. The appeals court affirmed. Plaintiff then appealed to the state supreme court.

On appeal, the state supreme court found that the state recreational use statute immunity was limited "to the type of recreational uses of land specified in the statute." As a result, the court found that "golf courses do not come within the scope of the statute."

Sec. 29.68, Stats., protects the owner of premises used by others for "hunting, fishing, trapping, camping, hiking, snowmobiling, berry picking, water sports, sightseeing, cutting or removing wood, climbing of observation towers or recreational purposes." "Recreational purposes" covers an almost limitless number of activities that could be so described. But the statute clearly limits the types of recreational activities meant to be covered. Golfing is not one of the enumerated uses, or types of use, described and therefore is not within the exceptions to owner liability described by the general term "recreational purposes."

In the opinion of the court, "the common feature of the enumerated words is that they are the type of activity that one associates being done on land in its natural undeveloped state as contrasted to the more structured, landscaped and improved nature of a golf course with its fairways, sand traps, rough and greens created for one purpose: to play the game of golf." The state supreme court, therefore, reversed the judgment of the trial court dismissing plaintiff's claim and remanded the case for further proceedings.

New Jersey

In the case of *Magro v. City of Vineland*, 148 N.J.Super, 34, 371 A.2d 815 (1977), the 14-year-old plaintiff was injured "while diving from a makeshift diving board into an abandoned pond or lake owned by the City of Vineland." At the time of the accident, the land was "predominantly rural, undeveloped, unoccupied, and unimproved." The land had been acquired by the city for later development as a park. The body of water where the injury oc-

curred had been formed "by the natural seepage of water into a 'sandwash.' " The trial court had granted summary judgment to the defendant city based upon the state recreational use statute. Plaintiff appealed.

In the opinion of the appellate court, "the summary judgment for defendant was warranted by virtue of the immunity created by N.J.S.A. 2A:42A-2 to 5 [the state recreational use statute]." According to the court, earlier decisions had held that the statute "was intended to apply to nonresidential, rural or semi-rural land whereon the enumerated sports and recreational activities [in the statute] are conducted." The court further rejected plaintiff's argument that the statute was not applicable to children. "Our study of the legislation and its history has failed to produce a single clue, direct or circumstantial, whereby it can be inferred that the Legislature intended to exempt infant claimants from the statutory immunity." In the opinion of the court, the recreational statute "grants immunity to a landowner under the facts herein." Further, the court found that such immunity was "equally available to a public entity and a private individual or corporation." The appellate court, therefore, affirmed the trial court's summary judgment in favor of the defendant city.

Louisiana

In the case of *Keelen v. State Department of Culture, Recreation and Tourism*, 463 So.2d 1287 (La. 1985), plaintiff's son drowned in a swimming pool in a state park. On appeal to the state supreme court, the issue was whether the state recreational use statutes conferred immunity from liability for a drowning in a swimming pool at a state park. Since the supreme court held that the statutes did "not confer immunity for a drowning in a swimming pool," the court found it unnecessary to decide "the question of whether the statutes apply to the State and its political subdivisions."

In the opinion of the state supreme court, "the legislature intended to confer immunity upon owners of undeveloped, nonresidential rural or semi-rural land areas."

> The use of the language "land and water areas" is suggestive of open and and undeveloped expanses of property. Furthermore, the type of recreational activities enumerated in both statutes—hunting, fishing, trapping, camping, nature study, etc.—can normally be accommodated only on large tracts or areas of natural and undeveloped lands located in thinly-populated rural or semi-rural locales. Specification of these types of activities suggests a policy that would encourage landowners to keep their property in a natural, open and environmentally wholesome state. We would stray from this goal were we to construe that statutes to grant a blanket immunity to landowners without regard to the characteristics of the property.

In categorizing property as rural or semi-rural, the state supreme court would consider "the size, naturalness and remoteness or insulation from populated areas."

> The existence of some improvements on relatively undeveloped rural or semi-rural property does not change the

Continued on next page

character of the land so as to deprive its owner of the immunity granted by the statutes. Improvements such as shelters, toilet facilities, fireplaces, etc. are merely conveniences incidental to the use of the land for enumerated recreational activities and do not themselves take the property out of a rural, undeveloped classification. This view is reinforced by the fact that the definition of "premises" in La.R.S. 9:2791 and of "land" in La.R.S. 9:2795 [the state recreational use statutes] include "buildings, structures and machinery."

In addition to the characteristics of the land, the court would also scrutinize "the injury—causing condition or instrumentality" in determining "whether the statutes apply to a particular factual situation."

> [R]eference to the types of recreational activities specified in the statutes (hiking, boating, horseback riding, etc.) indicates that the legislature envisioned immunity for landowners who offer their property for recreation that can be pursued in the "true outdoors." When the injury-causing condition or instrumentality is of the type normally encountered in the true outdoors, then the statutes provide immunity. Conversely, when the instrumentality, whether found in an urban or rural locale, is of the type usually found in someone's backyard, then the statutes afford no protection.

Applying this principle to the facts of the case, the state supreme court stated "it is clear that a swimming pool is not the type of instrumentality commonly found in the true outdoors." On the contrary, the court noted that "swimming pools are most often found in residential backyards."

> We recognize that "swimming" is included in the list of recreational activities in La.R.S. 9:2795; however, the word should be construed by reference to the context in which it is found. Such consideration leads to the conclusion that the legislature intended to grant immunity for injuries incurred while swimming in lakes, rivers, ponds or other similar bodies of water. Thus, an injury which occurs in a swimming pool is not subject to a defense of immunity under La.R.S. 9:2791 and 2795.

The state supreme court, therefore, concluded that "the State cannot assert these statutes in order to avoid liability in the instant case."

In the case of *Brooks v. City of Lake Charles*, 488 So.2d 465 (La.App. 3 Cir. 1986), plaintiff sued the city after her husband drowned following a fall from the dock of the Lake Charles Civic Center. The trial court dismissed plaintiff's negligence claim based upon the state recreational use statute. Plaintiff appealed.

On appeal, plaintiff argued that "the immunity statute is inapplicable because the concrete dock behind the Lake Charles Civic Center is a man-made facility and is not the type of instrumentality to be found in the true outdoors." The defendant city responded that the lake, unlike the swimming pool in *Keelan*, was a natural body of water which would constitute the true outdoors. Applying the reasoning of *Keelen* to the facts of this case, the appeals court found the recreational use statute "inapplicable because an accident occurring at the Civic Center within the corporate limits of Lake Charles does not constitute the true outdoors as contemplated by the statute."

> Although the lake is a natural body of water, the injury-causing condition was part of the civic center complex and as such, in our view, it cannot be categorized as the true outdoors; therefore, it does not come within the purview of the statute, which the legislature intended to apply to owners of undeveloped, nonresidential rural, or semi-rural land areas. . . Accordingly, under the circumstances of this case, we conclude that the City does not have the benefit of landowner immunity or limitation of liability accorded by R.S. 9:2795 [the state recreational use statute].

The appeals court, therefore, reversed the judgment dismissing Brooks' claim and remanded the case to trial court to consider the allegations of negligence against the City of Lake Charles.

Dr. Kozlowski is an attorney and consultant in recreational injury liability in Springfield, Virginia. He is the author of the Recreation and Parks Law Reporter.

"The President's Commission has made an important contribution to our understanding of the nation's outdoor recreation needs and resources. It is a much needed initiative…I suggest that we take this report seriously."

WILLIAM K. REILLY
President
World Wildlife Fund and The Conservation Foundation

"The President's Commission on Americans Outdoors was a timely and needed assessment of the threats and opportunities in our out-of-doors. It is my hope that the President and Congress will enthusiastically embrace and move forward on this important blueprint for action."

ROBERT L. HERBST
Executive Director
Trout Unlimited, and
Former Assistant Secretary of the Interior

"Wildlife was a strong and consistent element in the public's testimony. The Commission's recognition of the importance of insuring abundant and diverse wildlife and protecting its habitat may well yield momentous results."

JOYCE M. KELLY
President
Defenders of Wildlife

"If there is an example of pulling victory from the jaws of disaster, this report is it. The Commission did more than anyone expected, especially the administration. It gave Americans something serious to think about if we are to begin saving our natural resources."

PAUL C. PRITCHARD
President
National Parks and Conservation Association

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AMERICANS OUTDOORS

THE REPORT OF THE PRESIDENT'S COMMISSION

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THE LEGACY, THE CHALLENGE

With Case Studies

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Case Studies

• Financial and technical assistance to encourage innovation in such areas as recruiting skilled adults and senior citizens to provide experienced guidance to young corps members, and establishing linkages between corps programs and volunteer organizations.

The creation of a public sector/private sector National Volunteer Corps would create an opportunity for the American public to contribute their time, talents, and skills in the conserving and managing of America's natural resources, and would involve all sectors of society: government, business and industry, conservation organizations; but the program would essentially be run by volunteers for volunteers. All sectors can provide leadership. Additionally, each has skills and expertise it can share with the others; the land managers can provide the opportunities and tools; the business community can provide organizational structure funding; and the volunteers the energy and enthusiasm.

GERALD COUTANT
U. S. Forest Service
Concept Paper for the
Commission

Chapter 5

Volunteers Play Vital Roles

We recommend

• Local officials, mayors, governors and private sector managers support volunteering, develop incentives and remove barriers to encourage Americans to volunteer in outdoor recreation. The goal is to double volunteer efforts in conservation and recreation by the year 2000.

• Current laws and regulations be reviewed to enhance mechanisms for using volunteers in national parks, national forests, and all federal agencies.

Volunteering is part of our American heritage

From barn raising and crop harvesting to parents helping children and neighbors helping neighbors, Americans have always volunteered. An early incentive for helping others was the knowledge that at some point there would be the need for others to come to our aid. By helping others, we helped ourselves.

Budget and staffing cuts over the last decade have challenged the ability of professionals to meet recreation needs in a responsive way. Volunteering has increased, and managers now find themselves working with new partners in providing outdoor recreation.

Volunteers support communities and contribute to our economy

President Reagan stated in his 1986 State of the Union address that volunteers contributed an estimated $74 billion to the American economy. A 1985 study found that retired senior volunteers were better off socially, mentally, and physically than they would have been without the volunteer experience. Once again, by helping others we help ourselves.

Opportunities for community volunteer action vary widely, from Keep America Beautiful to the National Youth Sports Coaching Association, to the National Volunteer Project of the Appalachian Mountain Club to the Student Conservation Association. There are countless associations dedicated to a neighborhood or a particular park, and adopt-a-park and adopt-a-trail programs.

Volunteer organizations, with the assistance of providers, develop a community spirit and pride of accomplishment at the grass roots. The local level is where efforts to encourage volunteering should be strongest.

So much work remains to be done in this unfinished and imperfect world that none of us can justify standing on the sidelines. Especially in a society like ours, volunteering is an expression of democracy in its purest form. For the volunteer is a participant, not a looker-on, and participation is the democratic process.

EUNICE KENNEDY SHRIVER

. . . volunteerism is not a fad but a viable, long term solution to providing many recreation services. The success and importance of volunteer activities today are far exceeded by their potential for the future. Volunteer programs require a great deal of effort to initiate and sustain, and they are not free. However, when approached properly, these programs can have broad long term benefits that far outweigh costs.

ROGER MOORE
Appalachian Mountain Club

Volunteers are out there but we don't cultivate their talents

Organizations exist throughout all levels of government and the private sector to promote and support volunteers. However, we think we can do more. We need to double our efforts over the next decade to meet the challenges of tomorrow.

In 1985, of the 67 million hours donated by 348,000 National Retired Senior Volunteer Program volunteers, only 3.6 percent were in recreation related activities. A 1985 poll conducted by the Volunteers for Outdoor Colorado indicated that 40 percent of those surveyed would volunteer in the outdoors if asked. Eighty-two percent felt that local organizations are best suited to provide for community needs.

The 1982-83 National Recreation Survey found that 16 percent of people over age 60 said they had an outdoor recreation skill they could

teach. However, only a quarter of these people taught the skill, mostly to family and friends. The most common reason older people said they did not teach the skill was because they had not been asked.

Managers can better support volunteers

Though managers have begun to turn to volunteers in order to fill the void left by budget cuts to outdoor recreation programs, they are sometimes reluctant to delegate real responsibility to volunteers. Furthermore, employees have expressed concern that volunteers are replacing important employee functions, reducing opportunities for entry level positions and advancement. Volunteers must not be seen simply as a cure-all for staff cut-backs.

There is a thin line between effective utilization of volunteers and the negative effect volunteers can have on employee morale. Jeannette Fitzwilliams of the Virginia Trails Association observes:

At this time when people are fighting to keep their jobs, volunteers can be seen as a threat. Furthermore, it is not human nature for a manager to share responsibility; he has to make a conscious effort to do so. Yet [parks] do not exist in a vacuum; they are part of a community. Cooperation and partnership will do more for a manager's image than if he tried to do everything all by himself.

Volunteers can do more than menial tasks

The Appalachian Mountain Club believes that cooperation between volunteer organizations and public agencies offers many advantages. Agencies must spend a good deal of time on tasks that must be repeated year after year—recruiting, training, supervising. Volunteer organizations can perform these tasks along with many administrative ones and provide a continuity not easily achieved by the agencies.

Volunteer organizations are not always afforded equal opportunity to bid on public contracts. While some contracts have been awarded to nonprofit groups to manage park facilities, there are relatively few such cases. We recommend that public agencies and the private sector remove obstacles to competition for the chance to provide services to the American public. There should not be a penalty for being a nonprofit.

We need volunteer program leadership

Community, state, federal and private sector leaders must actively develop and encourage volunteering. We recommend that organizations, particularly those providing services or products for outdoor recreation, create staff positions responsible for the development of volunteer programs.

We recommend that policy statements and legislation be developed to nurture volunteering through:

- support for an expanded role by volunteer organizations in providing outdoor recreation opportunities;

- tax laws which allow deductions for contributions to volunteer organizations;

- deferment or partial forgiveness of student loans repayment, and/or work requirements, for students who volunteer in parks and outdoor corps;

- encouragement to government agencies and private groups to include volunteer programs in their organizational structures;

- training programs within agencies and organizations to develop understanding of volunteer program potential and to teach volunteer management skills;

- annual recognition, sponsored by governors, city and local officials and the federal government, of volunteers in outdoor recreation who have worked for the betterment of their communities;

- encouragement to the private sector to offer incentives to employees to volunteer their time to assist in providing outdoor recreation opportunities in their communities;

- protection for volunteers from legal liability and tort claims and coverage for injuries sustained while volunteering;

- provisions for minimal expense reimbursements to those volunteers less able to pay for their transportation or other incidentals (senior citizens and the less fortunate);

- encouragement to and authority for land managers to delegate real responsibility to volunteers.

Private organizations and businesses should encourage employees to serve their communities as volunteers. The IBM Corporation loans employees to community organizations as part of their community awareness and support ethic.

We need to review current laws to promote volunteering

The National Park Service's Volunteers in the Parks and the U.S. Forest Service's Volunteers in Forests programs are good examples of positive emphasis on volunteering by federal agencies. However, these laws do not

apply to all federal agencies. They do not encourage agency partnership development and cooperation with local profit and nonprofit groups and organizations, and they do not provide minimum budget levels for federal agencies to initiate and strengthen volunteer efforts. Neither the Bureau of Reclamation nor the Tennessee Valley Authority have volunteer authorities. Current statutes should be reviewed to address these opportunities.

The Bureau of Land Management received specific authority for volunteer programs through a 1984 amendment to the Federal Land Policy and Management Act. In 1981, 64,000 hours were donated to the agency. By 1985 the figure was 371,000 hours, valued at $3.2 million--a return of 10 to 1 over the costs to manage the program. This growth occurred without any full-time field staff devoted to development of volunteer programs. In two Bureau of Land Management districts the volunteer work-years were as much as 27 percent of the full-time staff work years.

Potential volunteers can't find the right information

Volunteers seeking opportunities to assist with outdoor recreation programs are not always able to get enough information. An agency or organization may not know about opportunities outside its own programs. There is no central volunteer information service for outdoor recreation.

Independent agency programs should develop direct working relationships with other agencies. When one agency cannot provide an opportunity for a volunteer, a referral should be made to another agency which can. This would require information sharing and cooperation—partnerships for the benefit of all. We recommend the establishment, with local communities, states and the federal government being equal partners, of a clearinghouse for volunteer information and opportunities.

Volunteering promotes respect for and knowledge about the outdoors and how people behave in the outdoors. Local volunteer groups are proving that people really believe Woody Guthrie's words, "This land is your land, this land is my land." Volunteers must be given leadership, real responsibilities and acknowledgment in order to foster a true feeling of accomplishment and to maintain viable ongoing programs.

National Leadership Helps Develop Local Action

The National Volunteer Project (NVP) of the Appalachian Mountain Club was formed in 1982 with private foundation grants to foster the development of local volunteer organizations. The NVP program founded six independent groups around the country—Volunteers for Outdoor Colorado, Outdoor Washington, Florida Trails Association, Trail Information and Volunteer Center, Volunteers for the Outdoors in New Mexico, and Tahoe Rim Trail Fund. The purpose of these organizations is to foster a partnership with federal, state, and local providers. The NVP does all recruiting, training, and supervising of the volunteers. The providers supply financial assistance through grants, concessions, or contracts. This kind of relationship between the local community and a national entity generates local impetus and interest in volunteer projects.

Volunteers Manage the Appalachian Trail

The Secretary of the Interior in 1984 gave the Appalachian Trail Conference overall responsibility for management and protection of the Appalachian Trail. The Conference and its 31 member clubs have long led volunteer efforts to provide public services that might otherwise be considered the responsibility of government. With 18,000 members nationwide, ATC's responsibilities include assigning sections of the Appalachian Trail to its member clubs and ensuring that they do a good job of management and maintenance. ATC's assuming management for the 60,000 acres along the Appalachian Trail was a unique effort in transferring broad management responsibilities for public lands to a private, nonprofit organization.

Traditionally, minority groups of all sorts have found it difficult to become involved in volunteering, sometimes because they were not made to feel welcome, sometimes because they did not have the carfare it took to reach or work in an agency across town or money for lunch. Neighborhood volunteer centers and reimbursement of expenses are two methods that have enabled these groups to volunteer.

Isolde Chapin Weinberg
National Center For Voluntary Action

For volunteers to perform well, they need to have a sense of responsibility. Too often government agencies have seen volunteers as inexpensive, unskilled laborers, not as a tremendous resource waiting to be tapped. Under-utilized volunteers rarely develop a solid sense of stewardship or participation. On the Appalachian Trail, where the clubs are clearly in the hot seat of responsibility, there is a remarkable level of commitment and resolve to do well. Public land managers must be willing to have faith

in volunteer organizations with good track records. In some cases specific legislation will be necessary to give volunteer groups significant responsibility.

Lawrence R. Van Meter
Potomac Appalachian Trail Club

Several urban recreation agencies could not function effectively without the public's efforts. With the initiation of the Gramm-Rudman Act and the general trend of reduced federal support for local services, the reliance on volunteerism will only increase in the coming years. The support and recognition of the public's effort must be continued at all levels of government.

Lawrence Allen
Temple University

be given to linking compatible uses in certain areas. Though certainly the natural resource recreation area would have to have multiple uses, it would seem that it could be planned in such a way that compatible uses are grouped and linked and non-compatible uses are separated.

Chapter 2

Private Landowners Have Opportunities and Needs

We recommend

- Private landowners recognize the opportunity to provide expanded recreation resources and services to the public.

- Local, state and federal governments consider incentives to private landowners to increase public access, and review existing statutes, policies, regulations and practices to assure that impediments to providing public recreation on private lands are removed.

- Recreation organizations actively encourage respect for private property rights and assist in managing use of private lands.

Private landowners: important partners for recreation supply

Private lands constitute nearly two-thirds of our nation's land base, and host many recreational activities. The potential for private lands to provide even more recreation opportunities is great. Yet, many landowners have concerns, ranging from liability to vandalism, which prevent them from opening their lands to the public for recreation use.

The pressures on the nation's lands and waters to provide recreation opportunities will continue to grow. Projections of overall recreation demand made in 1962 for the year 2000 were reached in 1980. Present budget limitations at the federal, state and local levels make dramatic increases in public recreational land holdings unlikely.

Today, most of the public lands are in areas of the country where people are not. Conversely, private lands are often located near population centers. This makes private lands especially important in certain regions of the country, notably the East and the South. Some private lands provide the only access to public lands.

Government finally came to the realization that there would never be enough money to purchase, develop and maintain sufficient land and facilities to meet the demand for outdoor recreation. There is a growing recognition that the private sector, owning a majority of the land and resources, must be considered a partner in meeting future recreational needs.

Private lands are integral to meeting future demands for recreation. Whether it be for the production of wildlife, integration of trail systems, provision of support businesses for recreational enterprises, the assurance of solitude or exclusivity or the maintenance of open space near centers of human population, the importance of these lands to the physical and psychological well being of the nation's citizens is indisputable. Recreation planners and supply and demand analysts must take into account the importance of private lands to the spectrum of recreation activity.

Herbert E. Doig
Assistant Commissioner
New York Department of
Environmental Conservation

What we must do . . . is create new institutional ways for farmers, foresters and other landowners to be able to deal with the "people" aspects of recreational use. If owners incur costs, and recreation users reap benefits, there has to be a way for the users to repay the owners, or there simply will not be the amount of recreation that would otherwise be possible. We pride ourselves in this country on our ability to let the free market regulate most of our activities, but this is one where we have not yet invented a market mechanism in many places, and we need to encourage that.

Neil Sampson
Executive Vice President
American Forestry Association

The system we have is not working, and the problems of creating quality sometimes seem insurmountable. If we are to save our wildlife and add new dimensions to recreational programs, we must turn to the private sector for answers. But, unfortunately, we are creating problems in this area faster than we can solve them.

Dayton O. Hyde
National Cattlemen's Association
Oregon

While we recognize the extent and the seriousness of the challenges to opening and reopening private lands to recreation, we also recognize opportunities to do so. Farming, ranching, timber production and other resource industries are experiencing difficult economic times. Adversity has prompted many in these industries to consider moving from single-purpose land management to multiple use management—from farming alone to farming and wildlife management, for example. As one witness told us, some landowners have arrived at a new view of recreation: "If it pays, it stays."

How recreation "pays" can vary. It can pay in community appreciation for the landowner, especially a corporate landowner. It can pay through reduced tax property payments, where a local jurisdiction provides credit for allowing public recreation access, or in reduced federal taxes resulting from donation of a public recreation easement. It can pay though a recreational use lease, typically entered into by a club or a unit of government. Or, it can pay through individual fees charged for services or facilities. Successful efforts to maximize recreational access to private lands must be voluntary and not coercive and originate at the state and local levels, because of the importance of state liability and trespass laws and local taxing practices.

Landowners have legitimate concerns about opening their lands

We participated in a workshop about recreation on private lands, convened by Senator Wallop, which revealed several reasons why private land owners are hesitant to provide public access.

- Managing land for public recreation is primarily managing for people. Many private landowners have neither the training nor the desire to manage visitors.
- Recreation use is sometimes not compatible with the main uses of land.
- Acts of trespass, vandalism and litter are reportedly increasing. "Willful trespass with firearm" is troublesome to many owners.
- Owners fear liability if people get injured on their property.
- Personal reasons for owning lands are changing. Many people seek privacy and discourage use by others.
- Incentives for the landowner are often lacking. In many cases, the landowner is unable to receive any compensation for public recreation use.

For these and other reasons, substantial portions of the private lands may never be available for general public recreation use.

Land ownership patterns influence recreation opportunities

Patterns and structures of land ownership in this country are changing, especially in rural areas, and these changes affect public access. Much of the change results from uncertain economies for agriculture and forest products, two principal uses of rural private land with multiple recreation values.

The number of small farms and forests is growing. Owners of small tracts often acquire them for personal recreation space and are less inclined to open their lands to other people. Smaller tracts often preclude certain types of recreation.

The number and size of larger farms and forests are also growing. These larger tracts generally are managed for maximum income production. While the majority of industrial forest land is open for some recreation, restrictions on access are increasing due to concerns over vandalism, liability, and costs.

The future availability of private lands for recreation is difficult to predict because of the lack of consistent information over time to determine these trends.

We must remove disincentives for public access

Some forty-six states have statutes protecting private landowners from liability suits when they provide free public access, except in cases of gross negligence. Legal experts believe these recreation use statutes provide substantial protection to owners; however, the laws have seldom been tested. The costs of successful defenses can be substantial in time and dollars. Some liability concerns in the future may be resolved by amending state and federal liability laws.

However, these statutes can also inhibit private landowners from providing recreation access. The economic costs of maintaining open lands are high, and many landowners must seek financial return for recreation access. But charging fees for access and use generally eliminates the landowners' legal liability protection. Recreation is a valuable commodity, and landowners should receive fair economic value for recreation access.

The Florida liability law provides continuing protection, even when a fee is charged, providing the landowner meets certain criteria for wildlife habitat management. Other states should consider similar expansion of protection.

Trespass is another challenge. Local enforcement officials generally look upon trespass as a nuisance and are reluctant to investigate and to prosecute offenses. In a number of cases, recreation groups have aided landowners through peer pressure, posting of signs and other means. Landowners, enforcement officials and enthusiasts need to develop local strategies for confronting and controlling recreation trespass.

- Recreation organizations should actively encourage respect for private property rights and assist in managing use of private lands.

We must establish incentives for private landowners

Several states encourage private landowners to plan for multiple uses of their lands. Wisconsin rewards land conservation by providing landowners with tax incentives to manage lands for forests. New Jersey gives grants to landowners to develop recreation facilities. Virginia develops agricultural and forestry districts which provide tax benefits and some protection from development to landowners. Many states reduce or postpone property taxes for certain open space purposes, including recreation.

A number of Internal Revenue Service policies and regulations significantly affect potential donors' willingness to consider making a gift of land or conservation easements. An example is the current requirement that donors assume the cost of a private appraisal of the value of a donated easement. These policies and their effects on conservation and recreation philanthropy should be examined.

Private lands have recreation value: make landowners aware

Often landowners do not realize the potential value of their land for recreation. Landowners need to understand how they can increase the value of their lands by providing public recreation access.

In times of economic pressure for agricultural uses, recreation may offer a way for private landowners to remain economically viable.

- States should create statewide councils of private landowners and recreation users to define mutual goals for conservation of private resources, enhancement of recreation access, and monitoring conditions of use.

- Extension agents and soil conservation districts should help landowners expand recreation access through technical assistance programs.

- A clearinghouse should be established to more effectively monitor, assemble and distribute legal, regulatory and other technical information and advice about recreation on private lands.

The farm bill: potential to improve quality and quantity of land for recreation

The 1985 Omnibus Food Security Act will expand recreation opportunity on private lands. The Act creates two programs, "Conservation Re-

serves" and "Easements for Credit Exchange," that remove large amounts of land from annual crop production and dedicate them for an interim period to conservation, recreation, and wildlife purposes.

The law authorizes up to 45 million acres to be placed in conservation reserves and removed from farm production for ten to fifty years. Soil, water and vegetation quality are improved when these lands are withdrawn from production. This potentially improves recreation beyond the reserved area as well.

As of October 1986, the U.S. Department of Agriculture had enrolled 9.1 million acres in this program. Much of the reserved land is in the more sparsely populated Plains states. The Easements for Credit program is not yet operational.

The effects of conservation reserves on the supply of publicly available recreation lands is uncertain. The economic distress in agriculture which stimulated enactment of this statute also motivates some farm owners to allow access only to persons or organizations able and willing to pay substantial fees for recreation.

Presently, billions of dollars are paid to agricultural interests in price supports for surplus crops. If equivalent dollars were paid to the same interests for wildlife habitat and recreation access improvement, extraordinary changes might occur in access to private lands.

Coordination of government actions would help

Public actions to expand recreation use on private land are likely to involve coordinated efforts by different agencies—agriculture, parks and recreation, and fish and wildlife, for example. Several people have suggested to us that interagency cooperation is difficult to achieve, and even harder to maintain. For example, fisheries policy, research and management—an area of significant interest to recreationists—is fragmented, and at times contradictory.

- The secretaries of the U.S. Departments of Agriculture and the Interior should jointly create a special *ad hoc* task force to focus attention and make detailed recommendations on issues involving public recreation access to private lands.

Dialogue stimulates recreation on private lands

Landowners have experienced vandalism and other malicious behavior on their lands. This disregard for private property by some individuals can be quite costly to private landowners.

A timber company in Virginia threatened to close its lands for recreation. The Izaak Walton League provided a forum where company representatives and recreation users discussed their problems. As a result, the

company decided against closing their lands to the public. The hunters, anglers, hikers and birdwatchers who enjoyed the land agreed to adhere to a code of behavior developed by the landowner and themselves.

Several states have followed this model and officially adopted councils of landowners and users to prevent unnecessary closures and provide a forum to voice concerns.

- A broad coalition of recreation users and private landowners should adopt codes of ethics describing acceptable behavior on all private lands.

In those few instances where landowners know about the law there is a perception that recreational use statutes do not provide sufficient immunity to act as an incentive for public access. Private landowners do not want to know if they will have a successful defense to a recreational injury lawsuit. Their concern is much more basic, they want to know, "Can I be sued?" . . . Unfortunately, the answer invariably is 'yes' with or without limited immunity recreational use statutes. . . . Whether you win or lose, it has been said that a lawsuit is the worst thing that can happen to an individual with the exception of death or serious illness. The challenge to encouraging public recreation access to private lands is to somehow insulate the private landowner from the costs attendant to a lawsuit . . . Absent a coordinated institutionalized approach to the issue of recreational injury liability, twenty years from now we will be back once again to explore the challenge, including public recreation access to private lands.

Louis C. Kozlowski, Esq.
Springfield, Virginia

So why do we keep our lands open to the public? Because we still feel that the goodwill we generate is worth the trouble. And because we have some concern that if the private sector withdraws its lands entirely, it will necessitate expanded government ownership to meet the demands of the public.

Claresce Sirefman
Bowater Southern Paper Company

A concern voiced by college students that visit our ranch on field trips is about our rates. Wouldn't hunting get so expensive that the poor man will not be able to afford to hunt. My answer is, "If you give me one coke and one pack of cigarettes a day for a year I will give you a good hunt." It depends on where the priorities are.

Hugo Louis Welge
Doss, Texas

In the nine Virginia counties served by the Piedmont Environmental Council, 14 percent of all private lands have been dedicated by their owners to continued rural use, at least in the short term. This represents protection of 300,000 acres—one and one half times the area of Shenandoah National Park. These lands have been protected through landowner response to incentives offered by government, primarily Virginia's agricultural and forestry district program, but including conservation easement provisions of the Federal tax code.

Robert T. Dennis
President, Piedmont
Environmental Council

How Three States Help Private Landowners

Wisconsin. Wisconsin's 'Managed Forest Law' provides a creative way to directly reward landowners for land conservation. The law encourages the management of private forest lands for commercial use, while recognizing the objective of individual property owners, compatible recreation uses, watershed protection, wildlife habitat and public access. The act provides lower taxes to owners of 10 acres or more who adopt and use an acceptable forest management plan. The plan may include approved, but not mandatory, actions to enhance wildlife, watershed or aesthetic values. The landowners may leave all or some of the area open to public hunting, fishing, hiking, skiing, sight-seeing or other recreation pursuits. Unauthorized access by motorized vehicles is prohibited.

Through 1992 the owner pays a fixed annual tax of $.74 per acre on open lands. On lands closed to the public the owner pays $.74 per acre, plus an additional annual tax of $1.00 per acre. Present taxes on forest land are about $2.00 per acre, so the economic benefits to landowners are especially high for open lands. Participants may not charge a user fee or lease managed lands. In 1992 and every fifth year, tax rates for open and closed areas will be adjusted.

The state pays local governments $.20 per acre in lieu of taxes from a state forestry fund. Participation in the 1987 signup, the state's first, encourages state officials. About 150,000 acres were designated for forest plans, with more than half of the owners choosing to keep lands open to the public.

New Jersey. New Jersey's 1984 Open Lands Management Act' provides financial assistance to aid the development and maintenance of private property for public recreation. The Act was adapted from authority used by the Countryside Commission for England and Wales where a strategy of aiding private landowners is long-standing.

In New Jersey private landowners are given grants to make lands available to the public. Emphasis is on developing modest facilities to support passive recreation. Funding is also available for repair or replacement of damaged facilities and properties of the landowner or adjacent owners due to public use. Maximum grants are $10,000. Purchase of liability insurance by the landowner is an eligible expense for the length of the agreement.

Funds are used to open up new areas or provide added recreation activities that had not previously existed. Owners agree to participate for a fixed period, not less than one year. The program guarantees public access for the full term, even with change of ownership. Fees can be charged for use of facilities, but only to cover costs of maintenance and repair.

Participants may be private individuals, businesses or organizations. Landowners benefiting the most from the program to date are nonprofit organizations. Farmland is poorly represented. Agreements with 17 owners have opened about 2,200 acres. The average cost of access covenants is $75 per acre for an average agreement of 5.3 years. Thus, the annual cost per acre is about $14. In the future program managers propose to 'take it to the cities and suburbs' and direct the program to newer private residential developments as well as vacant lands and waterfronts in economic transition.

Virginia. Virginia's authority to create local agricultural and forestry districts has resulted in about one-half million acres of private land voluntarily reserved as open space. About two-thirds of the acreage and perhaps 80 percent of the easements are in the nine counties organized by the Piedmont Environmental Council, a private nonprofit group. Public recreation access is not required, but is usually granted by landowners for hiking, horseback riding and cross-country skiing. "Firearms use is watched very closely," according to local officials, as is use of motorized vehicles.

The creation of districts is locally initiated by landowners and counties and is administered by the State Department of Agriculture and Consumer Services. Landowners, through county officials, generally determine the length of the agreements; 4 to 8 years is the present range. A proposal to amend state law to lengthen the contract term to 25 years will be advanced this year.

There are basically two incentives to landowners: districting "guarantees what the neighborhood will look like", and it provides for use value taxation, as opposed to potential development or market value tax rates. It is also more difficult procedurally to condemn reserved land for other purposes—roads, for example—so officials tend to give greater attention to proposed public projects.

Outdoor Recreation on Indian Lands

Native Americans have developed life-styles, cultures, religious beliefs and customs around fish, wildlife and other outdoor resources. These resources continue to provide sustenance, cultural enrichment and economic development for many tribes.

Native Americans own approximately 90 million acres of land. Native American lands are regarded as private lands, and decisions to develop public facilities rest exclusively with the tribe or pueblo. The opening of reservation lands for tourism and public access is relatively recent. However, these lands support approximately 10.5 million recreation days a year, including 8.5 million days of public use. Most of this recreation activity is water-based, especially fishing.

Reservation lands also provide critical wildlife habitat for endangered species, such as the bald eagle, as well as conservation of other plants and animals. Indian tribes are one of the nation's largest employers of fish and wildlife biologists.

As the population grows in the West, pressures on tribal lands for public recreation increase. As Mr. Cecil Antone from the Gila River Indian Community testified, "The public must be aware Indian lands are not public lands . . . Recreation on Indian lands is a privilege accorded to respectful guests, not a right that comes with American citizenship."

Access is a supply factor that might influence hunting participation at least as much as wildlife abundance. If wildlife is available but hunting is restricted, then there is no recreation provided. Factors related to the willingness of private landowners to permit hunting access have been studied by several researchers. These studies repeatedly show that the primary reason for posting of a land is for protection of property and control of trespass. About 62% of the variance in posting rates in New York was accounted for by three variables: percentage of permanent residents among property owners, educational level of landowners, and property value. These authors felt that a key factor involved with posting was prior experience of property owners with recreationists. Those who had negative experiences with hunters were more likely to post their land, compared to landowners that had not had conflicts with hunters.

The posting of land does not necessarily preclude hunting. Many private lands are intensively hunted by landowners, relatives, neighbors and friends. In fact, about 68 percent of the hunting effort in the United States during 1980 took place on private land. Hunters spent $36.7 million that year for fees to hunt on private land.

ED LANGDAU

Chapter 3

The Liability Crisis Threatens Outdoor Opportunities

We recommend

- Recreation providers (both public and private entities) improve risk management practices through better training and sharing of information.

- Federal and state governments enact or improve recreational use statutes to provide greater protection to governmental entities and private providers who allow the public to use their land for recreation.

What is the problem?

Throughout our history, self reliance has been an American hallmark. From the pilgrims of New England to the pioneers of westward expansion to the pilots of air and space, Americans always have been willing to accept risk in the hope of greater rewards. However, the year of 1986 marked a time of fundamental debate over who is responsible when someone is injured—who pays when something goes wrong.

Day care centers, skating rinks and beaches are being closed because liability insurance is either unavailable or too expensive. From airlines to zoos, all segments of our society are affected. As we held public hearings across the country, we heard time and again about the liability crisis. In 1985 1986, liability insurance premiums for recreation providers skyrocketed 200 300 percent—sometimes more.

In response, some cities cut back on recreation programs: Chicago removed playground equipment, Wheeling, West Virginia, stopped renting horses, Denver refused to let kids sled in the parks. Private recreation providers were also threatened—Seven Springs Mountain Resort in Champion, Pennsylvania, raised the price of ski-lift tickets an average of 25 percent last season to compensate for a sixfold premium increase.