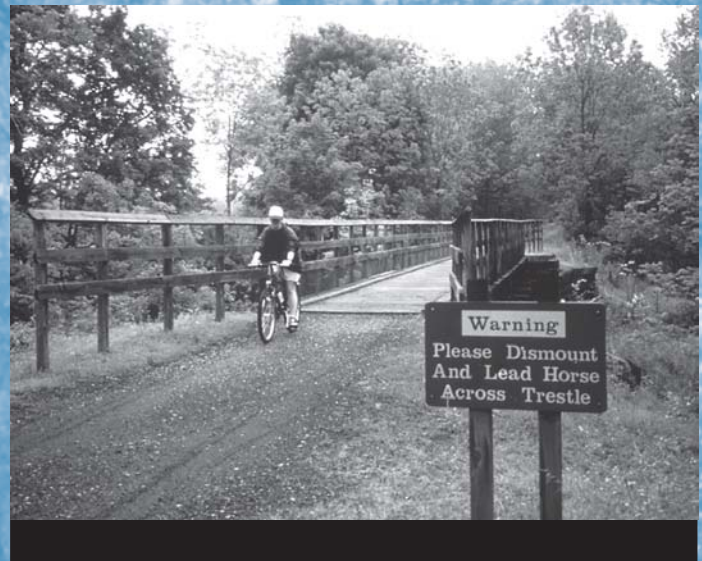


RAIL-TRAILS AND LIABILITY



A PRIMER ON TRAIL-RELATED
LIABILITY ISSUES & RISK
MANAGEMENT TECHNIQUES

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RAILS-TO-TRAILS CONSERVANCY

This report was produced by the Rails-to-Trails Conservancy. Founded in 1986, Rails-to-Trails Conservancy is the nation's largest trails organization with 100,000 members and donors dedicated to connecting people and communities by creating a nationwide network of public trails from former rail lines and connecting corridors. RTC has helped provide new opportunities for outdoor exercise by creating and extending a nationwide network of public trails and greenways. Rails-to-Trails is a 501(c) (3) nonprofit organization and has over 100,000 individual members and donors who support the RTC mission of building and maintaining trails.

RAIL-TRAILS AND LIABILITY

A Primer on Trail-Related Liability Issues
& Risk Management Techniques



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in cooperation with

National Park Service
Rivers, Trails and Conservation Assistance Program

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EXECUTIVE SUMMARY

The need for outdoor recreation areas has increased as our population has grown, our built environment has consumed more open space, and people have become more aware of the need to maintain a healthy level of physical activity.

One type of open space that has been receiving increasing amounts of attention and funding is trails. Trails are being built in urban, suburban, and rural areas. They are being built on former rail corridors as well as in vast public lands. People use trails for: walking, jogging, biking, in-line skating, skiing; even equestrians, snowmobilers and people in wheelchairs use them.

With all these uses in a variety of settings come a host of concerns about liability issues. Public agencies that are considering building a trail may worry about user injuries on the trail. Similarly, private landowners who own land adjacent to a trail may worry about trail users wandering off the trail, onto their land and injuring themselves or causing property damage. Or landowners may like to open up their land for recreational use but are concerned about the liability they may incur in doing so.

Fortunately, most states have laws that substantially limit public and private landowner liability. Recreational Use Statutes protect private landowners who want to open their land to the public for recreation free of charge. In some states, these statutes serve to protect public agencies as well. Public agencies, if not protected by the Recreational Use Statute, are often protected by governmental immunities or possess limited liability under a

State Tort Claims Act. Private landowners who have land adjacent to a trail are also protected by trespassing laws. For all these parties, insurance can provide protection as well.

While concerns about liability are understandable, real-world experience shows that neither public nor private landowners have suffered from trail development. Adjacent landowners are not at risk as long as they abstain from “willful and wanton misconduct” against trespassers such as recklessly or intentionally creating a hazard. Trail managers minimize liability exposure provided they design and manage the trail in a responsible manner and do not charge for trail access. The table below provides a summary of the protections available and who they apply to.

This report concludes that trail-related liability is primarily a management issue. Laws are in place to protect all parties from unwarranted lawsuits and the rest is up to proper design, maintenance and management.

Useful risk management strategies include:

- ▼ During trail design and development, develop a list of potential hazards, design and locate the trail such that dangerous locations are avoided, develop a list of permitted trail uses and the risks associated with each, identify applicable laws, and design and construct the trail in accordance with recognized guidelines.
- ▼ Once the trail is open for use, conduct regular inspections, document the results of the inspections and any actions taken, and maintain a plan for handling medical emergencies.

TYPE OF PROTECTION	PUBLIC LANDS	PRIVATE LANDS	ADJACENT LANDOWNER
1) Insurance	Yes	Yes	Yes
2) Recreational Use Statute	Some	Yes	No
3) Trespass Law	No	No	Yes
4) Government Immunity/State/Federal Tort Claims	Yes	No	No

I. INTRODUCTION

Along with the fear of increased crime rates and decreased property values, fear of being threatened with a lawsuit is a common concern among landowners adjacent to a proposed trail. Some landowners fear that a trail user will wander onto their property, get hurt, and sue. Private landowners who permit the general public to use their land for recreational purposes may have these concerns as well.¹ Likewise, potential trail owners and managers are sometimes leery of undertaking a trail project because of the liability exposure. In general, not only are there legal protections for these circumstances but the real threat of such liability does not seem to be common.

Trail skeptics and opponents often declare the liability associated with a trail is so great that communities cannot afford the insurance necessary to protect from potential lawsuits. Real-world experience does not support these concerns. Virtually all rail-trail managers dismiss liability as a problem. Since most trails are owned or operated by a public entity, such as a county parks department or a state department of natural resources, the insurance costs associated

with a trail tend to be folded into the overall insurance policy of the city, county or state. When asked, most trail managers were not able to identify the insurance costs associated with their trail.

Questions related to legal liability for accidents or injuries on or adjacent to trails must be answered in terms of state common (judge-made) law,² which varies from state to state. The following discussion provides a broad overview of trail



Warning signs help minimize the threat of liability. (John McDermott)

liability issues, forms of protection, and a discussion of risk management techniques that can be used to minimize risk and reduce liability.

This report outlines the general legal issues associated with trails, including the risks and responsibilities of various constituencies. The intent is to provide trail advocates, adjacent landowners, and trail managers with a background on liability issues to prepare them to pose appropriate questions to their legal counsel when developing a trail or when an accident occurs. This report is not intended as legal advice. If you have a question pertaining to a trail in a specific jurisdiction you should consult a lawyer familiar with the case law pertaining to that jurisdiction.

Virtually all rail-trails managers dismiss liability as a problem.



II. TRAIL LIABILITY CONCERNS AND SOLUTIONS

There are two primary categories of people who might be concerned about liability issues presented by a trail: the trail managing and owning entity (typically a public entity) and private landowners. Private landowners can be divided into two categories, those who have provided an easement for a trail over their land and those who own land adjacent to a trail corridor.

Similarly, there may be a preexisting corridor traversing or lying adjacent to their property such as a former rail corridor that has been converted to a trail. In either situation, private landowners may have some concerns about their liability should a trail user stray onto their land and become injured. In the first instance, where an easement is granted, the concern may be over injuries both on the granted right-of-way as well as injuries that may occur on land under their control that is adjacent to the trail. Under the latter condition, where the landowner has no ownership interest in the trail, the landowner will only be concerned with injury to trail users wandering onto their property and getting hurt or perhaps a tree from their property falling onto the trail.

In general, people owning land adjacent to a trail—whether the trail is an easement granted by them or is held by separate title—foresee that people using the trail may be endangered by a condition on their land. Potential hazards such as a pond, a ditch, or a dead tree may cause the landowner to worry about liability for a resulting injury. The landowner may reduce their liability by taking the following actions (BCEMC 1997, p. 58):

- ▼ Work with trail designers to have the trail located away from hazards that cannot be corrected.
- ▼ Make it clear that trail users are not invited onto the adjoining land. This can be aided by having the trail designer develop signs, vegetative screening, or fencing.
- ▼ If a hazardous condition does exist near the trail, signs should be developed to warn trail users of the hazard if it cannot be mitigated.

Of particular concern to adjacent landowners are attractions to children that may be dangerous, such as a pond. Many states recognize that children may trespass to explore an attractive nuisance. These states require a legal responsibility to children, even as trespassers, that is greater than the duty of care owed to adults (BCEMC 1997, p. 58).

If a landowner provides an easement for a public-use trail, the easement contract should specify that the managing agency will carry liability insurance, will design the trail to recognized standards, and will develop and carry out a maintenance plan. The landowner may also request that an indemnification agreement be created in their favor.

Abutting property owners frequently express concern about their liability to trail users. In general, their liability, if any, is limited and is defined by their own actions in relation to the trail. If an abutting property owner possesses no interest in the trail, then he or she does

not have any right or obligation to warn trail users about defects in the trail unless the landowner creates a dangerous condition on the trail by his own act or omission. In that event, the abutting landowner would be responsible for his own acts or omissions that caused the injury to a third party using the trail, just as the operator of one

The owner of land adjoining a trail may reduce their liability by making it clear that trail users are not invited onto the adjoining land. This can be aided by having the trail designer develop signs, vegetative screening, or fencing.



car is responsible to the operator of another for an accident he caused on a city street (Montange 1989, p. 127).

The fact that a trail is formed on a railroad right-of-way pursuant to section 8(d) of the Trails Act (16 U.S.C. § 1247 (d)), commonly known as railbanking, and that some of the parcels of land comprising the right-of-way were held by the railroad only in easement form does not alter the duty of care of the abutting property owners holding the fee to trail users and is no more than the abutting landowner owed the railroad. A railroad easement generally affords the railroad exclusive use and excludes the adjacent landowner from any occupation of the surface absent the railroad's consent. An abutting property owner cannot be responsible for the condition of property from which he or she is excluded (Montange 1989, p. 128).

FORMS OF PROTECTION

There are three legal precepts, either alone or in combination, that define and in many cases limit liability for injury resulting from trail use. The first is the concept of duty of care which speaks to the responsibility that a landowner (private or public) has to anyone on their land. Second is the Recreational Use Statute (RUS) which is available in all 50 states and provides protection to private landowners and some public landowners who allow public free access to land for recreational purposes. For those public entities not covered by a RUS, states tend to have a tort claims act which defines and limits governmental liability. Third, for all private and public parties, liability insurance provides the final line of defense. Trail owners can also find much protection through risk management.

DUTY OF CARE

Tort law, with regard to finding fault for an incident that occurs in a particular location, is concerned with the "class" of person who sustained the injury and the legal duty of care owed to a person in that class. The legal duty of care that a landowner owes a member of the general public varies from state to state but is generally divided

into four categories. In most states, a landowner's responsibility for injuries depends on the status of the injured person. A landowner owes increasingly greater duties of care (i.e.; is more at risk) if the injured person is a "trespasser," a "licensee," an "invitee," or a "child."

TRESPASSER—a person on land without the landowner's permission, whether intentionally or by mistaken belief that they are on public land. Trespassers are due the least duty of care and therefore pose the lowest level of liability risk. The landowner is generally not responsible for unsafe conditions. The landowner can only be held liable for deliberate or reckless misconduct, such as putting up a trip wire. Adjacent landowners are unlikely to be held liable for injuries sustained by trespassers on their property.

LICENSEE—a person on land with the owners permission but only for the visitor's benefit. This situation creates a slightly higher liability for the landowner. For example, a person who is permitted to hunt on a farm without paying a fee, if there were no RUS, would be classified as a licensee. If the landowner charged a fee, the hunter would probably be classified as an invitee. Again, the landowner is not responsible for discovering unsafe conditions; however the landowner must provide warning of known unsafe conditions.

INVITEE—a person on the owner's land with the owner's permission, expressly or implied, for the owner's benefit, such as a paying customer. This is the highest level of responsibility and therefore carries the highest level of liability. The owner is responsible for unknown dangers that should have been discovered. Put a different way, the landowner has a duty to:

- 1) Inspect the property and facilities to discover hidden dangers;
- 2) Remove the hidden dangers or warn the user of their presence;
- 3) Keep the property and facilities in reasonably safe repair; and
- 4) Anticipate foreseeable activities by users and take precautions to protect users from foreseeable dangers.

If a trail manager charges a fee for access to a recreational facility, the facility provider tends to owe a greater duty of care to the user and thus has a greater risk of liability



The landowner does not ensure the invitee's safety, but must exercise reasonable care to prevent injury. Generally, the landowner is not liable for injuries caused by known, open, or obvious dangers where there has been an appropriate warning. For example, customers using an ice rink open to the public for a fee would be invitees.

CHILD—even if trespassing, some states accord children a higher level of protection. The concept of “attractive nuisance” is particularly relevant to children. Land forms such as ponds can be attractive to children who, unaware of potential danger, may be injured if they explore such items.

Prior to the widespread adoption of RUS' by the states (see discussion below), this classification system defined the liability of adjacent landowners. Even now, trail managers or private landowners who charge a fee are at greater risk of liability because they owe the payee a greater responsibility to provide a safe experience.

Thus, where no RUS exists or is unavailable, trail users would be of the licensee class, provided the trail manager does not charge an access fee. If a trail manager charges a fee the facility provider tends to owe a greater duty of care to the user and thus has a greater risk of liability if a trail user is injured due to a condition of the trail.

RECREATIONAL USE STATUTES

The Council of State Governments produced a model recreational use statute (RUS) in 1965 in an effort to encourage private landowners³ to open their land⁴ for public recreational⁵ use by limiting the landowner's liability for recreational injuries when access was provided without charge (Kozlowski, p. VID1).

Recreational use statutes are now on the books in all fifty states. These state laws provide protection to landowners who allow the public to use their land for recreational purposes. The theory behind these statutes is that if landowners are protected from liability they would be more likely to open up their land for public recreational use and that, in turn, would reduce state expenditures to provide such areas. To recover damages, an injured person must prove “willful and wanton misconduct” on the part of the landowner essentially the same duty of care owed to a trespasser. However, if the landowner is charging a fee for access to the property, the protection offered by the recreational use statute is lost in most states.

The preamble of the model RUS is clear that it was designed for private landowners but the actual language of the model legislation does not differentiate between private and public landowners. The result is that while some states have followed the intent of the model statute and limited the immunity to private landowners, other states have extended the immunity to cover public landowners either legislatively or judicially (Goldstein 1997, p. 788).

Under the Federal Tort Claims Act, the federal government is liable for negligence like a private landowner under the law of the state. As a result, RUSs intended for private individuals have been held applicable to the federal government where it has opened land up for public recreation (Kozlowski, p. VID1).

Under lease arrangements between a public agency and a private landowner, land can be provided for public recreation while the public agency agrees to defend and protect the private landowner. The private landowner may still be sued but the public agency holds the landowner harmless, taking responsibility for the cost of defending a lawsuit and any resulting judgments (Kozlowski, p. VID2).

While state RUSs and the court interpretations of these laws vary somewhat, a few common themes can be found. The statutes were created to encourage landowners to make their land available for public recreation purposes by limiting their liability provided they do not charge an access fee. The RUS limits the duty of care a landowner would otherwise owe to a recreational licensee to keep his or her premises safe for use. It also limits a landowner's duty to warn of dangerous conditions provided such failure to warn is not considered grossly negligent, willful, wanton, or reckless. The result of many of these statutes is to limit landowner liability for injuries experienced by people partaking in recreational activities on their land. The existence of a RUS may also have the

The statutes were created to encourage landowners to make their land available for public recreation purposes by limiting their liability provided they do not charge an access fee.



effect of reducing insurance premiums for landowners whose lands are used for recreation (BCEMC 1997, p. 58).

To use Colorado as an example, a landowner who directly or indirectly invites or permits any person to use his or her property for recreational purposes without charge, does not:

- ▼ Extend any assurance that the premises are safe for any purpose;
- ▼ Confer upon such person the legal status of invitee or licensee to whom a duty of care is owed;
- ▼ Assume responsibility or incur liability for any injury to person or property or for the death of any person caused by an act or omission of such person (Montagne 1989, p. 128).

The above protections are voided if:

- ▼ The landowner willfully or maliciously fails to guard or warn against a known dangerous condition, use, structure, or activity likely to cause harm;
- ▼ The landowner charges the person who enters or goes on the land for recreational use thereof; except that, in the case of land leased to the state or a political subdivision thereof, any consideration received by the owner for such lease shall not be deemed a charge, nor shall any consideration received by an owner from any federal governmental agency for the purpose of admitting any person constitute such a charge;
- ▼ The landowner maintains or attracts a nuisance;
- ▼ The landowner causes injuries due to a use of the land for a commercial or business enterprise (Colo. Rev. 33-41-103-104).

The recreational use statutes appear to be “working” in the sense that they are limiting liability to the extent that was intended. In addition to recreational use statutes, some states have special statutes limiting liability that may be applicable. Pennsylvania, for example, has a specific trails statute (Act 32 P.S. §§ 5621 et seq.) which limits liability for landowners who allow their land to be used for trails, trail owners, and adjacent property owners with protections similar to a recreational use statute.



A good management plan will allow for detection and warning of non-permanent hazards. (David Burwell)

These laws do not prevent somebody from suing a trail manager/owner or a private property owner who has made his or her land available to the public for recreational use, it only means the suit will not advance in court if certain conditions hold true. Thus, the trail manager/owner may incur costs to defend himself or herself. Such costs are the principal reason for purchasing liability insurance.

A list of most state RUSs can be found in the appendix. It is useful to obtain a copy of your state’s RUS to discover its peculiarities as well as to find out the extent to which it has been tested in court.

PUBLIC AGENCY LIABILITY

As stated in the introduction, governments (federal, state, and local) can also find protection from lawsuits under Sovereign Immunity. The concept holds that the sovereign entity (the government) is generally immune from liability. However, the federal government and most state and local governments have waived this privilege of immunity, in many contexts, including trail user injuries, by enacting a Tort Claims Act. Such acts stipulate that the government can be held responsible for negligence under some circumstances

(Goldstein 1997, p. 793). A list of tort claims acts is in the appendix.

At the federal level, the Federal Tort Claims Act serves as a basis for the federal government's liability and many state Tort Claims Acts follow the content of the federal version. These laws lay out the limit of a state's liability and in some states the recreational use statute serves as a protection for public entities.

The Federal Tort Claims Act defines the instances under which the federal government is liable which are similar to the liability of a private individual.

The state Tort Claims Act defines the scope of liability for each state and usually pertains to the county and municipal levels of that state as well. Some states have followed the Federal Tort Claims Act and hold agencies to the same liability standards as private individuals. In these states, the RUS often applies to the public entity as well. In other states where there is a State Tort Claims Act, it will control the definition of liability under recreational circumstances. Lastly, some states have gone beyond the RUS and have enacted a law specifically to address public liability on recreational lands including on trails.

INSURANCE

Insurance is the last line of defense. While the above laws may mean a lawsuit does not ultimately prevail in the courts, they cannot prevent a suit from being filed. Insurance is necessary for both trail owners/managers as well as adjacent landowners. Fortunately, both tend to have insurance already. Most trails are owned and operated by a public entity such as a parks department. Under this structure, the responsible entity most often is covered by an umbrella insurance policy that protects all municipal activities and facilities. Such entities are self-insured. Some trails are owned by non-governmental organizations. In this case, the organization should purchase a comprehensive liability insurance policy.

These policies can be purchased from some insurance agencies, although such policies can be hard to come by. For example, Lake States Insurance, which insures the Leelanau Trail, does so only because the trail is local. Conversations held with representatives of the agency indicate that insurance has never been brought into any activity resulting from injuries on the trail. The insurance

agency recommends that trail groups carry liability insurance, workman's compensation insurance if they have any employees, and insurance to protect any equipment the group may own from vandalism, theft, or fire. The basic coverage in this case is \$1 million per occurrence. This costs the trail group about \$1,100 per year. The premium rates are based primarily on the length of the trail as well as any infrastructure associated with the trail.

The official person or organization responsible for maintaining the trail is most vulnerable to a lawsuit should an injury occur. The responsible management entity must have a liability policy sufficient in scope to cover the costs of a jury award. The policy should also provide for the insurer to cover the costs of defending a suit for injury. The management entity must be prepared to pay for the costs of defending a suit no matter how groundless (BCEMC 1997, p. 60).

Private land trusts may especially be concerned with obtaining liability insurance, if for no other reason than to cover attorney's fees. There are at least six different types of coverage to consider (LTA 1991, p. 9):

1. Comprehensive general liability;
2. Non-owned automobile liability for liability in excess of the auto owner's limits for work associated with your organization's property;
3. Property and owned assets insurance covering buildings and personal property, if any, at the site;
4. Volunteer worker accident insurance;
5. Workers compensation/employer liability insurance if you have a paid staff;
6. Association or "directors' and officers'" liability insurance.

If economical insurance is not available, your organization may be able to join Land Trust Exchange (LTE). Member land trusts can obtain economical insurance in all six categories. Check with the Land Trust Alliance in Washington, D.C. (www.lta.org).

While the class of person and the recreation use statutes may afford protection against a successful lawsuit, these safeguards do not prohibit a liability suit from being filed. This is why private land owners as well as public entities alike main-

tain some level of general liability insurance that can be used for defending against such suits.

RISK MANAGEMENT

All of the above mentioned forms of protection aside, perhaps the best defense a trail manager has is a sound policy and practice for trail maintenance and usage. Developing a comprehensive management plan that uses risk management techniques is the best defense against an injury-related lawsuit (BCEMC 1997, p. 60).

Trails that are properly designed and maintained go a long way to warding off any potential liability. There are some general design guidelines (AASHTO and MUTCD)⁶ that, if adhered to, can provide protection by showing that conventional standards were used in designing and building the trail. Trails that are designed in accordance with recognized standards or “best practices” may be able to take advantage of any design immunities under state law. Within the spectrum of public facilities, trails are quite safe, often less risky than roads, swimming pools, and playgrounds.

The managing agency should also develop a comprehensive maintenance plan that provides for regular maintenance and inspection. These procedures should be spelled out in detail in a trail management handbook and a record should be kept of each inspection including what was discovered and any corrective action taken. The trail manager should attempt to warn of or eliminate any hazardous situations before an injury occurs. Private landowners that provide public easements for a trail should ensure that such management



Trail managers cite warning signs as a good risk management technique.

plans are in place and used to reduce their own liability. Key points include (BCEMC 1997, p. 57); (LTA 1991, p. 8):

During trail design and development:

- ▼ Develop an inventory of potential hazards along the corridor;
- ▼ Create a list of users that will be permitted on the trail and the risks associated with each;
- ▼ Identify all applicable laws;
- ▼ Design and location of the trail such that obvious dangers are avoided. Provide warnings of potential hazards to the extent possible;
- ▼ Complete trail design and construction by persons who are knowledgeable about design guidelines, such as those listed in AASHTO and MUTCD documents;
- ▼ Post and enforce trail regulations.

Once the trail is open for use:

- ▼ Regular inspection of the trail by a qualified person who has the expertise to identify hazardous conditions and maintenance problems;
- ▼ Correct and document maintenance problems quickly. Where a problem cannot be promptly corrected, provide warnings to trail users;
- ▼ Develop procedures for handling medical emergencies. Document these procedures as well as any occurrence of medical emergencies;
- ▼ Maintain records of all inspections, what was found, and what was done about it. Photographs of found hazardous conditions can be useful.

These risk management techniques will not only help to ensure that hazardous conditions are identified and corrected in a timely manner, thereby averting injury to trail users, but will also serve to protect the trail owner and managing agency from liability. Showing that the agency had been acting in a responsible manner can serve as an excellent defense in the event that a lawsuit develops (BCEMC 1997, p. 58).



Sixty-one rails-with-trails now operate safely in the United States. For more information, see *RAILS-WITH-TRAILS*, by Rails-to-Trails Conservancy. Photo by Gwen Loose.

MANAGING SPECIAL SITUATIONS

The following are circumstances that Rails-to-Trails Conservancy has heard about through numerous conversations with local trail advocates who have expressed concern about situations that might present themselves. For the most part, these situations can be addressed through management techniques.

RAILS-WITH-TRAILS:

A variation on rails-**to**-trails is rails-**with**-trails where a trail is built along an active rail line. Sixty-one such trails exist today and there has been scant evidence of conflicts between trail users and trains (RTC, 2000). Nonetheless, railroad companies are often hesitant to place people in such close proximity to their locomotives. While this issue is a sticking point for many such projects, several projects have provided the railroad company complete indemnification with regard to any accidents that involve trail users.⁷ In theory, depending on the state and the facts, a Recreational Use Statute should protect the railroad in this situation. At the time of publication, however, we could not confirm that this had been tested in court.

PESTICIDES FROM ADJACENT FARMS:

Many rail-trails traverse rural countryside and active farmland. Questions have been raised (though no incidents reported to Rail-to-Trails Conservancy) about trail users being contaminated with pesticidal spray. While a farmer may technically be liable for such an incident because it is generally unlawful to conduct a hazardous activity that can migrate onto adjacent property, simple warnings to trail users can be used to avoid such conflicts. Because such spraying is only a periodic activity, farmers can provide trail managers with notification of when such activity will occur and the trail manager can place warning signs at the trailheads. See the Marsh Creek Trail case study on page 14.

HUNTING ADJACENT TO TRAILS:

Some trails traverse public and/or private land that, may at certain periods permit hunting. Such proximity can expose trail users to potential injury. Like pesticide use/application hunting tends to take place at limited times during the year. Thus a similar mitigation technique can be used: post signs at the trailheads when hunting season is open.



Using volunteers is a great way to keep your trail operating smoothly and create a feeling of community ownership. (Dave Dionne)

USE OF VOLUNTEERS FOR TRAIL WORK:

Trail managers often use volunteers for routine trail maintenance or even for trail construction. What happens if the volunteer is injured while performing trail-related work? What happens if an action taken by a volunteer leads to an injury of a trail user? First, make sure your insurance covers volunteer workers. Second, the trail manager should be protected from any user injury created by an act of a volunteer provided the act is not one of willful or reckless misconduct. The volunteer worker is protected by the Federal Volunteer Protection Act of 1997. This act protects volunteers of nonprofit organizations or governmental entities. The Act states that such volunteers are not liable for harm caused by their acts of commission or omission provided the act was in good faith.

RAILROAD HAZARDOUS MATERIAL REMAINS:

Concern over the remnants of railroad operations are often raised when a trail is proposed for development. Railroads often used toxic substances in their operations and then there is the occasional accidental spill. Provided the trail owning/managing agency practices “due diligence” prior to acquiring and developing the corridor and no hazardous items were discovered at that time, the trail owner would probably not be considered liable for and toxic substances discovered subsequently.

Since hidden environmental hazards may exist within the corridor, it is a good idea to hire an environmental engineer to conduct an environ-

mental assessment of the property before it is purchased. The nature of the assessment will depend on the property and the potential for contamination but should include at a minimum the equivalent of a Phase I assessment.

A Phase I assessment combines research into the property’s history with a visual inspection. Courthouse records, title abstracts, historic aerial photographs, and newspaper accounts that offer background on the past uses of the site might provide some insight into the property’s history. Interviews with local government representatives, adjacent landowners, and state and federal officials may also uncover historical events about which the current railroad knows nothing.

A Phase II assessment involves more thorough testing of water, air, and soil samples, as well as a more thorough investigation of the site. If contamination is found, a Phase III assessment will provide the remediation plan for clean-up.

While the techniques for identifying environmental contamination have become increasingly sophisticated, the cost and responsibility for clean-up and restoration are less clear. Federal law targets past and present owners, operators, transporters and generators of hazardous substances. Assigning responsibility and collecting money for clean-up is complicated by the history of contamination and the likelihood that the original contaminants may no longer be traceable, or if they still exist, do not have the financial capacity to pay for clean-up. Although the railroad has certain responsibilities as the property owner, do not be surprised if the railroad’s representative(s) want to include clean-up costs as a negotiating point.

Overall, an environmental assessment can cost anywhere from a few thousand dollars to more than \$20,000 if extensive soil and water samples are taken over a broad area. The assessment and its results can quickly become a critical issue in negotiations to acquire the property. Before you take title to the property, make sure the purchase contract clearly states who will pay for any environmental problems that have been discovered. See warranties and representations from the railroad that indicate there is no known contamination, or if that is not the case, that disclose the actual situation and plans for remediation.

III. RESULTS FROM THE REAL WORLD

Theory and practice are often two very different worlds. Fortunately, in the case of trails and liability risk, theory has translated into effective practice. This section first presents the results of a trail manager survey conducted by Rails-to-Trails Conservancy in the fall of 1997. Second, a series of brief case studies show how trails managers have dealt with some of the issues raised above.

FINDINGS FROM RTC'S TRAIL MANAGER SURVEY

In 1997, Rails-to-Trails Conservancy surveyed many rail-trail managers to ascertain, among other things, their experience with legal issues. The results of the survey show that from 1995 to 1996 only 19 of the 362 trails studied reported any claims. Of those 19 claims, only two involved instances where private property owners had suits filed against them.

The survey showed that 213 of the 362 trails were covered under a general umbrella policy or a trail specific policy. Eighty-eight trails were not covered at all and the contacts for the remaining 61 trails were unsure if the trail was covered. There were 203 responses to the question concerning the type of policy covering the trail, whether it be a trail specific policy, or an umbrella policy. Out of these trails, 192 of them were covered under a general umbrella policy, and the remaining 11 under a trail specific policy. The extra cost for a trail specific policy ranged from roughly \$1,000 to \$4,500 annually. Very few responded to what exactly the pay-out limit on the policies is, but those who did respond indicated a range from \$300,000 to \$5,000,000 per individual and \$500,000 to \$5,000,000 per year.

Several trails reported a total of 19 claims over a two-year period. These claims ranged from snowmobilers hitting posts to cattle from adjacent farms breaking onto the trail and knocking over

bicyclists. All but two of these cases were covered under the trail's insurance policy. There were two cases in which nearby landowners were sued. The first suit was brought about when a homeowner planted a bush on the curve of the trail such that a biker, unable to see around a corner, hit an oncoming biker. The second suit was due to an accident. Cases such as the first are of concern to trail managers who, on occasion, have discussed their concerns with adjacent landowners to encourage them to remove fences, sheds, gardens and other obstructions from trail property.

CASE STUDIES

The liability concerns of a trail manager can be divided into two categories: generic and situational. Generic liability concerns are those that all trail managers face and usually pertain to a trail user getting hurt. Situational liability concerns are a function of the trail location. For instance, a trail through farmland raises concerns about trail users interacting with livestock or pesticide contamination. Trails through public or private wild lands can have issues regarding hunting. These case studies aim to illustrate real strategies trail managers use to mitigate their liability in a variety of situations.

THE COWBOY TRAIL

*320 miles (when complete) through
Nebraska farmland.*

Larry Voecks took over management of the Cowboy Trail project in 1996. Four years later, 50 miles of the trail are open for public use, in three sections. Much of the trail traverses rural Nebraska farmland and the concerns of the farmers have been an issue from day one. The farmers were worried about the liability issues that trail users would create by crossing onto their property and using stock tanks or stock dams to bath in or drink from, get in trouble with a bull, or try to pet calves and otherwise harass livestock. Voecks has spent much of his time educating the adjacent landowners about the various legal mechanisms that would protect them if a trail user were injured on their property, including discussions of trespassing laws and the state's recreational use statute. Now that pieces of the trail have been operating for a couple of years, Voecks says that he still hears these concerns from time-to-time but not as frequently as he used to. The state also recently passed legislation to provide the adjoining landowner with the ability to obtain new fencing and fence materials from the state. The legislation defined these fences as being designed to exclude intruders. In an interesting twist to the trespass protection, Voecks suggested that it is possible that if an adjacent landowner sees a trail user on his land and does not communicate to the trail user that they are trespassing then that lack of response could be construed as tacit approval for being there.

With regard to the state's liability for trail operations, Voecks feels adequately protected there as well through a thorough signage program. Signs with trail rules are posted at all access points and at every location where trail passes are sold. Further, signs on the trail suggest that trail users dismount at bridges and at road crossings.

Should the trail managing agency be sued, Voecks says they are insured by the state. Happily, however, Voecks says that in the three years since the opening of the first section of the Cowboy Trail neither the State Game and Parks Commission nor adjacent land owners have had a suit brought against them.

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Hugh Morris

MARSH CREEK TRAIL

6.5 miles through rural Contra Costa County, California

When the East Bay Regional Park District set out to create the Marsh Creek Trail, they encountered some resistance from farmers who own land adjacent to the trail. The farmers worried about their liability because they periodically spray their crops with pesticides and felt that such operations would endanger trail users and that they would be held liable for any harm. To address these concerns, the East Bay Regional Park District (EBRPD) set out to convince the farmers that they could work together to responsibly operate the trail in a way that would protect trail users from spraying and thus, in turn, protect the farmers. The first step was to write language into the trail master plan that said that the EBRPD would close the trail whenever the farmers told them they were going to apply pesticides. This is not a major inconvenience as most farmers make such applications once or twice a year. This system appealed to some of the farmers and the EBRPD was able to open up a section of the trail. To date the system has worked well. There are still some sections of the trail that are not open because farmers have not yet been convinced. But the EBRPD indicates that having some farmers buy into the plan has helped convince other farmers to sign-on as well; thus more trail has opened as the operational experience has proved positive.

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BALTIMORE & ANNAPOLIS TRAIL PARK

14 miles through suburban Maryland

Dave Dionne has been managing the Baltimore & Annapolis Trail for thirteen years. The B&A Trail runs nearly 14 miles from Baltimore, MD to Annapolis, MD. It has an asphalt surface and runs primarily through suburban areas with both residential and commercial land uses bordering the trail. Dionne says that he and his staff keep meticulous notes about their management activities. They patrol the trail twice a day and document what they find. If they find a hazard they either correct it on the spot or provide warnings to trail users until it can be corrected. This thorough management style has paid off for Dionne several times. He reports that on three occasions a trail user has been injured on the trail and proceeded with a lawsuit against the park authority. In each case, when the plaintiff's lawyers discovered the meticulous methods used by Dionne and his staff to ensure a consistently safe experience for trail users the lawyers have backed off the case because they knew that the trail manager had been acting in a prudent manner.

Dionne also developed a volunteer trail patrol program. These volunteers help trail users in need and also report any unpermitted uses, crime, and maintenance needs to the park headquarters. The patrol consists of approximately thirty volunteer Trailblazers, ranging in age from eleven to seventy-eight. These folks receive three weekends of training for first aid, CPR, and patrol technique from the park rangers. They patrol the trail by foot, bike, and in-line skate. The Trailblazers supplement the park rangers' daily patrols.

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IV. CONCLUSIONS

General surveys of rail-trail managers conducted by Rails-to-Trails Conservancy indicate that rail-trails have not posed significant problems from the point of view of legal liability. This probably reflects the fact that trail managers are generally taking appropriate action to design, construct, and maintain recreational trails in a fashion which takes into account the safety of trail users.

In addition, it reflects that most trails are safer for bicycle and pedestrian use than the major alternatives such as public highways and roads. This point can be put another way: the risks of liability for bicycle and pedestrian use of trails are less than those associated with similar use of streets and highways. The reason is the user is less likely to be hit by a car or to run afoul of the detritus thrown from cars or other vehicles when the user is on a trail where such vehicles are prohibited. Indeed, the relative safety of trails is one of the major reasons that they are so popular with pedestrians and cyclists (Montagne 1989, p. 132).

In sum, there are no special or surprising problems associated with rail-trails or trails in general from the point of view of legal liability or risk management. The laws that protect adjacent landowners as well as trail managers, coupled with strategies for designing and managing a trail, should provide ample protection for trail managers and adjacent land owners alike from a successful lawsuit.

The key, as pointed out in the case studies, is to design and manage a trail according to generally accepted guidelines. That, coupled with a sound management policy that involves regular inspection of the trail and thorough documentation of those inspections and any resulting actions, appears to provide a sound defense should an accident occur. Permanent and as-needed warning signs provide trail users with the information they need to act responsibly and safely.



APPENDIX I: A GENERAL REVIEW OF TORT LAW⁸

Common law consists of three major parts: property, contract, and tort. Property law governs the acquisition of rights persons have in external things and even in themselves. Contract law governs the transfer of rights so acquired and protected. Tort law governs the protection of things reduced to private ownership. Questions of liability for accidents or injuries on trails, or otherwise, are a matter of the law of torts—literally “civil wrongs.” Tort law is sometimes called the law of accidents, even though it encompasses liability for intentional misconduct as well (Montange 1989, p. 125).

Under the tort law of most states, one person (Person A) may be liable to another person (Person B) for an accident if three factors are demonstrated: 1) that Person B was injured, 2) that Person B’s injury was “proximately caused” by Person A’s action or inaction, and 3) that Person A’s action or inaction which proximately caused Person B’s injury violated an applicable “standard” or “duty” of care to the class of which Person B is a part (see page 6 for discussion of this concept). The injury may be property loss, physical injury, or, in some cases, mental trauma (“pain and suffering”). The question of proximate cause relates to when responsibility ends, and tends to be case specific. However, much can be said about the question of standard of care and related matters (Montange 1989, p. 125).

The most general standard of care is the so-called “negligence” or “fault” standard. Under this standard, Person A owes Person B a duty to “do what a reasonable person would do under similar circumstances.” In the case of a trail, this translates into an obligation to design, construct, and maintain the trail as a reasonably prudent trail manager would do. When the conduct that is allegedly the cause of the harm involves activities which are ordinary, the standard is that of a “reasonable person” and is decided by the jury without the expert guidance of what is reasonable. If the activity is somewhat out of the ordinary, the standard of care (i.e., the balance for determining whether the conduct was negligent) is often established by expert testimony. If the conduct violates

an applicable law, however, some states deem it to be negligence *per se* or at least evidence of negligence (Montange 1989, p. 126).

“Contributory negligence” is a classic general defense to tort claims. Suppose Person B sues Person A alleging breach of standard of care by Person A proximately causing Person B’s injury. Person A responds that Person B was contributorily negligent, that is, that Person B would not have sustained the injury but for his own misconduct, such as failure to heed a posted warning to walk one’s bicycle across a bridge, climbing over a fence, or going too fast. Contributory negligence, if proved, would bar a recovery under classic tort law. However, the contributory negligence defense has tended to shift in some states to a comparative negligence standard. Under this standard, the trier of fact (usually the jury unless both parties elect a trial to the judge) must assign weights to the relative negligence of both sides. The parties are then responsible for their share of the overall negligence. For example, suppose again the scenario of Person B suing Person A, with Person A asserting that Person B failed to heed a warning. The jury, depending on the evidence, may determine that it was unreasonable for Person A not to afford a better warning, but that it was unreasonable for Person B to be so oblivious to the warning posted by Person A. The jury accordingly finds each side 50% responsible. In some states following strict contributory negligence rules, this may mean no financial liability on the part of Person A. Other states may require Person A to compensate Person B for the relevant percentage of B’s loss; still others will do so only if Person A is found more than 50% responsible (Montange 1989, p. 126).

Governments, such as the United States government, were generally immune from liability (so-called “sovereign immunity”), except to the extent that they have waived such protection. The federal government, again generally speaking, has waived immunity for purposes considered here. Under the Federal Tort Claims Act, the United States is liable for tort claims “in the same manner and to the same extent as a private individual under like

circumstances...” (28 U.S.C. § 2674). Many states have similarly waived a portion of their sovereign immunity, and this waiver tends to apply to local governments as well (Montange 1989, p. 126).

It may be helpful to illustrate these principles with a concrete example. Colorado has waived a portion of its sovereign immunity through the Colorado Governmental Immunity Act (10 Colo. Rev. Stat. § 24-10-101 to -120). Under that statute, a local government may be held liable for injuries which were caused as a result of the breach of its duty to maintain a recreational trail in a reasonably safe condition for travel. The basic standard of care is the same as that applicable to city streets. The general rule in Colorado is that a city is under a duty to maintain its streets in a reasonably safe condition for travel. According to the

Colorado Supreme Court (Montange 1989, p. 127):

This duty may be satisfied in one of two ways: When the city knows or, in the exercise of reasonable care, should know of a defect or dangerous condition in its streets it must either 1) repair or remedy the defect, or 2) exercise reasonable care to give adequate warning of the existence of the condition to the users of its streets (Wollman, supra).

If the defective condition arose due to the action of a third party, the third party may of course be liable for his or her acts and omissions that proximately caused the injury (Montange 1989, p. 127).

APPENDIX II: GLOSSARY (DRAKE, 1995)

Contributory Negligence: If the injured party (plaintiff) was not acting in a reasonable and prudent manner, he or she may be shown to have contributed to the cause of the accident. This “contributory negligence” often results in rulings against the plaintiff.

Deep Pocket: Well-insured and well-funded organizations and individuals are considered by some plaintiffs to be likely sources for court settlements. They are said to have “deep pockets”. Often plaintiff’s attorneys bring cases against “deep pocket” agencies, corporations or individuals in an effort to maximize settlement amounts.

Defendant: The party charged with causing the loss.

Discoverable: The degree to which the defendant agency or individual was aware of or could have reasonably “discovered” the condition that most directly contributed to the accident. The longer the agency can be proved to have knowledge of the condition, the more “discoverable” it is. The longer the “discoverable” condition is present and not corrected, the greater the risk of an accident and the weaker a defendant agency’s case generally becomes.

Duty: Before “negligence” can be proven, courts first determine if the subject agency or individual had a “duty” to provide for the injured party in some way. This is one of the easiest elements to prove since by definition agencies exist to provide specified services and facilities.

Liability: “Liability” indicated “responsibility.” If the actions or duties of an individual, agency, or corporation lead to a loss, that party can be held responsible for the loss.

Negligence: An act or omission within the scope of the duties if an individual, agency, corporation, or other organization that leads to harm of a person or the public is said to be “negligence”. Negligence must be proved. Public and private professionals are expected to exercise “ordinary care” in performance of their duties and to be “reasonable and prudent” in their actions.

Ordinary Care: Courts base settlements on the level of care that a reasonably experienced and prudent professional or other individual would have taken in the same or similar event, action, or circumstances. This level of care is referred to as “ordinary care”. Ordinary care is distinguished legally from “extra-ordinary care” which parties are not expected to meet. Standards for separating “ordinary” from “extra-ordinary” are based on the expectation that 85% of travelers operate in a responsible manner (the “85th Percentile Rule”).

Plaintiff: The party that suffered the loss.

Proximate Cause: The most direct omission or act of “negligence” leading to damage and/or an injury is considered the most immediate, or “proximate cause”.

Reasonable and Prudent: All parties are expected to exercise responsibility, a basic level of skill and judgment in their actions. When they do, they are considered to be acting in a “reasonable and prudent” manner. When they do not, either party (plaintiff or defense) may be found liable for actions that caused or contributed to the injury or loss or harming another.

Sovereign Immunity: An agency that has full “sovereign immunity” is not required to pay settlements. Starting in the 1950s, courts began to erode government immunity, exposing them to significant court settlements. Since that time, the trend in the U.S. is to make governments responsible for their actions. Many states, but few cities, have partial immunity. This immunity puts a cap on how much can be awarded or limits exposure to certain areas such as maintenance and operations.

Tort: A wrongful act, not including breach of contract or trust, that results in injury to another’s person, property or the like and for which the injured party is entitled to compensation.

APPENDIX III: STATE TORT CLAIMS ACTS AND RECREATIONAL USE STATUTES

Note: This chart is meant only as a guide. Statutes are frequently amended.

State	Tort Claims Act	Recreation Use Statute
Alabama	Code of Ala. §§ 41-9-62 et seq. Code of Ala. §§ 11-93-1 et seq.	Ala. Code Sec. § 35-15-1
Alaska	Alaska Stat. §§ 09.50.250 et seq.	Ak. Stat. Sec. 09.45.795
Arizona	Ariz. Rev. Stat. Ann. §§ 12-820 et seq.	Az Rev. Stat. Ann. Sec. § 33-1551
Arkansas	Ark. Code 1987 §§ 21-9-201 et seq.	Ar. Stat. Ann. Sec. 50-1101 to 1107
California	Cal. Tort Claims Act, Deering's Cal. Gov. Code §§ 810-996.6 et seq.	Ca Gov't Code Sec. 846
Colorado	Colo. Governmental Immunity Act, Colo. Rev. Stat. §§ 24-10-101 et seq.	Co Rev. Stat. Sec. 33-41-101 to 106
Connecticut	Conn. Gen Stat. Ch 53 §§ 4-141 et seq. (administrative claims procedure).	Gen. State Sec. 52-557 f to k
Delaware	Del. Tort Claims Act, Del. Code Ann. Tit. 10, Ch 40 §§ 4001 et seq. (state and local).	De Code Ann. Title 7 Sec. 5901 to 5907
District of Columbia	D.C. Code §§ 1-1201 et seq.	Unknown
Florida	Fl. Tort Claims Act, Fla. Stat. §§ 768.28 et seq.	Fl State Ann. Sec. 375.251
Georgia	Official Code of Ga. Ann. §§ 36-33-1 et seq.	Ga Code Ann. Sec. 51-3-20 to 26
Hawaii	Hi. Rev. Stat. §§ 662-2 et seq. (State).	Hi Rev. Stat. Sec. 520-1 to 8
Idaho	Id. Code §§ 6-901 et seq.	Id Code Sec. 36-1601 to 1604
Illinois	Court of Claims Act, Ill. Rev. Stat. Ch 37 ¶ 439.8 (state); Ill. Rev. Stat. Ch 85 ¶¶ 1-101 to 10-101 (local gov't. units).	Il Ann. Stat. Ch 70 Sec. 31 to 37
Indiana	Ind. Tort Claims Act., Ind. Code §§ 34-4-16.5-1 et seq.	In. Code Ann. Sec. 14-2-6-3
Iowa	Ia. Tort Claims Act, Ch 25A (state); Tort Liability of Governmental subdivisions, Ch 613A.	Ia Code Ann. Sec. 111C.1 to .7
Kansas	Kan. Stat. Ann. §§ 75-6101 et seq.	Ks Stat. Ann. Sec. 58-3201 to 3207
Kentucky	Ky Board of Claims against the Commonwealth, Ky. Rev. Stat. §§ 44.070 et seq.	Ky Rev. Stat. Ann. Sec. 150.645 & 411.190
Louisiana	LA Const. Any. 12§ 10	La Rev. Stat. Ann. Sec. 2791 & 2795
Maine	Me. Tort Claims Act, Me. Rev. Stat. Ann. §§ 14-8101 et seq.	Me Rev. Stat. Ann. Title 14. Sec. 159-A
Maryland	Md. Tort Claims Act, Ann. Code of Md., S.G. §§ 12-101 et seq. (state gov't); CJ §§ 5-401 et seq. (local gov't).	Md Nat. Res. Code Ann. NR Sec. 5-1101 to 1108
Massachusetts	Ma. Tort Claims Act, Ann. Laws of Ma., Ch 258.	Ma Gen. Law Ann. Ch 21 Sec. 17c
Michigan	Mi. Comp. Laws §§ 691.1401-691.1415.	Mi Comp. Laws Ann. Sec. 324.73301
Minnesota	Mn. Tort Claims Act, Mn. Stat. Ann. §§ 3.736 et seq. (state); Mn. Stat. Ann. §§ 466.01 et seq. (local).	Mn Stat. Ann. Sec. 87.01-.03
Mississippi	MS Code Ann. §§ 11-46-1 to 11-46-16	Ms Code Ann. Sec. 89-2-1 to 7, 21-27
Missouri	Mo. Stat. §§ 537.600 et seq.	Ch 357 Sec. 537.345-.348
Montana	Mt. Comprehensive State Insurance Plan and Tort Claims Act, Mt. Code Ann. §§ 2-9-101 et seq. (state and local). Municipal immunity is waived pursuant to Mt. Code Ann. § 7-1-4125, which refers to the tort claims act.	Mt Rev. Code Ann. Sec. 70-16-301, 302
Nebraska	Ne. State Tort Claims Act, R.R.S. §§ 81-8,029 et seq.; Political Subdivisions Tort Claims Act. §§ 23-2401 et seq.	Ne Rev. Stat. Sec. 37-1001 to 1008

State	Tort Claims Act	Recreation Use Statute
Nevada	Nv. Rev. Stat. §§ 23-2401 et seq.	Nv Rev. Stat. Sec. 41.510
New Hampshire	NH Rev. Stat. Ann. §§ 541-B: 1 et seq. (administrative claims against the state; political subdivisions excluded).	NH Rev. Stat. Ann. Sec. 212.34
New Jersey	NJSA 59:1-1 et seq.	NJ Stat. Ann. Sec. 2A:42A-1 to 7
New Mexico	NMSA 27 §§ 41-4-1 to 41-4-27.	NM Stat. Ann. Sec. 16-3-9: 17-4-7
New York	CLS, Court of Claims Act § 8.	NY Gen. Oblig. Law Sec. 9-103
North Carolina	NC Gen. Stat. §§ 143-291 to 143-300.1	NC Gen Stat. Sec. 113A-95
North Dakota	NDCC Ch 32-12.1 (Chapter 303, S.L. 1977), applicable to political subdivisions of state.	ND Cent. Code Sec. 53-08-1 to 06
Ohio	Court of Claims Act, RC Ch 2743, applicable only to the state and its agencies or instrumentalities. Political Subdivisions Act, RC Ch 2744 applicable to political subdivisions of state.	Oh Rev. Code Ann. Sec. 1533.18; 1533.181
Oklahoma	Ok. Political Subdivision Tort Claims Act, 51 Ok. Stat. Supp. §§ 151 et seq.	Ok Stat. Ann. Title 76 Sec. 10 to 15
Oregon	Or. Rev. Stat. §§ 30.260-30.300; 30.265(2) (state and subdivisions).	Or Rev. Stat. Sec. 105.655 to .680
Pennsylvania	1 Pa. Consol. Stat. § 2310 (commonwealth); 42 Pa. Consol. Stat §§ 8541 et seq. (local Agencies); Pa. Rules of Civ. Proc. 2101 et seq. (commonwealth and political subdivisions).	Pa Stat. Ann. Title 68 Sec. 477-1 to 8
Rhode Island	RI. Gen. Laws Ann. §§ 9-31-1 et seq. (state and subdivisions).	RI Gen. Law Sec. 32-6-1 to 7
South Carolina	SC Tort Claims Act, SC Code §§ 15-78-10 et seq. (state and local).	SC Code Ann. Sec. 27-3-10 to 70
South Dakota	SD Cod. Laws 3-21-1 et seq. (state).	SD Comp. Laws Ann. Sec. 20-9-12 to 18
Tennessee	Tn. State Board of Claims Act, Tn. Code Ann. §§ 9-8-101 et seq. (administrative claims procedure against state); Tn. Governmental Tort Liability Act, T.C.A. §§ 29-20-101 et seq., applicable only to units of local government and not to the state.	Tn Code Ann. Sec. 70-7-101 to 104; Sec. 11-10-101 to 104
Texas	Tx. Rev. Civ. Stat. Ann. Art. 6252-19.	Civ. Prac. & Rem. Code Sec. 75.001 to .003
Utah	Ut. Governmental Immunity Act, Ut. Code Ann. §§ 63-30-1 to 63-30-34.	Ut Code Ann. Sec. 57-14-1 to 7
Vermont	Vt. State Tort Claims Act, Vt. Stat. Ann. 12 §§ 5601 et seq. (state).	Vt Stat. Ann. Title 10 Sec. 5212
Virginia	Va. Tort Claims Act. Code of Va. §§ 8.01-195.1 et seq. (state); Code of Va. § 8.01-222 (notice of claim to cities and towns).	Va Code Sec. 29.1-509
Washington	Wa. Rev. Code Ann. § 4.92.090 (state and subdivisions).	Wa Rev. Code Ann. Sec. 4-24.200 & .210
West Virginia	WV Court of Claims Act, WV Code §§ 14-2-1 et seq. (state); Governmental Tort Claims and Insurance Reform Act, WV Code §§ 29-12A-1 et seq. (political subdivisions).	WV Code Sec. 19-25-1 to 5
Wisconsin	Wi. Stat. Ann. § 893.80.	Wi Stat. Ann. Sec. 895.52
Wyoming	WY stat. § 1-39-101 to 1-39-118	Wy Stat. Ann. Sec. 34-19-101

Source: Tort Claims Act cites: "Landowner Liability." International Mountain Bicycling Association. Recreational Use Statute cites: Montange, C., 1989. "Preserving Abandoned Railroad Rights-of-Way for Public Use: A Legal Manual." Rails-to-Trails Conservancy, Washington, D.C.

ENDNOTES

¹ There is a long history in the United States of private landowners allowing public use of their land for recreation. This can happen in an informal way such as for hunting or fishing, or in a more formal way where a trail is established.

² Sometimes federal law will relate to the issue. For example, if a former railroad right-of-way is being used for interim trail purposes pursuant to a Surface Transportation Board order implementing section 8(d) of the National Trails System Act, the interim trail user may indemnify or otherwise hold the railroad harmless from legal liability.

³ Recreational Use Statutes protect the property “owner.” While the definition of “owner” can vary somewhat from state to state, most define it broadly to include the legal owner of the land, a tenant, lessee, occupant, or person in control of the premises. Some statutes specifically include public entities in the definition of owner while other states specifically exclude public entities, while still others have left it for the courts to decide.

⁴ In most states, Recreational Use Statutes apply to both land and water areas as well as to buildings, structures, and other items on the land.

⁵ Most states define recreational use in the statute by listing a broad range of activities such as swimming and hiking and may even include the phrase “includes, but is not limited to” in order to prevent as narrow interpretation of the term recreation.

⁶ “Guide for the Development of Bicycle Facilities.” American Association of State Highway and Transportation Officials, 1999. More information about AASHTO can be found at: www.aashto.org. Manual on Uniform Traffic Control Devices. More details of the MUTCD can be found at: www.ohs.fhwa.dot.gov/devices/mutcd.html.

⁷ See “Rails-with-Trails: Design, Management, and Operating Characteristics of 61 Trails Along Active Railroads.” Published by the Rails-to-Trails Conservancy, September 2000.

⁸ This section of the report draws directly from a prior Rails-to-Trails Conservancy Publication, *Preserving Abandoned Railroad Rights-of-Way for Public Use: A Legal Manual*. See the reference section for full citation. This publication is no longer in print.

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