# The Supply of Recreational Lands and Landowner Liability: Recreational Use Statutes Revisited

*by James C. Kozlowski, J.D., Ph.D. and Brett A. Wright, Ph.D.*

As the nation's population increases and the demand for recreational opportunities continues its upward spiral, the supply of recreational open space becomes an increasingly critical issue. Recognizing the inability of public lands to satisfy current demand for outdoor recreation, not to mention future needs, the President's Commission on Americans Outdoors (PCAO) suggested the need to seek alternative ways of increasing the supply of outdoor recreational opportunities.

One such recommendation was to seek the assistance of the private sector in opening more land for public recreation, since fully two-thirds of the nation's land base is in private ownership. However, downward trends in the availability of private lands for public recreation suggest that efforts to encourage private landowners to open their lands to the public will be difficult, at best. Not only are we losing valuable land to development that is close to major population centers, but we are also experiencing increasing land closures by private landowners. These trends have been monitored by a number of social researchers (e.g., Brown 1974, Holecek and Westfall 1977, Guynn and Schmidt 1984, Wright, et al. 1988) and estimates of up to 50 percent of the private lands in some states have been reported as being closed to public recreation.

Private landowners have experienced a flood of problems that can dissuade them from allowing public recreational access to their properties. These problems vary by locale, but generally include property damages, trespassing, minimal economic incentive to keep lands open and perceived landowner liability when recreationists are injured on the premises. The impact of liability is particularly perplexing given the fact that a concerted effort was made to alleviate this barrier to recreational access over 20 years ago.

## State Recreational Use Statutes

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 by limiting landowner liability for recreational injuries when access is provided without charge. Research regarding private landowners and their willingness to provide recreation indicates liability is still a major barrier to increasing recreational opportunities. Now, some 23 years later, this article will again examine the legal aspects of public recreation on private lands in hopes of facilitating ways of increasing recreational access to private open space.

Under the recreational use statutes, 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 and wanton misconduct on the part of the landowner. Unlike ordinary negligence, such misconduct is much more outrageous behavior demonstrating an utter disregard for the physical well-being of others.

At present, 49 states have enacted recreational use statutes (the exceptions are Alaska and the District of Columbia), based in whole or in part, upon the 1965 model. The original intent of this model legislation was to provide limited immunity to private landowners. However, the statutes also have been held applicable to public entities, including the federal government. Under 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 (RUS's), intended for private individuals, have uniformly been held applicable to the federal government.

In addition, the RUS is applicable to state and local governmental entities in approximately 17 jurisdictions. In some instances, the statutes are limited to recreational activities conducted on rural lands. However, some state courts have found the RUS applicable to urban lands as well.

For example, the City of Omaha has successfully raised the state recreational use statute as a defense to alleged ordinary negligence liability for injuries sustained in a public park. Given the applicability of the RUS to public entities (at least in some jurisdictions), public park and recreation systems can, once again, offer programs that they were forced to eliminate because of the perceived liability crisis.

## Legislation is Not Enough

If the framework for providing private landowners with recreational immunity was developed more than 20 years ago, why is public access still an issue today? Research has shown that most landowners, as well as agency land managers, 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, landowners usually become aware of the insulation provided by the statute after an injury occurs and counsel raises the statute as a defense to negligence liability.

In those few instances where landowners are aware of the statute, there is a perception that the RUS does 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 the limited immunity provided by the RUS. As a result, the lower landowner standard of care (from ordinary negligence to willful and wanton misconduct) imposed by the RUS will not encourage most private individuals to open their lands to public recreational use.

It could be suggested 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, except for death or serious illness. Therefore, a major challenge to increasing the amount of private recreational acreage is to somehow insulate the private landowner from the costs attendant to a lawsuit.

Since the management of public lands does not happen in a vacuum and since insufficient private opportunities have negative impacts on public land management, the burden of finding ways to encourage more private land access must fall to governmental land managing agencies. These agencies must exhibit the same degree of commitment and fervor usually associated with land acquisition programs.

As an alternative to fee simple acquisition, lease arrangements with private landowners can provide public recreational land whereby the agency agrees to defend and protect the private landowner. The private landowner may still be sued, but the public agency will hold the 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 use. Further, agency information and education divisions need to conduct public awareness campaigns to educate private landowners to the immunity available to them under existing recreational use statutes.

A specific provision of the model legislation which has been adopted by most states preserves limited immunity for lands leased to the state or local government for recreational purposes. Any payment received by the landowner from a governmental agency for leasing the land is not considered a charge or fee within the meaning of the RUS. 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.

Where necessary, the recreational use statutes should be amended to be 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 agency, the private landowner as well as the agency may be sued. In that case, it would be preferable that the lower standard of care

associated with the RUS be applicable to all potential defendants, public and 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 Support Effort Needed

Attorneys defending recreational injury lawsuits tend to be jurisdiction specific. They are, therefore, not necessarily aware of the statutes 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 shown that it is not enough to get the statutes on the books. There are presently 49 recreational use statutes, but potential landowner liability for allowing public recreational access is still an issue. No doubt, the problem has improved since 1965. However, much needs to be done to ensure that these statutes are favorably interpreted by the courts.

Yuen-Gi Yee, USDA Forest Service

*Four-wheel drive motorcyclists enjoy one of the designated touring trails on the Allegheny National Forest.*

It would be advantageous to the park and recreation profession 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 as has been suggested by the PCAO. For want of a better term, this proposed think tank has been referred to as the "Recreational Law Institute."

An institute of this type is well suited for the university environment, working closely with agencies of all jurisdictions utilizing its services. One would expect the insurance industry would be interested in supporting a coordinated effort by the park and recreation field to address the problem of recreational liability. Without this coordinated and institutionalized approach, we may be back again in 20 years to explore the liability question and how it is affecting the supply of recreational opportunities.

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