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Donald H. Gjerdingen

Indiana University Maurer School of Law, dongjerd@indiana.edu

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THE MINNESOTA RECREATIONAL USE STATUTE: A PRELIMINARY ANALYSIS

In the past twenty-four years, Minnesota and forty-two other states in an effort to ease the growing burden on public parks and campgrounds have enacted recreational use statutes to encourage private landowners to open their land to the public for recreational use. As incentive, the statutes offer the landowners a limited form of tort immunity if they gratuitously allow entry for recreational use. Despite their simplicity, the possible ramifications of the statutes in the area of premises liability law are far-reaching. This Note analyzes the Minnesota recreational use statute and suggests a theoretical framework for its interpretation.

I. INTRODUCTION

Land has been the strength of America. Yet it no longer is of boundless supply.¹ Since the closing of the frontier in 1890, America has had to face the realization it must deal with finite boundaries.² As competition increases for the use of our fixed supply of land, "land use" becomes a concept of greater environmental and economic concern. A collateral, yet significant, part of this problem is finding land and water resources to accommodate the recent growth in public recreation.

In recent years Americans have taken part in an exodus of unprecedented proportions to public recreational lands. They have dramatically increased the number of visits to state and federal parks and campgrounds³ and are expected to place ever-increasing demands on the lim-

1. The United States Department of Agriculture estimates that two million acres of agricultural lands (not including lands taken by surface mining) are converted to nonagricultural use each year. While one-half goes to recreational or wildlife use, of the remaining one million acres per year, 420,000 are used for reservoirs and flood control projects, 420,000 are developed for urban use, and 160,000 are covered by highways and airports. 1 COUNCIL ON ENVIRONMENTAL QUALITY ANN. REP. 173 (1970). It has been estimated by the coal industry that 3,200,000 acres of land have been "disturbed" by strip mining. Only about one-third has been reclaimed, leaving "an area equivalent to the combined acreage of Connecticut and Rhode Island" almost completely reduced to sterile inactivity. Note, *Crisis on the Public Lands*, 6 SUFFOLK U.L. REV. 104, 108 (1971).

2. See TURNER, *The Significance of the Frontier in American History*, in THE FRONTIER IN AMERICAN HISTORY 1 (1920).

3. The number of visits to national recreational areas, including national parks, climbed from 33,300,000 in 1950 to 238,800,000 in 1975. U.S. BUREAU OF CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1976, at 214 (97th ed. 1976). State park attendance figures on a national level showed similar increases. See *id.* at 216 (114,291,000 in 1950 to 482,536,000 in 1970). Visits to local parks in 1970 have been estimated as high as 1,500,000,000. 3 COUNCIL ON ENVIRONMENTAL QUALITY ANN. REP. 321 (1973).

In Minnesota, in 1969, an estimated 5,493,000 visitor-days were spent in state parks. [1968-1970] MINNESOTA DEP'T OF NATURAL RESOURCES BIENNIAL REP. 22. This increased

ited public resources available for recreational use.⁴ The cost of developing new public areas, however, was often prohibitive. Thus, it was inevitable private land be suggested as an additional source. The availability of private land, however, was hindered by common-law premises liability. A private landowner who allowed members of the public to use his land easily could subject himself to tort liability. Recreational users if allowed upon the land, even gratuitously, became invitees or licensees.⁵ This additional burden outweighed any benefit the typical landowner received in return. Consequently, consent was routinely withheld. An accommodation of the reasonable expectations of both the recreation-seeking public and the liability-conscious landowner was necessary.

A proffered legislative solution, now in effect in forty-three states⁶

to 6,918,023 visitor-days in 1971. [1970-1972] MINNESOTA DEP'T OF NATURAL RESOURCES BIENNIAL REP. 43.

4. By the year 2000, the need for recreational land, both public and private, may be six times what it was in 1956. See M. CLAWSON, R. HELD & C. STODDARD, *LAND FOR THE FUTURE* 135 (1960).

5. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 60, at 376-78, § 61, at 385-86 (4th ed. 1971) [hereinafter cited as PROSSER].

6. ALA. CODE tit. 47, §§ 281-285 (Cum. Supp. 1973); ARK. STAT. ANN. §§ 50-1101 to -1107 (1971); CAL. CIV. CODE § 846 (West Cum. Supp. 1977); COLO. REV. STAT. §§ 33-41-101 to -106 (1973 & Cum. Supp. 1976); CONN. GEN. STAT. ANN. §§ 52-557f to -557j (West Cum. Supp. 1977), as amended by Act of June 10, 1977, Pub. Act No. 77-393, 1977 Conn. Legis. Serv. 588 (West); DEL. CODE ANN. tit. 7, §§ 5901-5907 (1974); FLA. STAT. ANN. § 375.251 (West 1974 & Cum. Supp. 1977); GA. CODE ANN. §§ 105-403 to -409 (1968); IDAHO CODE § 36-1604 (1977) (formerly codified at IDAHO CODE § 36-2503); ILL. ANN. STAT. ch. 70, §§ 31-37 (Smith-Hurd Cum. Supp. 1977); IND. CODE ANN. § 14-2-6-3 (Burns 1973); IOWA CODE ANN. §§ 111C.1-.7 (West Cum. Supp. 1977-1978); KAN. STAT. ANN. §§ 58-3201 to -3207 (1976); KY. REV. STAT. § 150.645 (1970); LA. REV. STAT. ANN. § 9:2791 (West 1965); ME. REV. STAT. tit. 12, §§ 3001-3005 (1974); MD. NAT. RES. CODE ANN. §§ 5-1101 to -1108 (1974) (formerly codified at MD. ANN. CODE art. 66C, §§ 410J-410R); MASS. GEN. LAWS ANN. ch. 21, § 17C (West 1973); MICH. COMP. LAWS ANN. § 300.201 (West Cum. Supp. 1977-1978); MINN. STAT. §§ 87.01-.03 (1976); MONT. REV. CODES ANN. §§ 67-808 to -809 (1970); NEB. REV. STAT. §§ 37-1001 to -1008 (1974); NEV. REV. STAT. § 41.510 (1975); N.H. REV. STAT. ANN. § 212:34 (Supp. 1975); N.J. STAT. ANN. §§ 2A:42A-1 to -5 (West Cum. Supp. 1977-1978); N.M. STAT. ANN. § 53-4-5.1 (Supp. 1975); N.Y. GEN. OBLIG. LAW § 9-103 (McKinney Supp. 1976-1977), as amended by Act of May 3, 1977, ch. 91, 1977 N.Y. Sess. Law News 153 (McKinney); N.C. GEN. STAT. §§ 113-120.5 to .7 (1975); N.D. CENT. CODE §§ 53-08-01 to -06 (1974); OHIO REV. CODE ANN. §§ 1533.18-.18.1 (Page 1964 & Supp. 1976); OKLA. STAT. ANN. tit. 76, §§ 10-15 (West 1976); OR. REV. STAT. §§ 105.655-.680 (1975); PA. STAT. ANN. tit. 68, §§ 477-1 to -8 (Purdon Cum. Supp. 1977-1978); S.C. CODE ANN. §§ 51-81 to -87 (Cum. Supp. 1975); S.D. COMPILED LAWS ANN. § 20-9-5 (Supp. 1976); TENN. CODE ANN. §§ 11-1301 to -1303 (1973) (liability of owner of land leased to state), 51-801 to -805 (1977) (liability of landowner to persons using land); TEX. REV. CIV. STAT. ANN. art. 1b (Vernon 1969); VT. STAT. ANN. tit. 10, § 5212 (1973); VA. CODE § 8.01-654.2 (1977) (formerly codified at VA. CODE § 8-654.2); WASH. REV. CODE ANN. §§ 4.24.200-.210 (Supp. 1976); W. VA. CODE §§ 19-25-1 to -6 (1977); WIS. STAT. ANN. § 29.68 (West 1973 & Supp. 1976); WYO. STAT. §§ 34-389.1 to .6 (Cum. Supp. 1975).

Utah enacted a recreational use statute but later repealed it. See Act of May 11, 1965,

including Minnesota,⁷ is the recreational use statute (RUS). Recreational use statutes alter the tort duties owed by a possessor of land to entrants in the specific instance of recreational use. The statutes offer a pragmatic "trade-off" whereby the landowner is relieved of certain tort duties when he gratuitously allows access to his land by members of the public for recreation.⁸ The typical recreational use statute relieves the landowner of the common-law duty to warn of dangerous conditions or uses upon the land, or to prepare the land for entry by recreational users, and limits his liability to instances involving willful or grossly negligent misconduct. Presumably, this qualified immunity, which might be described best as making the recreational user a "constructive trespasser," encourages landowners to open their land since no greater burden of care would follow as a consequence of their consent to entry.

Despite the widespread adoption of recreational use statutes, little commentary exists which explains their rationale or analyzes their application.⁹ The case law is limited to thirteen states.¹⁰ Minnesota as yet

ch. 115, 1965 Utah Laws 317 (repealed 1971) (formerly codified at UTAH CODE ANN. §§ 23-1-13 to -14).

7. MINN. STAT. §§ 87.01-.03 (1976).

8. Many statutes contain express policy statements. The Oregon RUS gives the best statement:

The Legislative Assembly hereby declares it is the public policy of the State of Oregon to encourage owners of land to make their land available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes and, in the case of permissive use, by protecting their interests in their land from the extinguishment of any such interest or the acquisition by the public of any rights to use or continue the use of such land for recreational purposes.

OR. REV. STAT. § 105.660 (1975).

9. Only one significant law review article exists. See Note, *Liability of Landowner to Persons Entering for Recreational Purposes*, 1964 WIS. L. REV. 705, cited in *Garfield v. United States*, 297 F. Supp. 891, 895 (W.D. Wis. 1969) and *Kesner v. Trenton*, ___ W. Va. ___, ___, 216 S.E.2d 880, 885 (1975) and *Goodson v. City of Racine*, 61 Wis. 2d 554, 558, 213 N.W.2d 16, 18 (1973) and *Copeland v. Larson*, 46 Wis. 2d 337, 343-44, 174 N.W.2d 745, 751 (1970). However, this article was written in 1964, prior to most of the significant case law in the area.

Other articles which discuss the statutes briefly include Beckwith, *Developments in the Law of Historic Preservation and a Reflection on Liberty*, 12 WAKE FOREST L. REV. 93, 124-26 (1976); Hustace, *Free Outdoor Recreational Areas for Missouri—A Law Limiting Landowners' Liability*, 25 J. MO. B. 423 (1969) (briefly discussing model act); Malone, *Liability to Trespassers*, 25 LA. L. REV. 47 (1964) (Louisiana statute); Morris, *Gross Negligence in Michigan—How Gross is it?*, 16 WAYNE L. REV. 457, 471 (1970) (Michigan statute); Slaughter, *Torts, Annual Survey of Virginia Law*, 48 VA. L. REV. 1367, 1376 (1962) (Virginia statute); Tate, *The Law-Making Function of the Judge*, 28 LA. L. REV. 211, 215 (1968); Note, *Liability of Owners and Occupiers of Land*, 58 MARQ. L. REV. 609, 613-14 (1975); Note, *Survey of Kansas Law: Real and Personal Property*, 18 U. KAN. L. REV. 427, 438 (1970) (Kansas statute). See also *Garfield v. United States*, 297 F. Supp. 891, 897-98 (W.D. Wis. 1969); *Scheck v. Houdaille Constr. Materials, Inc.*, 121 N.J. Super. 335, 338-39, 297 A.2d 17, 19 (Super. Ct. Law Div. 1972) (history of New Jersey

statute); *Loney v. McPhillips*, 268 Or. 378, 385-88, 521 P.2d 340, 343-44 (1974) (discussion of legislative history and policy of Oregon RUS); *Copeland v. Larson*, 46 Wis. 2d 337, 343-48, 174 N.W.2d 745, 749-51 (1970) (history of Wisconsin statute).

10. *California*: *English v. Marin Mun. Water Dist.*, 66 Cal. App. 3d 725, 136 Cal. Rptr. 224 (Ct. App. 1977) (RUS applied to motorcyclist on excavation maintained by water district).

Georgia: *Georgia Power Co. v. McGruder*, 229 Ga. 811, 194 S.E.2d 440 (RUS not applied to drowning of infant in private natural pool area posted with "Keep Out" signs and maintained by commercial power company), *rev'g* 126 Ga. App. 526, 191 S.E.2d 305 (1972); *Bourn v. Herring*, 225 Ga. 67, 166 S.E.2d 89 (RUS applied to drowning of 14-year-old boy at picnic area maintained by commercial dairy for goodwill purposes), *appeal to supreme court from grant of summary judgment against amended complaint dismissed for failure to raise a constitutional question sub nom. Herring v. R.L. Mathis Certified Dairy Co.*, 225 Ga. 653, 171 S.E.2d 124 (1969), *appeal dismissed for want of a substantial federal question*, 400 U.S. 922, *grant of summary judgment against amended complaint aff'd*, 121 Ga. App. 373, 173 S.E.2d 716, *cert. denied*, 121 Ga. App. 890, 173 S.E.2d 716 (1970); *Stone Mt. Mem'l Ass'n v. Herrington*, 225 Ga. 746, 171 S.E.2d 521 (applied RUS where admission fee was strictly parking fee and not charge for recreational use of land), *rev'g* 119 Ga. App. 658, 168 S.E.2d 633 (1969), *discussed in Gregory, Torts, Annual Survey of Georgia Law, June 1, 1969-May 31, 1970*, 22 MERCER L. REV. 323, 326 (1971); *Epps v. Chattahoochee Brick Co.*, 140 Ga. App. 426, 231 S.E.2d 443 (1976) (dictum) (RUS applicable to six-year-old boy who drowned in small artificial lake located 900 feet from an apartment complex posted with signs inviting public use); *Shepard v. Wilson*, 123 Ga. App. 74, 179 S.E.2d 550 (1970) (RUS not applied to vacant lot in residential area), *cert. denied*, 123 Ga. App. 872, 179 S.E.2d 550 (1971); *Herring v. Hauck*, 118 Ga. App. 623, 165 S.E.2d 198 (1968) (RUS not applied to neighbor in residential area who permitted his friends to use swimming pool without charge).

Michigan: *Lovell v. Chesapeake & O.R.R.*, 457 F.2d 1009 (6th Cir. 1972) (interpreting Michigan law) (RUS applied to scouting hike on railroad property); *Magerowski v. Standard Oil Co.*, 274 F. Supp. 246 (W.D. Mich. 1967) (RUS applied to infant who drowned while fishing from private commercial dock); *Heider v. Michigan Sugar Co.*, 375 Mich. 490, 134 N.W.2d 637 (1965) (en banc) (5-3 decision) (RUS applied to drowning of two boys in private commercial pond while trapping muskrats), *cert. granted*, 383 U.S. 905, *writ dismissed as improvidently granted*, 385 U.S. 362 (1966); *Anderson v. Brown Bros.*, 65 Mich. App. 409, 237 N.W.2d 528 (1975) (RUS not applied to municipal land when engaged in governmental function); *Estate of Thomas v. Consumers Power Co.*, 58 Mich. App. 486, 228 N.W.2d 786 (RUS applied to power company owning easement where snowmobiler killed when struck guy wires), *aff'd in part, rev'd in part*, 394 Mich. 459, 231 N.W.2d 653 (1975); *Taylor v. Mathews*, 40 Mich. App. 74, 198 N.W.2d 843 (1972) (RUS applied to trespassing child who drowned in private commercial gravel pit).

Montana: *State ex rel. Tucker v. District Court*, 155 Mont. 202, 468 P.2d 773 (1970) (RUS applied to power company leasing land from United States government).

Nevada: *Gard v. United States*, 420 F. Supp. 300 (N.D. Cal. 1976) (RUS applied to hikers injured in abandoned mine on federal land).

New Jersey: *Odar v. Chase Manhattan Bank*, 138 N.J. Super. 464, 351 A.2d 389 (Super. Ct. App. Div.) (RUS intended to apply to nonresidential, rural land on which recreational activities enumerated in the statute are conducted), *petition for certification denied*, 70 N.J. 525, 361 A.2d 540 (1976); *Boileau v. De Cecco*, 125 N.J. Super. 263, 310 A.2d 497 (Super. Ct. App. Div. 1973) (RUS does not apply to "homeowners in suburbia"), *aff'd mem.*, 65 N.J. 234, 317 A.2d 716 (1974); *Villanova v. American Fed. of Musicians Local 16*, 123 N.J. Super. 57, 301 A.2d 467 (Super. Ct. App. Div.) (RUS not applicable to musician giving concert in public park), *petition for certification denied*, 63 N.J. 504, 308 A.2d 669 (1973); *Scheck v. Houdaille Constr. Materials, Inc.*, 121 N.J. Super. 335, 297 A.2d 17 (Super. Ct. Law Div. 1972) (RUS not applicable to 14-year-old infant trespasser); *O'Connell v. Forest Hill Field Club*, 119 N.J. Super. 317, 291 A.2d 386 (Super. Ct. Law

has none. Using the Minnesota statute as a model, this Note will suggest a theoretical framework for determining when a recreational use statute should be applied.

II. LEGISLATIVE HISTORY AND TEXT OF THE MINNESOTA RECREATIONAL USE STATUTE

In 1961, Minnesota became the third state¹¹ to adopt a recreational use statute. By enacting the statute, the legislature expected to provide beneficial access to recreational land to the public and to boost the tourism industry within the state by limiting the liability of possessors who opened their land to the public for general recreational purposes.¹² The 1961 statute¹³ utilized the concept of a "free recreational area."

Div. 1972) (RUS not applied to three-year-old infant on golf course); *Krevics v. Ayars*, 141 N.J. Super. 511, 358 A.2d 844 (Salem County Ct. Law Div. 1976) (RUS not applied to landowner who deliberately created a hazard).

New York: *Merriman v. Baker*, 34 N.Y.2d 330, 313 N.E.2d 773, 357 N.Y.S.2d 473 (1974) (RUS applicable to railroad property); *Rock v. Concrete Materials, Inc.*, 46 App. Div. 2d 300, 362 N.Y.S.2d 258 (1974) (RUS applied to snowmobiler on private commercial property), *appeal dismissed*, 36 N.Y.2d 772, 329 N.E.2d 672, 368 N.Y.S.2d 841 (1975).

Oregon: *Tijerina v. Cornelius Christian Church*, 273 Or. 58, 539 P.2d 634 (1975) (in banc) (RUS not applicable to softball field maintained by church within city boundaries); *Loney v. McPhillips*, 268 Or. 378, 521 P.2d 340 (1974) (in banc) (RUS applied to owner of naturally dangerous ocean cove where 13-year-old boy drowned while trespassing); *Denton v. L.W. Vail Co.*, ___ Or. App. ___, 541 P.2d 511 (1975) (RUS applied to state and federal land not open for public use). *See also* *Bilbao v. Pacific Power & Light Co.*, 257 Or. 360, 479 P.2d 226 (1971) (interpreting Washington RUS).

Virginia: *Hamilton v. United States*, 371 F. Supp. 230 (E.D. Va. 1974) (RUS applied to federal government).

Washington: *Bilbao v. Pacific Power & Light Co.*, 257 Or. 360, 479 P.2d 226 (1971) (Washington RUS applied by Oregon court to private beach opened to public).

West Virginia: *Kesner v. Trenton*, ___ W. Va. ___, 216 S.E.2d 880 (1975) (attraction of prospective customers by allowing people to swim in lake at no charge sufficient to exclude marina operators from protection of RUS).

Wisconsin: *Garfield v. United States*, 297 F. Supp. 891 (W.D. Wis. 1969) (RUS applied to military reservation operated by federal government); *Cords v. Ehly*, 62 Wis. 2d 31, 214 N.W.2d 432 (1974) (inapplicable to state parks); *Goodson v. City of Racine*, 61 Wis. 2d 554, 213 N.W.2d 16 (1973) (inapplicable to city parks); *Copeland v. Larson*, 46 Wis. 2d 337, 174 N.W.2d 745 (1970) (RUS does not apply to business invitees).

Wyoming: *Smith v. United States*, 383 F. Supp. 1076 (D. Wyo. 1974) (RUS applied to visitor in Yellowstone National Park), *aff'd*, 546 F.2d 872 (10th Cir. 1976).

11. The state of Michigan passed the first RUS in 1953; New York followed in 1956. Both these statutes only codified the common-law, however. *See* note 108 *infra* and accompanying text.

12. *See Hearings on H.F. 1294 Before the Minnesota House Comm. on Forestry and Public Domain* (Mar. 17, 1961).

The present system of taping committee and floor sessions was not in effect in 1961. Only the hearing reports are available.

13. The 1961 RUS contained the following provisions:

87.01 POLICY. It is the policy of the state, in furtherance of the public health and welfare, to encourage and promote the use of privately owned lands

Unlike the present statute, it applied only to possessors who registered their land.¹⁴ To qualify, a possessor was required to give public notice of the areas opened and the uses permitted.¹⁵ Under the original act, this could be done only by making an appropriate recording with the register of deeds.¹⁶ A 1963 amendment permitted public notice to be given by posting the land¹⁷ in addition to recording. The statute then

and waters by the public for beneficial outdoor recreational purposes, and the provisions of sections 87.01 to 87.04 are enacted to that end.

87.02 DEFINITIONS. Subdivision 1. The definitions given in this section shall obtain for the purposes of sections 87.01 to 87.04, except as otherwise specified or indicated by the context.

Subd. 2. "Outdoor recreational use" includes, without limitation, hunting, fishing, boating, swimming, walking, climbing, skating, skiing on land or water, snowshoeing, riding, camping, picnicking, participating in outdoor sports or games, nature study, and other pursuits for the purpose of outdoor recreation.

Subd. 3. "Free recreational area" means any privately owned area of land or water which the owner or the person having the right of possession and control thereof has made subject to any recreational use or uses by the public without compensation, evidenced by written declaration describing the area and specifying the free public uses permitted therein, executed by such owner or person as provided by law for a conveyance of land, and recorded in the office of the register of deeds of the county wherein the area is situated. Such declaration shall run with the land and remain in effect until modified or revoked by written instrument executed by the fee owner and recorded in like manner.

87.03 DEDICATION. No dedication of any free recreational area or part thereof to any outdoor recreational use by the public specified in the applicable declaration of record shall take effect in consequence of the exercise of such use for any length of time hereafter except as expressly permitted or provided by the owner. No dedication of any road, path, trail, portage, waterway, or other passageway through or over any such area for the purpose of or in connection with any outdoor recreational use by the public specified in the applicable declaration of record shall take effect in consequence of the exercise of such use for any length of time hereafter except as expressly permitted or provided by the owner or as otherwise expressly provided by sections 160.05 and 160.06, or other legislative act.

87.04 LIABILITY FOR INJURIES. No liability or cause of action for any injury to person or property occurring in the course of or in connection with any outdoor recreational use of any free recreational area specified in the applicable declaration of record insofar as such injury was caused or contributed to by any natural or artificial object, structure, or condition existing therein shall lie against the owner or the person having the right of possession and control of the area; provided, that this shall not relieve any person from civil or criminal liability for negligence as defined by Minnesota Statutes, Section 610.02.

Act of Apr. 20, 1961, ch. 638, 1961 Minn. Laws 1192 (repealed 1971).

14. California still requires the record owner to register his land with the county recorder. See CAL. CIV. CODE § 813 (West Cum. Supp. 1977). Another state which still uses this restricted type of RUS is Florida, which phrases its statute in terms of providing "park areas" for the public. See FLA. STAT. ANN. § 375.251 (West 1974 & Cum. Supp. 1977). It does not have a registration requirement, however. See *id.*

15. Act of Apr. 20, 1961, ch. 638, § 2, 1961 Minn. Laws 1193 (repealed 1971).

16. *Id.*

17. Act of Apr. 9, 1963, ch. 207, 1963 Minn. Laws 302 (repealed 1971).

applied to these "free areas."¹⁸

In 1971, Minnesota abandoned the "free recreational area" concept in favor of a statute of general application. It is, with only a minor amendment, the statute in effect today. Two post-1961 developments were responsible for the 1971 statute. The first was the promulgation of a model landowner liability law by the Council of State Governments.¹⁹ The 1971 Minnesota legislative hearings do not mention the model act, but the drafters clearly relied on it for substantive provisions. The current Minnesota statute thus closely follows those of at least fifteen other states.²⁰ Decisions in these states should help to interpret the Minnesota Act.²¹

The second, and principal, impetus for the 1971 act was snowmobiling.²² Earlier the state attempted to provide a state-wide system of trails

18. Few, if any, "free recreational areas" were dedicated. In retrospect, two elements of the act appear responsible. First, the registration requirement likely retarded implementation by covering only landowners who were aware of the existence of the statute rather than all landowners who permitted access to their land in the manner the legislature was trying to promote. If unaware of the act, even the most hospitable landowner was not protected. Although promoting the spirit of the act, he would be denied its benefits. Thus, the act was simply underinclusive. Second, the consent provision was by public notice rather than by face-to-face meeting. The landowner could not grant or deny entry at this pleasure, but only by deliberate plan. Thus, personal autonomy was hindered.

19. For a brief discussion of the model act, see Hustace, *Free Outdoor Recreational Areas for Missouri—A Law Limiting Landowners' Liability*, 25 J. Mo. B. 423, 425 (1969).

20. Arkansas, Connecticut, Delaware, Georgia, Idaho, Illinois, Iowa, Maryland, Nebraska, North Dakota, Oklahoma, South Carolina, Tennessee, West Virginia, and Wyoming. All of these states except two, Connecticut and Maryland, preceded Minnesota in the adoption of the model act. For citations for these statutes, see note 6 *supra*.

21. See MINN. STAT. § 645.22 (1976) (canon of statutory construction which provides that uniform acts are to be construed to make them consistent with other states).

22. From a mere 18,000 machines in 1967, snowmobiling had grown to an estimated 312,000 machines in 1973. Regulation of snowmobiles and their effect on conservation also caused concern. See 3 COUNCIL ON ENVIRONMENTAL QUALITY ANN. REP. 379 (1972); Comment, *Snowmobiles — A Legislative Program*, 1972 WIS. L. REV. 477 ("classic example of technology moving faster than the law"); Note, *Snowmobiles and the Environment*, 82 YALE L.J. 772 (1973); Annot., 45 A.L.R.3d 1438 (1972) (criminal penalties for snowmobilers); Annot., 42 A.L.R.3d 1422 (1972) (reported cases on snowmobiling).

By the late 1960's a body of snowmobile legislation had developed in Minnesota which included prohibitions against snowmobilers entering any land without permission, whether posted or not, MINN. STAT. § 84.90 (1976), and the establishment of a state "trails program" whereby the State of Minnesota could acquire privately-owned lands for construction of snowmobile trails, *id.* § 84.029. This right, however, was restricted to certain trails. See *id.* § 85.015(12)(c), (13)(c). These two policies, the prohibition against trespass by snowmobilers and the commitment of the state to provide a system of trails, caused snowmobile clubs and the snowmobile industry of Minnesota to press for the development of new trails. This, in turn, led to strong support for a more comprehensive recreational use statute. See *Tapes of Hearings on S.F. 1061 Before the Minnesota Senate Judiciary Comm.* (Apr. 4, 1973) (statement of Minnesota Association of Snowmobilers).

to serve the growing needs of snowmobilers.²³ In 1969, the legislature empowered the Department of Natural Resources²⁴ to establish and maintain recreational areas for snowmobilers. Leasing of lands as well as establishing recreational easements was contemplated. Private landowners, however, hindered the development of the system. Fearful of subjecting themselves to possible tort liability, many landowners refused either to lease their land to the state or to consent to the establishment of easements.²⁵ In response to pressures from snowmobiling interests,²⁶ the Department of Natural Resources sponsored the 1971 recreational use statute. The 1971 statute defined the duties of consenting landowners and stipulated that private land leased to the state would be protected. Thus, it was expected greater numbers of landowners would give their consent. Numerous recreational groups backed these changes and the 1971 bill passed both houses of the legislature with strong support.²⁷

Despite the comprehensive statement by the 1971 legislature, landowners still were hesitant.²⁸ Although clearly within the scope of the

23. See DIVISION OF PARKS & RECREATION, MINNESOTA DEP'T OF NATURAL RESOURCES, SNOWMOBILING AND SKI TOURING TRAIL MANUAL (1973). By the date of the publication of this manual, over 3,300 miles of snowmobile trails had been constructed and marked in the state. The manual contains a copy of the RUS and the suggestion that snowmobilers encourage landowners to grant trail easements across their lands.

Since 1971 the trail program sought to channel snowmobile use to protect both the environment and participants. The Department of Natural Resources participated in efforts to control snowmobile use by supporting enactment of laws to prevent destruction of property, ensure safe use of machines by operators, and minimize permanent damage to plants and soil and disruptive side effects to wildlife. See [1971-1973] SUBCOMM. ON SNOWMOBILERS AND ALL-TERRAIN-VEHICLES OF THE MINNESOTA HOUSE COMM. ON NATURAL RESOURCES & MINNESOTA SENATE COMM. ON SNOWMOBILE INDUSTRY AND SNOWMOBILING, FINAL JOINT REP. *passim* (interim activities). This report recommended, *inter alia*, inclusion of snowmobilers in drunk driving statutes, adoption of trespass law for snowmobilers, expansion of the trails system, clarification of the RUS, possible indemnification by the state of landowners sued by users, and communication from Department of Natural Resources attorneys to county attorneys about RUS and the legality of a landowner liability statute. See *id.*

24. This was previously the Department of Conservation.

25. Hearings on H.F. 1209 Before the Minnesota Senate Judiciary Comm. (May 8, 1971).

26. These included the Minnesota Association of Snowmobilers and the North Central Marine Association—a snowmobile manufacturer and dealers association. See Minutes of Minnesota House Comm. on Natural Resources Hearings on H.F. 1209 (Mar. 9, 1971); *id.* (Mar. 11, 1971).

27. The final vote in the House was 122-10. 2 MINN. H.R. JOUR. 4024 (1971). The final vote in the Senate was 60-2. 2 MINN. S. JOUR. 3314 (1971).

28. See generally [1971-1973] SUBCOMM. ON SNOWMOBILES AND ALL-TERRAIN-VEHICLES OF THE MINNESOTA HOUSE COMM. ON NATURAL RESOURCES & SENATE SUBCOMM. ON SNOWMOBILE INDUSTRY AND SNOWMOBILING OF THE MINNESOTA SENATE COMM. ON NATURAL RESOURCES AND ENVIRONMENT, FINAL JOINT REP. *passim* (interim activities); Memorandum from the Office of Minnesota Senate Research to Members of the Joint Committee on Snowmobiles

statute, "snowmobiling" was not specified. Thus, efforts were made to clarify the statute. Supported by the Department of Natural Resources and many northern Minnesota communities,²⁹ a 1973 amendment added "snowmobiling" to the list of activities covered and made specific the duty of care owed by landowners to persons using motorized recreational vehicles.³⁰ In other respects the statute was unaltered. The product was the present Minnesota recreational use statute contained in Chapter 87 of Minnesota Statutes, which provides:

87.01 POLICY. It is the policy of the state, in furtherance of the public health and welfare, to encourage and promote the use of privately owned lands and waters by the public for beneficial recreational purposes, and the provisions of this chapter are enacted to that end.

87.021 DEFINITIONS. Subdivision 1. For the purposes of this chapter the terms defined in this section have the meanings given them, except where the context clearly indicates otherwise.

Subd. 2. "Land" means land, roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to the realty.

Subd. 3. "Owner" means the possessor of a fee interest or a life estate, a tenant, lessee, occupant or person in control of the premises.

Subd. 4. "Recreational purpose" includes, but is not limited to, any of the following, or any combination thereof: hunting, trapping, fishing, swimming, boating, camping, picnicking, hiking, bicycling, horseback riding, pleasure driving including snowmobiling and the operation of any motorized vehicle or conveyance upon a road or upon or across any land in any manner whatsoever, nature study, water skiing, winter sports, and viewing or enjoying historical, archaeological, scenic, or scientific sites.

Subd. 5. "Charge" means the admission price or fee received in return for invitation or permission to enter or go upon the land.

87.022 LANDOWNER'S DUTY; WARNINGS. Except as specifically recognized by or provided in section 87.025, an owner of land owes no duty of care to render or maintain the premises safe for entry or use by others for recreational purposes.

87.0221 OWNER'S DUTY OF CARE OR DUTY TO GIVE WARNINGS. Except as specifically recognized by or provided in sec-

(Jan. 15, 1973). Also, such companies as United States Steel, Boise Cascade Corporation, and Hanna Mining Company, all of whom own large areas of land in northern Minnesota were considering posting their lands against public use unless the statute was made even more explicit in relieving them of liability. See *Tapes of Hearings on S.F. 1351 Before the Subcomm. on Judicial Admin. of the Minnesota Senate Judiciary Comm.* (Apr. 11, 1973). The Hanna Mining Company in particular had been subjected to several (although largely unsuccessful) suits by snowmobilers. *Tapes of Hearings on S.F. 1351 Before the Subcomm. on Judicial Admin. of the Minnesota Senate Judiciary Comm.* (Apr. 4, 1973) (statement of lobbyist for Hanna Mining Company, Hibbing, Minnesota).

29. See, e.g., *Grand Rapids Herald Review*, Mar. 26, 1973, at 4, col. 1 (editorial).

30. The duty of care section was codified as MINN. STAT. § 87.0221.

tion 87.025, an owner of land (a) owes no duty of care to render or maintain his land safe for entry or use by other persons with a motorized recreational vehicle for recreational purposes, (b) owes no duty to warn those persons of any dangerous condition on the land, whether patent or latent, (c) owes no duty of care toward those persons except to refrain from willfully taking action to cause injury, and (d) owes no duty to curtail his use of his land during its use for recreational purposes.

87.023 LANDOWNER'S LIABILITY. Except as specifically recognized by or provided in section 87.025, 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 person or property caused by an act of [*sic*] omission of such persons.

87.024 LIABILITY; LEASED LAND. Unless otherwise agreed in writing, the provisions of sections 87.022 and 87.023 shall be deemed applicable to the duties and liability of an owner of land leased to the state or any subdivision thereof for recreational purposes.

87.025 LANDOWNER'S LIABILITY; NOT LIMITED. Nothing in this chapter limits in any way any liability which otherwise exists:

- (a) For conduct which, at law, entitles a trespasser to maintain an action and obtain relief for the conduct complained of;
- (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 from the state or subdivision thereof by the owner for such lease shall not be deemed a charge within the meaning of this section.

87.026 LAND USER'S LIABILITY. Nothing in this chapter 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 chapter 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.

87.03 DEDICATION. No dedication of any land in connection with any use by any person for a recreational purpose shall take effect in consequence of the exercise of such use for any length of time hereafter except as expressly permitted or provided by the owner or as otherwise expressly provided by sections 160.05 and 160.06, or other legislative act.

III. THEORETICAL CONSIDERATIONS IN CONSTRUING THE MINNESOTA RECREATIONAL USE STATUTE

At first view the Minnesota recreational use statute appears easy to

apply. The statute is only several paragraphs long and deals with a noncontroversial area. The possible legal implications of the Act, however, are far-reaching. A sample of possible fact situations reveals some areas a study of the Minnesota recreational use statute must consider. For example, what is the effect of the Minnesota recreational use statute on the following situations:

Situation A. A homeowner invites a friend over to use his newly-acquired backyard pool. The friend, an adult, is injured because of negligent maintenance of the pool. Can the recreational use statute be used as a defense?

Situation B. A private manufacturer in an urban area offers free educational tours of its plants for purposes of public goodwill. Can the company argue this constitutes a "recreational" use of the land by plant visitors?

Situation C. A private company makes part of a large, rural industrial park available for public use, but uses the operation to distribute sample products. Can this benefit to the landowner be a "charge" and thus preclude application of the statute?

Situation D. A person opens land for public use but collects a fee to park in an adjoining lot. Later he expands the operation to offer services for camping trailers. No fee is asked for use of the land itself, but one is collected for the water or electricity used. Can these items be "charges"?

Situation E. A visitor in a state or federal park is injured because of the negligence of a government employee. Can the recreational use statute be used as a defense?

Situation F. A government military reservation is opened for use by hunters several weeks a year. Can the government take advantage of the recreational use statute?

Situation G. A social guest is injured during a cross-country skiing or snowmobiling outing on private, rural land because of the failure of the landowner to warn of the presence of a fence, partially hidden by snow. Can the landowner use the recreational use statute as a defense against the social guest?

Situation H. A railroad company is aware that children play on its property. Can the recreational use statute be used to limit the doctrine of attractive nuisance?

As these situations illustrate, the recreational use statute may raise issues concerning its application to urban and residential land (Situations A & B) or government land (including parks) (Situations E & F); the interpretation of the terms "charge" (Situations B, C & D) and "recreation" (Situation B); and its effect on existing categories of entrants, such as social guests (Situations A & G), and on the common-law doctrine of attractive nuisance (Situation H). The answers are of more than academic concern. Many have been considered by courts in other states, often with varying results. When a Minnesota court confronts such questions, the growing body of law from other states can

supply some guidelines. It should be recognized, however, that much of the existing case law is controlled by certain unarticulated assumptions about recreational use statutes.

The recreational use statute appears to offer a landowner an island of immunity in a rising sea of rights. Several countervailing considerations are present. The specific policy of the recreational use statute is to encourage landowners to grant the public access for recreational use. In effect, the statute offers a limited immunity.³¹ It offers a statutory promise that consent to entry will not subject the landowner to liability and limits the creation of possible prescriptive rights. On the other hand, the trend of premises liability law is to impose a greater duty of care on landowners. Minnesota, for example, retains the classification of trespasser, but has abolished the invitee-licensee distinction in favor of a single standard of reasonableness.³² Moreover, another trend in the law is to eliminate immunities.³³ Thus support also exists for preserving

31. Several states, in fact, have so described it. See, e.g., *Anderson v. Brown Bros.*, 65 Mich. App. 409, 415, 237 N.W.2d 528, 531 (1975) (referring to "recreational property owners immunity statute"); *Tijerina v. Cornelius Christian Church*, 273 Or. 58, 64, 539 P.2d 634, 637 (1975) ("immunity"); ARK. STAT. ANN. §§ 50-1104 to -1106 (1971) (sections labeled "owner's immunity").

32. The invitee-licensee distinction was abolished by the Minnesota Supreme Court in *Peterson v. Balach*, 294 Minn. 161, 199 N.W.2d 639 (1972). Accord, *Powers v. Bethlehem Steel Corp.*, 483 F.2d 963 (1st Cir. 1973) (interpreting Massachusetts law); *Mounsey v. Ellard*, 363 Mass. 693, 297 N.E.2d 43 (1973). *Balach* established a single duty of care toward all lawful visitors and precludes an injured entrant's chance of recovery from being dependent on the "pigeonhole in which the law has put him." 294 Minn. at 167, 199 N.W.2d at 643. The court held an entrant's status is one of many elements to be considered in determining a landowner's liability under ordinary negligence standards and that there is a duty to use reasonable care for the safety of all persons invited upon the premises. See *id.* at 173, 199 N.W.2d at 647. For a list of other factors used to determine the status of an entrant, see *id.* at 174 n.7, 199 N.W.2d at 648 n.7.

California was the first state to abolish the trespasser as well as the invitee-licensee distinction and impose a single standard of reasonable care with the entrant's status being only one factor in determining reasonableness. See *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). Accord, *Smith v. Arbaugh's Restaurant, Inc.*, 460 F.2d 97 (D.C. Cir. 1972), cert. denied, 412 U.S. 939 (1973); *Mile High Fence Co. v. Radovich*, 175 Colo. 537, 489 P.2d 308 (1971), discussed in Comment, *The Foreseeable Emergence of the Community Standard*, 51 DENVER L.J. 145 (1974); *Pickard v. Honolulu*, 51 Haw. 134, 452 P.2d 445 (1969). For discussion of the erosion of the three categories, see Comment, *Landowner's Duty to Entrant Upon Land*, 41 TENN. L. REV. 190 (1973); Comment, *Abrogation of Common-Law Entrant Classes of Trespasser, Licensee, and Invitee*, 25 VAND. L. REV. 623 (1972).

33. The law generally is eliminating immunity. See RESTATEMENT (SECOND) OF TORTS ch. 45A (Tent. Drafts Nos. 18-19, 1972-1973). The editorial committee takes the position that all immunities should be abrogated to the extent there is substantial authority to that effect. See *id.* Note to Institute at 59 (Tent. Draft No. 18, 1972).

Charitable immunity was rejected long ago by the Minnesota court, see *Miller v. Macalester College*, 262 Minn. 418, 115 N.W.2d 666 (1962) (college); *Mulliner v. Evangelischer Diakonissenverein*, 144 Minn. 392, 175 N.W. 699 (1920) (hospital). In the past

rights of invitees and licensees.

The coexistence of these trends has led courts to different fundamental assumptions about recreational use statutes. Although no specific theories have been articulated in the case law, the interpretation given the recreational use statute often depends on which trend is given preference. A consideration of the elements of the recreational use statute follows. The effect of favoring one trend over the other is most evident when considering the land covered by the statute (Section IV.B.) and the persons covered by the statute (Section IV.D.).

IV. ANALYSIS OF THE ELEMENTS OF THE MINNESOTA RECREATIONAL USE STATUTE

The Minnesota recreational use statute, which is typical of recreational use statutes generally, applies to (1) possessors of (2) land who (3) gratuitously assent to the entry of (4) members of the public for (5) recreational use. Each of these elements will be considered in turn. Key elements are "land," "gratuitously," and "members of the public."

A. "Possessors"

The Minnesota recreational use statute grants immunity to persons possessing a present interest in realty, occupants, and persons in control of the premises.³⁴ This is typical in the recreational use statutes and flows logically from the legislative desire to extend immunity to any

fifteen years the Minnesota Supreme Court has abolished sovereign immunity, *see* *Nieting v. Blondell*, ___ Minn. ___, 235 N.W.2d 597 (1975) (abrogated state immunity after August 1, 1976); *Spanel v. Mounds View School Dist.*, 264 Minn. 279, 118 N.W.2d 795 (1962) (abolished governmental immunity as to school districts, municipal corporations, and other subdivisions of government), and intrafamily immunity, *see* *Beaudette v. Frana*, 285 Minn. 366, 173 N.W.2d 416 (1969) (abolished interspousal tort immunity); *Silesky v. Kelman*, 281 Minn. 431, 161 N.W.2d 631 (1968) (abolished immunity of parent from suit by unemancipated child); *Balts v. Balts*, 273 Minn. 419, 142 N.W.2d 66 (1966) (abolished immunity of unemancipated child from suit by parent).

34. MINN. STAT. § 87.021(3) (1976) provides: "'Owner' means the possessor of a fee interest or life estate, a tenant, lessee, occupant or person in control of the premises."

Immunity is also applied to owners of private land leased to the state, unless otherwise agreed in writing. *See id.* § 87.024.

This corresponds to the concept of "possessor" at common-law. *Compare* *Isler v. Burman*, 305 Minn. 288, 232 N.W.2d 818 (1975) (adopting *RESTATEMENT (SECOND) OF TORTS* § 328E (1965) definition of "possessor" of land); *PROSSER*, *supra* note 5, § 58, at 359-60. "Possessor" is not limited to individuals, *see* *Bourn v. Herring*, 225 Ga. 67, 166 S.E.2d 89 (1969) (corporation); *State ex rel. Tucker v. District Court*, 155 Mont. 202, 468 P.2d 773 (1970) (power company). *See also* notes 63-80 *infra* and accompanying text (governmental entities as possessors).

One court has held that an easement is sufficient to qualify its holder as an "owner" of property. *See* *Estate of Thomas v. Consumers Power Co.*, 58 Mich. App. 486, 228 N.W.2d 786, *aff'd in part, rev'd in part on other grounds*, 394 Mich. 459, 231 N.W.2d 653 (1975).

person who has the power, as a practical matter, to grant others access to the land. Typically, the recreational use statutes protect the "owner, lessee or occupant"³⁵ or persons in "control"³⁶ of property, thus encouraging such persons to open an increasing number of areas to beneficial public use. The only significance of this terminology is its emphasis on power rather than title and its corresponding extension of immunity to those who have something of value to trade for the statute's protection.³⁷

35. "Owner, lessee or occupant" is used in: ALA. CODE tit. 47, § 281 (Cum. Supp. 1973); KY. REV. STAT. § 150.645 (1970); LA. REV. STAT. ANN. 9:2791(A) (West 1965); ME. REV. STAT. tit. 12, § 3113 (1974); NEV. REV. STAT. § 41.510(1) (1975); N.H. REV. STAT. ANN. § 212:34(I) (Supp. 1975); N.J. STAT. ANN. § 2A:42A-3(a) (West Cum. Supp. 1977-1978); N.Y. GEN. OBLIG. LAW § 9-103(1)(a) (McKinney Supp. 1976-1977); OHIO REV. CODE ANN. § 1533.18 (Page 1964); TEX. REV. CIV. STAT. ANN. art. 1b(1) (Vernon 1969); WIS. STAT. ANN. § 29.68(1) (West 1973).

Other variations include: CAL. CIV. CODE § 846 (West Cum. Supp. 1977) ("owner of any estate in real property"); FLA. STAT. ANN. § 375.251(2)(a) (West Cum. Supp. 1977) ("owner or lessee"); IND. CODE ANN. § 14-2-6-3 (Burns 1973) ("owners or possessors"); MASS. GEN. LAWS ANN. ch. 21, § 17C (West 1973) ("owner"); MICH. COMP. LAWS ANN. § 300.201 (West Cum. Supp. 1977-1978) ("owner, tenant or lessee"), construed in *Estate of Thomas v. Consumers Power Co.*, 58 Mich. App. 486, 228 N.W.2d 786, *aff'd in part, rev'd in part on other grounds*, 394 Mich. 459, 231 N.W.2d 653 (1975); MONT. REV. CODES ANN. § 67-808 (1970) ("landowner or tenant"); NEB. REV. STAT. § 37-1001 (1974) ("owners of land"); N.C. GEN. STAT. § 113-120.5 (1975) ("owner, lessee or occupant or person in control of premises"); S.D. COMPILED LAWS ANN. § 20-9-5 (Supp. 1977) ("owner, tenant or lessee"); TENN. CODE ANN. § 51-801 (1977) ("legal title holder or owner of said land or premises, and . . . any lessee, occupant or any other person in control of said land or premises"); VA. CODE § 8.01-654.2(a) (1977) ("legal title holder, lessee, occupant or any other person in control of land or premises"); W. VA. CODE § 19-25-5(b) (1977) ("tenant, lessee, occupant or person in control of the premises").

36. "[T]he possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises" is used in the following statutes: ARK. STAT. ANN. § 50-1102(b) (1971); CONN. GEN. STAT. ANN. § 52-557f(b) (West Cum. Supp. 1977); DEL. CODE ANN. tit. 7, § 5902(b) (1974); GA. CODE ANN. § 105-404(b) (1968); IDAHO CODE § 36-1604 (1977); IOWA CODE ANN. § 111C.2(2) (West Cum. Supp. 1977-1978); KAN. STAT. ANN. § 58-3202(b) (1976); MD. NAT. RES. CODE ANN. § 5-1101(e) (1974); OKLA. STAT. ANN. tit. 76, § 10(b) (West 1976); OR. REV. STAT. § 105.655(3) (1975); PA. STAT. ANN. tit. 68, § 477-2(2) (Purdon Cum. Supp. 1977-1978); S.C. CODE ANN. § 51-82(b) (Cum. Supp. 1975); WYO. STAT. ANN. § 34-389.1(b) (Cum. Supp. 1975).

Other statutes using "control" are as follows: ILL. ANN. STAT. ch. 70, § 32(b) (Smith-Hurd Cum. Supp. 1977) ("the possessor of any interest, a tenant, lessee, occupant or person in control of the premises"); MINN. STAT. § 87.021(3) (1976) ("the possessor of a fee interest or a life estate, a tenant, lessee, occupant or person in control of the premises"); N.M. STAT. ANN. § 53-4-5.1(A) (Supp. 1975) ("any owner, lessee, or person in control of lands"); N.D. CENT. CODE § 53-08-01(2) (1974) ("a tenant, lessee, occupant or person in control of the premises"); VT. STAT. ANN. § 5212(a)(2) (1973) ("possessor of a fee in land, or an occupant or person in control of land"); WASH. REV. CODE ANN. § 4.24.210 (Supp. 1976) ("landowner or others in lawful possession and control").

37. *But see* *Estate of Thomas v. Consumers Power Co.*, 58 Mich. App. 486, 493, 288 N.W.2d 786, 790 (utility company holding easement for power poles qualified as "owner" of land within meaning of MICH. COMP. LAWS ANN. § 300.201 (West Cum. Supp. 1977-1978) even though unable to accept "valuable consideration" in return for consent to entry), *aff'd in part, rev'd in part on other grounds*, 394 Mich. 459, 231 N.W.2d 653 (1975).

B. "Land"—the Areas Covered by the Minnesota Recreational Use Statute

A crucial threshold question is the "land"³⁸ covered by the Minnesota recreational use statute. The majority of recreational use statutes apply to "land"³⁹ or "premises"⁴⁰ or "property"⁴¹ and do not differentiate between urban and rural⁴² or government and private land.⁴³ The policy statement in the Minnesota recreational use statute mentions "privately owned" lands.⁴⁴ This leaves two areas of coverage uncertain.

38. "Land" is usually defined broadly. See, e.g., MINN. STAT. § 87.021(2) (1976) (" 'Land' means land, roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to the realty. "). This, along with the typical provision stating the landowner owes no duty to curtail his use of the land during its use for recreational use, see, e.g., MINN. STAT. § 87.0221(d) (1976), indicate a total "sphere" of immunity is intended. See also *State ex rel. Tucker v. District Court*, 155 Mont. 202, 206-07, 468 P.2d 773, 775 (1970) (operation of tram car) ("The overall intent of the [Montana] statute is relief from any and all liability to persons gratuitously entering for recreational purposes. ").

39. See ARK. STAT. ANN. § 50-1101 (1971); CONN. GEN. STAT. ANN. § 52-557g (West Cum. Supp. 1977); DEL. CODE ANN. tit. 7, § 5901 (1974); FLA. STAT. ANN. § 375.251(1) (West 1974); GA. CODE ANN. § 105-403 (1968); IDAHO CODE § 36-1604 (1977); ILL. ANN. STAT. ch. 70, § 31 (Smith-Hurd Cum. Supp. 1977); IOWA CODE ANN. § 111C.1 (West Cum. Supp. 1977-1978); KAN. STAT. ANN. § 58-3201 (1976); MD. NAT. RES. CODE ANN. § 5-1102 (1974); MASS. GEN. LAWS ANN. ch. 21, § 17C (West 1973); MICH. COMP. LAWS ANN. § 300.201 (West Cum. Supp. 1977-1978); MINN. STAT. § 87.01 (1976); NEB. REV. STAT. § 37-1001 (1974); N.M. STAT. ANN. § 53-4-5.1 (Supp. 1975); N.D. CENT. CODE § 53-08-02 (1974); OKLA. STAT. ANN. tit. 76, § 11 (West 1976); OR. REV. STAT. § 105.660 (1975); PA. STAT. ANN. tit. 68, § 477-1 (Purdon Cum. Supp. 1977-1978); S.C. CODE ANN. § 51-81 (Cum. Supp. 1975); S.D. COMPILED LAWS ANN. § 20-9-5 (Supp. 1977); TENN. CODE ANN. § 51-801 (1977); VT. STAT. ANN. tit. 10, § 5212 (1973); WASH. REV. CODE ANN. § 4.24.210 (Supp. 1976); W. VA. CODE § 19-25-1 (1977); WYO. STAT. ANN. § 34-389.1 (Cum. Supp. 1975).

40. See ALA. CODE tit. 47, § 281 (Cum. Supp. 1973); CAL. CIV. CODE § 846 (West Cum. Supp. 1977); IND. CODE ANN. § 14-2-6-3 (Burns 1973); KY. REV. STAT. § 150.645 (1970); LA. REV. STAT. ANN. § 9:2791 (West 1965); ME. REV. STAT. tit. 12, § 3002 (1974); NEV. REV. STAT. § 41.510 (1975); N.H. REV. STAT. ANN. § 212:34 (Supp. 1975); N.J. STAT. ANN. § 2A:42A-3 (West Cum. Supp. 1977-1978); N.Y. GEN. OBLIG. LAW § 9-103 (McKinney Supp. 1976-1977), as amended by Act of May 3, 1977, ch. 91, 1977 N.Y. Sess. Law News 153 (McKinney); N.C. GEN. STAT. § 113-120.5 (1975); OHIO REV. CODE ANN. § 1533.18.1 (Page 1964); TENN. CODE ANN. § 51-801 (1966).

41. See MONT. REV. CODES ANN. § 67-808 (1970); TEX. REV. CIV. STAT. ANN. art. 1b (Vernon 1969).

42. But see, e.g., ILL. ANN. STAT. ch. 70, § 32(a) (Smith-Hurd Cum. Supp. 1976) ("land located outside the corporate limits of a city, village or incorporated town"); VT. STAT. ANN. tit. 10, § 5212(a)(1) (1973) ("areas which are . . . outside of city limits").

43. But see *Estate of Thomas v. Consumers Power Co.*, 58 Mich. App. 486, 495-96, 228 N.W.2d 786, 791 (dictum) ("We perceive a legitimate state purpose . . . in opening up . . . vast areas of vacant but private lands to the use of the general public.") (emphasis added), *aff'd in part, rev'd in part on other grounds*, 394 Mich. 459, 231 N.W.2d 653 (1975); IOWA CODE ANN. § 111C.1 (West Cum. Supp. 1977-1978) ("private owners of land"); WIS. STAT. ANN. § 29.68(5)(b) (West Cum. Supp. 1976) (includes municipal, state, and federal governments in definition of "owner").

44. See MINN. STAT. § 87.01 (1976) ("It is the policy of the state . . . to encourage . . .

First is urban or residential lands. Since over one-half of the population of the state live in urban areas,⁴⁵ this is particularly important. Second is government land, including parks. Ironically, the term "private" in the Minnesota recreational use statute may not foreclose application of the statute to government land. As subsequently discussed, the tort liability of both the state and federal government is determined by deciding whether a "private" person would be liable under like circumstances. The Minnesota recreational use statute potentially could cover all land in the state—city or country, public or private. The existing case law in other states, however, suggests both urban and residential lands, and public parks should be exempted.

1. *The Minnesota Recreational Use Statute and Urban or Residential Lands*

The text of the Minnesota recreational use statute does not distinguish between urban or residential as opposed to purely rural land. The policy behind the Minnesota recreational use statute and the law in other states suggest such a distinction should exist, however. This would leave common-law duties intact to cover urban and residential settings.

Six states limit their recreational use statutes to "agricultural," or similar, lands.⁴⁶ Two other states limit their recreational use statutes to areas outside the corporate limits of a city or town.⁴⁷ One state also limits the statute to 500 feet from a residential or commercial building.⁴⁸ While limited authority exists to the contrary,⁴⁹ the case law considering

the use of privately owned lands and waters by the public").

45. In 1970, 66.4% of Minnesota's population resided in urban areas. This marked a 19.1% increase over 1960. See U.S. BUREAU OF CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF UNITED STATES 1974, at 19 (95th ed. 1974).

46. See COLO. REV. STAT. § 33-41-101 (1973) ("rural areas"); IOWA CODE ANN. § 111C.2(1) (West Cum. Supp. 1977-1978) ("land used for agricultural purposes"); OKLA. STAT. ANN. tit. 76, § 10(a) (West 1976) ("land which is used primarily for farming or ranching activities"); OR. REV. STAT. § 105.655(2) (1975) ("agricultural land, range land, forest land, and lands adjacent or contiguous to the ocean shore"), construed in *Tijerina v. Cornelius Christian Church*, 273 Or. 58, 539 P.2d 634 (1975) (in banc) (O'Connell, C.J.); S.D. COMPILED LAWS ANN. § 20-9-5 (Supp. 1977) ("rural real estate used exclusively for agricultural purposes"); WASH. REV. CODE ANN. § 4.24.210 (Supp. 1976) ("agricultural or forest lands or water areas or channels and rural lands adjacent to such areas or channels"). But see *Stone Mt. Mem'l Ass'n v. Herrington*, 225 Ga. 746, 749, 171 S.E.2d 521, 523 (rejects argument that RUS was intended to apply only to land such as that owned by farmers because the Georgia statute has no specific limitation), *rev'g* 119 Ga. App. 658, 168 S.E.2d 633 (1969).

47. See ILL. ANN. STAT. ch. 70, § 32(a) (Smith-Hurd Cum. Supp. 1977) ("lands located outside the corporate limits of a city, village or incorporated town and not subdivided into blocks and lots"); VT. STAT. ANN. tit. 10, § 5212(a)(1) (1973) ("areas which are: (A) unposted, and (B) more than 500 feet from any residential or commercial building, and (C) outside of city limits").

48. See VT. STAT. ANN. tit. 10, § 5212(a)(1) (1973).

49. See *Herring v. Hauck*, 118 Ga. App. 623, 625, 165 S.E.2d 198, 200 (1968) (Jordon,

the meaning of "land" within the context of recreational use statutes generally reaches a similar conclusion. The leading decision of *Boileau v. De Cecco*,⁵⁰ a case in which a New Jersey court considered the application of its state's recreational use statute to a private swimming pool in a residential area, illustrates the rationale. An invited adult guest dove into the shallow end of the pool, fractured his neck, and eventually died of the injuries sustained. A wrongful death action was brought against the homeowner, alleging negligence in the construction and maintenance of the pool. The homeowner pleaded immunity under the New Jersey recreational use statute as a defense and was granted a summary judgment by the trial court. On appeal, the appellate court reversed, holding that the recreational use statute did not apply. The court relied on the broad definition of "sport and recreational activities" enumerated in the New Jersey recreational use statute,⁵¹ the statute's references to "posting" of land,⁵² which would be expected only to apply to rural or semi-rural tracts of land, and the recent trend in public policy to eliminate islands of tort immunities.⁵³ The court reasoned the statute covered only activities conducted in the "true outdoors not in someone's backyard"⁵⁴ and held the recreational use statute inapplicable to

P.J., concurring specially) (would apply Georgia RUS to residential settings); *Villanova v. American Fed. of Musicians Local 16*, 123 N.J. Super. 57, 301 A.2d 467 (Super. Ct. App. Div.) (by implication) (applied to park; however, no "recreational" use found), *petition for certification denied*, 63 N.J. 504, 308 A.2d 669 (1973); *Estate of Thomas v. Consumers Power Co.*, 58 Mich. App. 486, 228 N.W.2d 786 (*semble*) (undeveloped property within city limits), *aff'd in part, rev'd in part on other grounds*, 394 Mich. 459, 231 N.W.2d 653 (1975); *McWilliams v. Guzinski*, 71 Wis. 2d 57, 75-76, 237 N.W.2d 437, 446 (1976) (R. Hansen, J., dissenting, joined by Hanley & C. Hansen, JJ.) (interprets *Goodson v. Racine*, 61 Wis. 2d 554, 213 N.W.2d 16 (1973), as authority for applying Wisconsin statute to urban and residential areas).

50. 125 N.J. Super. 263, 310 A.2d 497 (Super. Ct. App. Div. 1973), *aff'd mem.*, 65 N.J. 234, 323 A.2d 449 (1974).

51. N.J. STAT. ANN. § 2A:42A-2 (West Cum. Supp. 1977-1978) ("sport and recreational activities" means and includes: hunting, fishing, trapping, horseback riding, training of dogs, hiking, camping, picnicking, swimming, skating, skiing, sledding, tobogganing and any other outdoor sport, game and recreational activity including practice and instruction").

52. N.J. STAT. ANN. § 2A:42A-3 (West Cum. Supp. 1977-1978) ("whether or not posted"). *Accord*, MD. NAT. RES. CODE ANN. § 5-1107 (1974); VT. STAT. ANN. tit. 10, § 5212(a)(1) (1973). The New York statute does not contain an express reference to posting, but the legislative history of the statute indicates that it was meant to affect lands which otherwise might be "posted." See 1956 N.Y. Laws 2016. An earlier version of the Minnesota RUS also contained reference to posting. See Act of Apr. 9, 1963, ch. 207, § 1, 1963 Minn. Laws 302 (repealed 1971).

53. 125 N.J. Super. at 266, 310 A.2d at 499.

54. *Id.* at 257, 310 A.2d at 500. *Accord*, *Villanova v. American Fed. of Musicians Local 16*, 123 N.J. Super. 57, 59, 301 A.2d 467, 469 (Super. Ct. App. Div.), *petition for certification denied*, 63 N.J. 504, 308 A.2d 669 (1973). *But see* Act of June 8, 1971, ch. 946, § 1, 1971 Minn. Laws 1977 (deleting "outdoors" from policy statement on recreational purposes) (now codified at MINN. STAT. § 87.01 (1976)).

"homeowners in suburbia."⁵⁵ Courts in Georgia⁵⁶ and arguably Oregon⁵⁷ have reached similar results.

Limiting the Minnesota recreational use statute to rural areas is desirable. The purpose of the statute is to make available additional rural land areas which would not otherwise have been open to the public, such as farmlands and other open areas. If the Minnesota recreational use statute is applied to urban settings, every backyard, sandlot, home, office, or factory might be covered. The immunity of the statute would extend only to persons engaged in "recreational" activities but because of the broad definition of that term in the statute⁵⁸ it is entirely possible activities such as tours in factories or public buildings or even sporting events could be covered.

A court could avoid injustice on a case-by-case basis or even imply a broad "urban" exemption, but the exactness the statute needs cannot easily be supplied without entering the area of legislation. Many of the recreational use statutes from other states use only general terms such as "rural" or "agricultural" land.⁵⁹ The distinction between "urban" and "rural" is a common one in Minnesota legislation⁶⁰ but such a general distinction might be difficult to implement because of the central position the consent of the landowner plays in the application of the recreational use statute. Uncertainty by landowners about the coverage of the recreational use statute undoubtedly would be resolved against recreational users. Thus a more definitive standard should facilitate use

55. *Id.* at 267, 310 A.2d at 500.

56. *Shepard v. Wilson*, 123 Ga. App. 74, 179 S.E.2d 550 (1970) (*semble*) (vacant lot in residential area), *cert. denied*, 123 Ga. App. 872, 179 S.E.2d 550 (1971); *Herring v. Hauck*, 118 Ga. App. 623, 165 S.E.2d 198 (1968) (*semble*) (swimming pool in residential area).

57. *See Tijerina v. Cornelius Christian Church*, 273 Or. 58, 63-64, 539 P.2d 634, 636-37 (1975) (in banc) (O'Connell, C.J.). A neophyte softball player was injured when he stepped in a hole in a field held open to the public by a local church. Although the three and one-half acre field on which the church maintained a backstop was within the city boundaries, the church contended that the land qualified as "agricultural land" within the meaning of the Oregon RUS, *see OR. REV. STAT. § 105.655(2)* (1975), because of the presence of some natural grain. Reasoning that the legislature wished to avoid a grant of immunity to all recreational land by the use of the more restrictive "agricultural lands," the court held that the application of the statute was limited to "landholdings which tended to have recreational value but not be susceptible to adequate policing or correction of dangerous conditions." 273 Or. at 64, 539 P.2d at 637. The holding thus appears broad enough to support the nonapplication of a RUS to residential areas.

58. MINN. STAT. § 87.021(4) (1976) defines "recreational purpose" to include, but not limited to: hunting, trapping, fishing, swimming, boating, camping, picnicking, hiking, bicycling, horseback riding, pleasure driving including snowmobiling and the operation of any motorized vehicle or conveyance upon a road or upon or across any land in any manner whatsoever, nature study, water skiing, *winter sports, and viewing or enjoying historical, archaeological, scenic or scientific sites* (emphasis added).

59. The statutes are collected in note 46 *supra*.

60. *See, e.g.*, MINN. STAT. § 347.22 (1976) ("dog bite" statute limited to "urban" areas); *id.* § 504.07 (special holding over provisions applied only to less of "urban" real estate).

of the statute. Perhaps the best approach would be to follow the lead of several states and precisely limit the application of the Minnesota recreational use statute to areas outside the territorial limits of towns or cities and also outside given distances from residential or commercial buildings.⁶¹ While such an approach might be thought unduly mechanical and also slightly underinclusive,⁶² the gains in certainty of application should outweigh any imperfections of inclusion.

2. *The Minnesota Recreational Use Statute and Government Lands*

An important issue is whether the Minnesota recreational use statute applies to state and federal land, most importantly, parks. Under both the Minnesota Tort Claims Act⁶³ and the Federal Tort Claims Act,⁶⁴ the liability of the respective governmental units is that of a "private" person under like circumstances.⁶⁵ Moreover, the standard of care under the federal act is measured by the state law where the negligence occurs.⁶⁶ Thus, the liability of both the state and federal governments rests upon a reading of the Minnesota recreational use statute.

The key issue which a Minnesota court must resolve is whether state and federal lands are covered by the Minnesota recreational use statute because of the "private" person standard used by the tort claims acts.

61. By combining the language of the Illinois and Vermont statutes, the definition of "land" in the Minnesota RUS could be amended to include the following: "Land" means areas outside of the corporate limits of a city or town and not subdivided into blocks or lots and more than 500 feet from any residential or commercial building." *Compare* MINN. STAT. § 87.021(2) (1976) *with* ILL. ANN. STAT. ch. 70, § 32(a) (Smith-Hurd Cum. Supp. 1977) *and* VT. STAT. ANN. tit. 10, § 5212(a)(1) (1973).

The exclusion of residential and commercial areas would also avoid possible conflict with respect to applying the statute to many classes of social guests and business invitees. This aspect of the statute is discussed in notes 109-14 *infra* and accompanying text.

62. The need for use of private urban lands for recreation may, in some instances, be acute. Vacant lots or large private holdings could serve as recreational land for persons in urban areas. *See* *Estate of Thomas v. Consumers Power Co.*, 58 Mich. App. 486, 228 N.W.2d 786 (Michigan statute applied to snowmobiling on fairgrounds within city limits), *aff'd in part, rev'd in part on other grounds*, 394 Mich. 459, 231 N.W.2d 653 (1975); *O'Connell v. Forest Hill Field Club*, 119 N.J. Super. 386, 291 A.2d 386 (Super. Ct. Law Div. 1972) (golf course). *But see* *Tijerina v. Cornelius Christian Church*, 273 Or. 58, 539 P.2d 634 (1975) (in banc) (Oregon statute not applied to 3-1/2 acre field used for softball within boundaries of city). The closer proximation to public parks should help satisfy this demand, however.

63. MINN. STAT. § 3.736 (1976).

64. Tort Claims Act, 28 U.S.C. §§ 2671-2680 (1970 & Supp. V 1975).

65. The Minnesota act extends liability "under circumstances where the state, if a private person, would be liable to the claimant." MINN. STAT. § 3.736(1) (1976). The federal act provides that the United States shall be liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674 (1970).

66. 28 U.S.C. § 1346(b) (1970). *See, e.g.,* *United States v. Muniz*, 374 U.S. 150, 152-54 (1962); *Buchanan v. United States*, 305 F.2d 738, 742 (8th Cir. 1962) (Blackmun, J.).

Two different approaches have been taken by the cases in other states. Under the first, the recreational use statute would apply to all government lands, including parks. Under the second, public parks would be excluded.

Two federal district court decisions⁶⁷ and one commentator⁶⁸ follow the first approach. The cases involved a visitor in Yellowstone National Park,⁶⁹ and a user of a wayside rest maintained by the federal government,⁷⁰ respectively. In each the court found the "private person" test of the Federal Tort Claims Act required the state recreational use statute be applied to the federal government.⁷¹ Under the rationale of these decisions, persons entering public land, including parks, are treated as if they were entering private land. If no consideration is asked for entry, the owner of the land, in this case the government, is protected by the statute.

This approach is an easy one to follow; however, it should not be adopted in Minnesota. It furthers the purposes of neither the tort claims acts nor the recreational use statute. Government tort immunity was abolished to place governmental entities on an even footing with individuals.⁷² Applying the recreational use statute to public parks would place the government in a superior position by relieving it of duties it previously owed to entrants and "sacrifice good sense to a syllogism."⁷³ The rationale behind the recreational use statute is that the acceptance of the lower standard of care by the entrant is the quid pro quo for a new right of entry. In return for accepting this greater risk, persons who otherwise would have been refused are allowed to enter. The "benefit"—a new right of entry—does not attach to the use of public parks. A citizen always has enjoyed the right to enter public recreational land. Applying the recreational use statute to public recreational areas

67. See *Smith v. United States*, 383 F. Supp. 1076 (D. Wyo. 1974), *aff'd*, 546 F.2d 872 (10th Cir. 1976); *Hamilton v. United States*, 371 F. Supp. 230 (E.D. Va. 1974).

68. See Comment, *The Status of Visitors in the National Parks Located in Wyoming—Federal Liability Under Current Applicable Wyoming Law*, 2 LAND & WATER L. REV. 447, 457-60 (1967).

69. *Smith v. United States*, 383 F. Supp. 1076 (D. Wyo. 1974) (Canadian youth was severely burned after falling into a thermal pool located in an undeveloped area within Yellowstone National Park in which foot travel was not allowed), *aff'd*, 546 F.2d 872 (10th Cir. 1976).

70. *Hamilton v. United States*, 371 F. Supp. 230 (E.D. Va. 1974) (woman was injured from fall off cliff after proceeding through a cut chain link fence encircling an overlook on the George Washington Memorial Parkway).

71. See *Smith v. United States*, 383 F. Supp. 1076, 1081 (D. Wyo. 1974), *aff'd*, 546 F.2d 872 (10th Cir. 1976); *Hamilton v. United States*, 371 F. Supp. 230, 234 (E.D. Va. 1974).

72. See, e.g., *Feres v. United States*, 340 U.S. 135, 139 (1950); *Panella v. United States*, 216 F.2d 622, 624 (2d Cir. 1954); *McNamara v. United States*, 199 F. Supp. 879, 880-81 (D.D.C. 1961).

73. O.W. HOLMES, *THE COMMON LAW* 36 (1881).

deprives citizens of existing rights without granting them an offsetting benefit. The equation of interests does not balance. The application of recreational use statutes to public parks therefore is unwarranted.⁷⁴

In contrast, two Wisconsin state court decisions hold the recreational use statute inapplicable to municipal and state parks.⁷⁵ The rationale used is that since governmental units had previously encouraged their citizens to make use of public parks, any attempted inclusion by the legislature of such units in the recreational use statute would be purposeless.⁷⁶ This approach assumes with respect to government lands previously open to the public that existing rights of entrants are to be undisturbed, and is preferable. It preserves both the legitimate expectations of the citizens entering public park areas and the purpose of governmental immunity.⁷⁷

74. Moreover, the specific facts of the first decision, *Smith v. United States*, 383 F. Supp. 1076 (D. Wyo. 1974), *aff'd*, 546 F.2d 872 (10th Cir. 1976), although it involved a visitor to Yellowstone National Park, indicate the injury received by the visitor took place in an area not otherwise open to the public. The visitor had purposely avoided warning signs and proceeded to enter a particularly dangerous hot spring area where subsequently he was burned. See 383 F. Supp. at 1079. Similarly, *Hamilton v. United States*, 371 F. Supp. 230 (E.D. Va. 1974), involved an injury to a visitor who left an area normally open for recreational use. The injury occurred when the visitor climbed over a retaining wall and through a cut chain link fence into an area adjacent to an overlook on the George Washington Memorial Parkway owned by the United States Department of Interior. While in this area, which was not open to the public, she slid off a cliff having a sheer drop of 75 to 100 feet. See 371 F. Supp. at 232-33.

To cite these decisions as holding that in all instances the recreational use statute should apply to federal areas held open to the general public for recreational use is unwarranted. At best, these decisions stand only for the proposition that even members of the public entering public lands prepared for recreational use will become trespassers and not be protected when they leave those areas and assume the risks of dangers existing in areas not normally open to the public. The cases are merely examples of leaving the area of invitation. Compare *Firfer v. United States*, 208 F.2d 524 (D.C. Cir. 1953) (area of invitation at Jefferson Memorial); PROSSER, *supra* note 5, § 69, at 391-92. Thus, their precedential value as cases applying the RUS to public parks is in doubt.

75. See *Cords v. Ehly*, 62 Wis. 2d 31, 35, 214 N.W.2d 432, 434 (1974) (state); *Goodson v. Racine*, 61 Wis. 2d 554, 213 N.W.2d 16 (1973) (municipal). But see *Stone Mt. Mem'l Ass'n v. Herrington*, 225 Ga. 746, 747, 171 S.E.2d 521, 523 (park of governmental entity), *rev'g* 119 Ga. App. 658, 168 S.E.2d 633 (1969). Although the case report does not disclose the fact, Stone Mountain Memorial Association is an authority of the state, "a body corporate and politic and instrumentality of the state of Georgia." Telephone conversation with Steve Doster, assistant manager of Stone Mountain Memorial Association, Stone Mountain, Georgia (Aug. 17, 1977).

The *Goodson* court also held limiting the statute to private land was not an unreasonable (and thus unconstitutional) classification. 62 Wis. 2d at 561, 214 N.W.2d at 20.

76. *Goodson v. Racine*, 61 Wis. 2d 554, 559, 213 N.W.2d 16, 19 (1973). The *Cords* decision merely cited *Goodson* as controlling. See *Cords v. Ehly*, 62 Wis. 2d 31, 35, 214 N.W.2d 432, 434 (1974).

77. An alternative approach would be to apply a recreational use statute to government-owned property used in a proprietary capacity but not apply it to property used in a governmental function (which would include the providing of parks). See *Anderson v.*

A suggested approach to applying the Minnesota recreational use statute to government lands and also to harmonizing most of the decisions involving government lands is to read the term "private" in the Minnesota statute in terms of *access*, rather than *ownership*.⁷⁸ The purpose of the recreational use statute is to open lands which otherwise would not be open to the public for recreational use. While public parks should not be included, there is no compelling reason to exclude all government land. To provide maximum access for the public, it would be beneficial to open not only privately-owned lands which were "private" in terms of access of the public for recreational use, but also government-owned lands which were "private" in terms of access of the public for recreational use. Thus, "private" under this analysis would correspond to areas not otherwise available for public recreational use, whether the land itself is privately or publicly owned.

A decision illustrative of this approach is an early Wisconsin federal district court decision, *Garfield v. United States*,⁷⁹ which applied the Wisconsin recreational use statute to hunters on a federal military reservation. Unlike a park, the reservation was a type of land not usually held open to the public for recreational use. In return for accepting a lower duty of care the entrant received a right of entry which he would not otherwise have as a member of the public. Although not speaking in these terms, the court thus applied the statute to government land which was "private" in terms of access for recreational use. All the other decisions to apply a recreational use statute to government land other

Brown Bros., 65 Mich. App. 409, 418 & n.6, 237 N.W.2d 528, 532 & n.6 (1976).

After the dates of the Wisconsin decisions discussed in the text the Wisconsin recreational use statute was amended in 1975 (effective March 25, 1976) to redefine "owner" to mean "any private citizen, a municipality . . . the state, or the U. S. government . . ." At the same time the definition of "valuable consideration" was amended to exclude (1) payments to landowners of amounts of \$25 or less annually and (2) entrance fees paid to the state, municipal, or federal government. See Act of Mar. 24, 1975, ch. 179, § 5, 1975 Wis. Laws 570 (codified as Wis. STAT. ANN. § 29.68(5)(b), (c) (West Supp. 1976)). Thus, public parks in Wisconsin, along with all other government-owned land, apparently are now subject to the statute. The reasoning of the court decisions holding the Wisconsin statute inapplicable to parks is still sound, however, and should be followed in states where such restrictive language does not exist.

78. Such an analysis would not apply to a state, such as Iowa, that excludes land owned by "the state . . . its political subdivisions, or any public body or any agencies, departments, boards or commissions thereof." See IOWA CODE ANN. § 111C.2(2) (West Cum. Supp. 1977-1978). Iowa is the only state to use such language. The remaining states do not so exclude state land.

79. 297 F. Supp. 891 (W.D. Wis. 1969). While a subsequent Wisconsin state court decision declined to follow this case as precedent for applying the recreational use statute to public parks, see *Goodson v. Racine*, 61 Wis. 2d 554, 560, 213 N.W.2d 16, 19 (1973), the decision nonetheless is consistent with applying the recreational use statute to government land. Wisconsin later amended its statute to include government-owned land. See note 77 *supra*.

than park areas accord with this analysis.⁸⁰

In summation, the Minnesota recreational use statute should not apply to public parks and other government lands which normally are held open to the public for recreational use; however, the statute could be applied properly to government land otherwise closed to public recreation.

C. "Gratuitously"—the Benefits the Landowner May Exact

Application of a recreational use statute is contingent upon gratuitous entry. This indicates a legislative intent to deny protection to landowners motivated by self-interest and expectations of financial gain. The legislature bargained on behalf of the public for the landowner's consent to entry by offering tort immunities. The gratuitous permission requirement gives the landowner a choice—give consent in exchange for the tort immunities, or give consent in exchange for benefits exacted from the recreation-seeking entrant. He cannot exact both.

Recreational use statutes utilize a variety of language to express this concept. Some states deny coverage if "commercial" activity⁸¹ is involved or "consideration"⁸² is given in return for entry. One state simply

80. See *Gard v. United States*, 420 F. Supp. 300 (N.D. Cal. 1976) (hiker and abandoned mine on federal land); *English v. Marin Mun. Water Dist.*, 66 Cal. App. 3d 725, 136 Cal. Rptr. 224 (Ct. App. 1977) (motorcyclist and excavation used to accommodate large water tank on land owned by water district); *Denton v. L.W. Vail Co.*, ___ Or. App. ___, 541 P.2d 511 (1975) (motorcyclist and area of highway construction not yet open to public on land owned by federal government).

81. See ALA. CODE tit. 47, § 283(b) (Cum. Supp. 1973) ("[entry] was granted for commercial enterprise for profit"); COLO. REV. STAT. § 33-41-104(1)(d) (1973) (statute does not affect "injury received on land incidental to the use of land on which a commercial or business enterprise of any description is being carried on"); CONN. GEN. STAT. ANN. § 52-557g(a) (West Cum. Supp. 1977) ("makes all or any part of such land available to the public without charge, rent, fee or other commercial service"); FLA. STAT. ANN. § 375.251(2)(b) (West 1974) ("any charge made or usually made for entering or using such park areas, or any part thereof, or if any commercial or other activity for profit is conducted on [part of the land]"); LA. REV. STAT. ANN. § 9:2791 (West 1965) ("premises are used principally for a commercial, recreational enterprise for profit"); MD. NAT. RES. CODE ANN. § 5-1101(b) (1974) ("'Charge' means price or fee asked for services, entertainment, recreation performed, or products offered for sale on land or in return for invitation or permission to enter or go upon the land."); TEX. REV. CIV. STAT. ANN. art. 1b(4) (Vernon 1969) ("uses the premises or any part thereof, or permits the use of the premises or any part thereof, as a commercial recreational enterprise for purposes of profit, or . . . makes a charge for permission to enter the premises, other than that levied against those who remove game from the premises in such sum as may reasonably be required for the replacement of such game"). See also IND. CODE ANN. § 14-2-6-3 (Burns 1973) ("the provisions of this [statute] shall not be construed as affecting the existing case law of Indiana of liability of owners or possessors of premises with respect to business invitees in commercial establishments").

82. See CAL. CIV. CODE § 846 (West Cum. Supp. 1977) ("consideration"); IND. CODE ANN. § 14-2-6-3 (Burns 1973) ("payment of monetary consideration"); KY. REV. STAT. §

uses "gratuitously."⁸³ Other states,⁸⁴ including Minnesota,⁸⁵ deny coverage if there is a "charge"; this in turn usually is defined as the "admission price or fee received in return for invitation or permission to enter or go upon the land."⁸⁶ Consistent with a policy to encourage

150.645 (1970) ("consideration"); ME. REV. STAT. tit. 12, § 3004 (1974) ("consideration"); MICH. COMP. LAWS ANN. § 300.201 (West Cum. Supp. 1977-1978) ("valuable consideration"); MONT. REV. CODES ANN. § 67-808 (1970) ("valuable consideration"); NEV. REV. STAT. § 41.510(3)(b) (1975) ("consideration"); N.H. REV. STAT. ANN. § 212:34(III)(b) (Supp. 1975) ("consideration"); N.J. STAT. ANN. § 2A:42A-4(b) (West Cum. Supp. 1977-1978) ("consideration"); N.Y. GEN. OBLIG. LAW § 9-103(2)(b) (McKinney Supp. 1976-1977) ("consideration other than [certain specified dog training programs]"); OHIO REV. CODE ANN. § 1533.18(B) (Page Supp. 1975) ("fee or consideration"); S.D. COMPILED LAWS ANN. § 20-9-5 (Supp. 1977) ("valuable consideration"); TENN. CODE ANN. § 51-805(2) (1966) ("consideration"); VA. CODE § 8.01-654.2(d) (1977) ("consideration"); WIS. STAT. ANN. § 29.68 (West 1973 & Supp. 1976) ("Valuable consideration' does not include contributions to the sound management and husbandry of natural and agricultural resources of the state resulting directly from recreational activity, payments to landowners either in money or in kind, if the payment does not have a value in excess of \$25 annually, or those entrance fees paid to the state, its agencies or departments, municipalities . . . or the U. S. government."), *construed in* Garfield v. United States, 297 F. Supp. 891 (W.D. Wis. 1969), and Copeland v. Larson, 46 Wis. 2d 337, 174 N.W.2d 745 (1970), and discussed in Note, *Liability of Landowner to Persons Entering for Recreational Purposes*, 1964 Wis. L. Rev. 705.

83. VT. STAT. ANN. tit. 10, § 5212(b) (1973).

84. ARK. STAT. ANN. § 50.1106(b) (1971); COLO. REV. STAT. § 33-41-104(1)(b) (1973); CONN. GEN. STAT. ANN. § 52-557g(a) (West Cum. Supp. 1977); DEL. CODE ANN. tit. 7, § 5906(b) (1974); FLA. STAT. ANN. § 375.251(2)(b) (West 1974) ("charge made or usually made"); GA. CODE ANN. § 105-408(b) (1968); IDAHO CODE §§ 36-1604 ("charge"), -1604(f) (3) ("compensation") (1977); ILL. ANN. STAT. ch. 70, § 36(b) (Smith-Hurd Cum. Supp. 1977); IOWA CODE ANN. § 111C.6(2) (West Cum. Supp. 1977-1978); KAN. STAT. ANN. § 58-3206(b) (1976); MD. NAT. RES. CODE ANN. § 5-1104 (1974); MASS. GEN. LAWS ANN. ch. 21, 17C (West 1973); NEB. REV. STAT. § 37-1005(2) (1974); OKLA. STAT. ANN. tit. 76, § 12 (West 1976); OR. REV. STAT. § 105.675(2) (1975); PA. STAT. ANN. tit. 68, § 477-4 (Purdon Cum. Supp. 1977-1978); S.C. CODE ANN. § 51-84 (Cum. Supp. 1975); TEX. REV. CIV. STAT. ANN. art. 1b(4)(2) (Vernon 1969); WASH. REV. CODE ANN. § 4.24.210 (Supp. 1976) ("charging a fee of any kind"); W. VA. CODE ANN. § 19-25-4(b) (1977); WYO. STAT. ANN. § 34-389.5(b) (Cum. Supp. 1975).

85. MINN. STAT. § 87.025(b) (1976). *See also id.* § 87.021(5) ("Charge' means the admission price or fee received in return for invitation or permission to enter or go upon the land.").

86. *See* ARK. STAT. ANN. § 50-1102(d) (1971) ("Charge' means the admission price or fee asked in return for invitation or permission to enter or go upon the land."); COLO. REV. STAT. § 33-41-102(1) (1973) ("Charge' means a consideration paid for entry upon or use of the land or any facilities thereon or adjacent thereto."); CONN. GEN. STAT. ANN. § 52-557f(d) (West Cum. Supp. 1977) ("Charge' means the admission price or fee asked in return for invitation or permission to enter or go upon the land."); DEL. CODE ANN. tit. 7, § 5902(d) (1974) ("Charge' means the admission price or fee asked in return for invitation or permission to enter or go upon the land."); FLA. STAT. ANN. § 375.251(3) (West 1974) ("any charge made or usually made for entering or using such [land]"); GA. CODE ANN. § 105-404(d) (1968) ("Charge' means the admission price or fee asked in return for invitation or permission to enter or go upon the land."), *construed in* Bourn v. Herring, 225 Ga. 67, 166 S.E.2d 89 (1969); IDAHO CODE § 36-1604(a) (1977) ("without

landowners to open land for public recreation, however, most states,⁸⁷

charge"); ILL. ANN. STAT. ch. 70, § 32(d) (Smith-Hurd Cum. Supp. 1977) ("Charge" means the admission price of fee asked in return for invitation or permission to enter or go upon the land."); IOWA CODE ANN. § 111C.2(4) (West Cum. Supp. 1977-1978) ("Charge" means any consideration, the admission price or fee asked in return for invitation or permission to enter or go upon the land."); KAN. STAT. ANN. § 58-3202(d) (1976) ("Charge" means the admission price or fee asked in return for invitation or permission to enter or go upon the land."); MD. NAT. RES. CODE ANN. § 5-1101(b) (1974) ("Charge" means price or fee asked for services, entertainment, recreation performed, or products offered for sale on land or in return for invitation or permission to enter or go upon the land."); MASS. GEN. LAWS ANN. ch. 21, § 17C (West 1973) ("a charge or fee"); NEB. REV. STAT. § 37-1108 (1974) ("charge shall mean the amount of money asked in return for an invitation to enter or go upon the land"); OKLA. STAT. ANN. tit. 76, § 10(d) (West 1976) ("Charge" means the admission price or fee asked in return for invitation or permission to enter or go upon the land."); OR. REV. STAT. § 105.655 (1975) ("Charge" means the admission price or fee asked by any owner in return for invitation or permission to enter or go upon his land."); PA. STAT. ANN. tit. 68, § 477-2(4) (Purdon Cum. Supp. 1977-1978) ("Charge" means the admission price or fee asked in return for invitation or permission to enter or go upon the land."); S.C. CODE ANN. § 51-82(d) (Cum. Supp. 1975) ("Charge" means the admission price or fee asked in return for invitation or permission to enter or go upon the land."); TEX. REV. CIV. STAT. ANN. art. 1b(4)(2) (Vernon 1969) ("makes a charge for permission to enter the premises, other than that levied against those who remove game from the premises in such sum as may reasonably be required for the replacement of such game"); WASH. REV. CODE ANN. § 4.24.210 (Supp. 1976) ("charging a fee of any kind"); W. VA. CODE ANN. § 19-25-5(d) (1977) ("charge" shall mean the amount of money asked in return for an invitation to enter or go upon the land"), construed in *Kesner v. Trenton*, ___ W. Va. ___, ___, 216 S.E.2d 880, 884-86 (1975); WYO. STAT. ANN. § 34-389.1(d) (Cum. Supp. 1975) ("Charge" means the admission price or fee asked in return for invitation or permission to enter or go upon the land.").

87. All but nine states have such provisions. All those that do, include the state, many also include subdivisions of the state. A few include payments by the federal government. See ARK. STAT. ANN. § 50-1105 (1971) (state or subdivision); COLO. REV. STAT. § 33-41-104(b) (1973) (state or federal government or political subdivision); CONN. GEN. STAT. ANN. § 52-557g(c) (West Cum. Supp. 1977) (state or subdivision); DEL. CODE ANN. tit. 7, § 5905 (1974) (state or subdivision); FLA. STAT. ANN. § 375.251(3)(a) (West 1974) (state); GA. CODE ANN. § 105-407 (1968) (state or subdivision); IDAHO CODE § 36-1604(e) (1977) (state or subdivision); ILL. ANN. STAT. ch. 70, § 35 (Smith-Hurd Cum. Supp. 1977) (state or subdivision); IND. CODE ANN. § 14-2-6-3 (Burns 1973) (agency of the state or federal government); IOWA CODE ANN. § 111C.5 (West Cum. Supp. 1977-1978) (state or federal government or any agency or subdivision); KAN. STAT. ANN. § 58-3205 (1976) (state or subdivision); ME. REV. STAT. tit. 12, § 3004 (1974) (state); MD. NAT. RES. CODE ANN. § 5-1105 (1974) (state or political subdivision); MASS. GEN. LAWS ANN. ch. 21, § 17C (West 1973) (commonwealth or political subdivision); NEB. REV. STAT. § 37-1004 (1974) (state); NEV. REV. STAT. § 41.510 (1975) (state or subdivision); N.H. REV. STAT. ANN. § 212:34(III)(b) (Supp. 1975) (state); N.J. STAT. ANN. § 2A:42A-4 (West Cum. Supp. 1977-1978) (state); N.M. STAT. ANN. § 53-4-5.1(A) (Supp. 1975) (state or federal government or any other governmental agency); N.Y. GEN. OBLIG. LAW § 9-103(2)(b) (McKinney Supp. 1976-1977) (state); N.C. GEN. STAT. § 113-120.6 (1975) (state or other governmental unit); N.D. CENT. CODE § 53-08-04 (1974) (state or political subdivisions); OHIO REV. CODE ANN. § 1533.18 (Page Supp. 1976) (state or agency); OKLA. STATE. ANN. tit. 76, § 13 (West 1976) (state or subdivision); OR. REV. STAT. § 105.670 (1975) (state or political subdivision); PA. STAT. ANN. tit. 68, § 477-5 (Purdon Cum. Supp. 1977-1978) (state or subdivision); S.C. CODE ANN. § 51-85 (Cum. Supp. 1975) (state or political subdivision); S.D. COMPILED LAWS

including Minnesota,⁸⁸ exclude consideration or fees received by landowners for leasing land to the government for recreational purposes.

Under the Minnesota statute an important issue is whether "admission price or fee" may consist of nonmonetary benefits. On the one hand there is a need to encourage the opening of private lands for recreation. This requires standards which are clear, certain, and easy to apply. If the landowner doubts the extent of his protection he may not give his consent. Thus there could be support for construing "admission price or fee" to mean only realized monetary benefits, such as cash or checks. On the other hand there is a need to construe "charge" broadly. Otherwise, the landowner could enjoy both immunity and substantial nonmonetary benefits such as goodwill.⁸⁹

The case law in other states is conflicting. Three states have dealt with the issue. In a Georgia case,⁹⁰ a dairy company maintained a farm, processing plant, and distribution facilities, together with a lake resort and picnic grounds for advertising purposes. The dairy welcomed visitors with signs, conducted tours, and distributed literature and samples of its products. During one of the activities so encouraged a fourteen-year-old boy drowned in the swimming area maintained on the premises. An intermediate appellate court held a complaint alleging these facts sufficient, if proven, to make the child an invitee, without mentioning the statute.⁹¹ The Georgia Supreme Court, relying on its state's recreational use statute, held such goodwill was not a "charge."⁹² The court found the dairy was not responsible unless it willfully and maliciously failed to guard or warn the child against a dangerous condition. Yet the unrealized benefit and expectation of benefits from goodwill were obvious motivations behind the landowner's consent to entry. In a second case⁹³ the same court held a parking fee was not a "charge." A

ANN. § 20-9-5 (Supp. 1977) (state or federal government); TENN. CODE ANN. § 51-805 (1977) (state, federal government or any other governmental agency); VA. CODE § 8.01-654.2(d) (1977) (state, federal government or any other governmental agency); W. VA. CODE § 19-25-3 (1977) (state, county or municipality or any agency); WIS. STAT. ANN. § 29.68(3) (Supp. 1976) (state); WYO. STAT. § 34-389.4 (Cum. Supp. 1975) (state or subdivision).

88. MINN. STAT. § 87.024 (1976) (state or subdivision).

89. Note, *Liability of Landowner to Persons Entering for Recreational Purposes*, 1964 WIS. L. REV. 705, 710-11. See Beckwith, *Developments in the Law of Historic Preservation and a Reflection on Liberty*, 12 WAKE FOREST L. REV. 93, 126 (1976).

90. *Bourn v. Herring*, 225 Ga. 67, 166 S.E.2d 89, appeal to supreme court from grant of summary judgment against amended complaint dismissed for failure to raise a constitutional question *sub nom.* *Herring v. R.L. Mathis Certified Dairy Co.*, 225 Ga. 653, 171 S.E.2d 124 (1969), appeal dismissed for want of a substantial federal question, 400 U.S. 922, grant of summary judgment against amended complaint *aff'd*, 121 Ga. App. 373, 173 S.E.2d 716, cert. denied, 121 Ga. App. 890, 173 S.E.2d 716 (1970).

91. See *Herring v. R.L. Mathis Certified Dairy Co.*, 118 Ga. App. 132, 162 S.E.2d 863 (1968), *rev'd sub nom.* *Bourn v. Herring*, 225 Ga. 67, 166 S.E.2d 89 (1969).

92. 225 Ga. at 68, 166 S.E.2d at 92.

93. *Stone Mt. Mem'l Ass'n v. Herring*, 225 Ga. 746, 171 S.E.2d 521, *rev'g* 118 Ga. App.

park charged a two dollar fee for automobiles entering the park, but did not charge persons entering on foot. An injured visitor argued the money was a fee asked in return for permission to enter the land. The court reasoned the fee was purely a permit fee for automobiles and not related to the admission of persons to the park. Therefore, it held the recreational use statute applied.

In contrast, two cases construing the Wisconsin statute gave "valuable consideration,"⁹⁴ the corresponding term in that state, a more liberal reading. In one case, the court found "valuable consideration" present in the expectation of increased sales by a resort which operated a general store and equipment rental and allowed the public to use its facilities for swimming and diving without charge.⁹⁵ In another, the court found a hunting permit required by the government "valuable consideration."⁹⁶ Each concluded "valuable consideration" could include the conferring of a benefit upon the landowner or a mutuality of interest of the landowner and the entrant.⁹⁷

In an analogous situation the West Virginia Supreme Court reached a similar result in interpreting "charge."⁹⁸ A boat marina offered rental spaces for boats, camping spots with facilities, and rented boats and campsites to the public. In conjunction with this commercial operation it provided, without charge, areas for picnicking and swimming. A family visited the area to rent a boat. Upon arrival at the marina they first had a picnic lunch. Afterwards while a parent was waiting to rent a boat

658, 168 S.E.2d 633 (1969).

94. For a general discussion of the interpretation of the term "valuable consideration" in the Wisconsin statute, see *Garfield v. United States*, 297 F. Supp. 891, 898-99 (W.D. Wis. 1969); *Copeland v. Larson*, 46 Wis. 2d 337, 346-47, 174 N.W.2d 745, 750-51 (1970); Note, *Liability of Landowner to Persons Entering for Recreational Purposes*, 1964 Wis. L. Rev. 705, 707-11.

95. See *Copeland v. Larson*, 46 Wis. 2d 337, 347, 174 N.W.2d 745, 750 (1970).

96. See *Garfield v. United States*, 297 F. Supp. 891 (W.D. Wis. 1969).

97. 297 F. Supp. at 899; 46 Wis. 2d at 346-47, 174 N.W.2d at 750-51. This corresponded to the benefit necessary to give an entrant the status of an invitee under Wisconsin law. 46 Wis. 2d at 347, 174 N.W.2d at 750. The Wisconsin Supreme Court later abolished the categories of invitee and licensee in favor of a single standard of reasonableness, but retained the category of trespasser. See *Antoniewicz v. Reszczyński*, 70 Wis. 2d 836, 236 N.W.2d 1 (1975) (5-4 decision). *Accord*, *Peterson v. Balach*, 294 Minn. 161, 199 N.W.2d 639 (1972). The result of this change on the Wisconsin recreational use statute is unclear. *Compare* *Antoniewicz v. Reszczyński*, 70 Wis. 2d 836, 236 N.W.2d 1 (1975), *with id.* at 861-62, 866, 236 N.W.2d at 14, 16 (R. Hansen, J., dissenting, joined by Hanley & C. Hansen, JJ.) ("clearly established a group of licensees or guests to whom no standard of host care is applicable, and to which the [abolishment of the categories of invitee and licensee in favor of a single standard or reasonableness] as to guests or licensees does not apply"). A California court, however, has construed the recreational use statute to be a statutory exception to the reasonableness standard and to perpetuate the invitee-licensee distinction. See *English v. Marin Mun. Water Dist.*, 66 Cal. App. 3d 725, 731, 136 Cal. Rptr. 224, 228 (Ct. App. 1977).

98. See *Kesner v. Trenton*, ___ W. Va. ___, ___, 216 S.E.2d 880, 884-86 (1975).

two children, both nonswimmers, drowned while wading in the water near the picnic area because a drop-off was unmarked. In the ensuing wrongful death action, the marina argued the recreational use statute applied. Both the trial court and the appellate court disagreed. Although the West Virginia statute specifically defined "charge" as "the amount of *money* asked in return for an invitation to enter or go upon the land," the court nonetheless found a sufficient "charge" to avoid applying the statute. The court relied on the Wisconsin decisions⁹⁹ and found the marina was a money-making business and, by allowing people to swim in the lake at no cost, reasonably could have expected to attract prospective customers and thus increase its sales and rentals.¹⁰⁰

"Charge" or "consideration" could be construed to cover only direct monetary benefits received in return for entry upon the land, as done by the Georgia court. Adoption of this approach would be unfortunate, however. This interpretation of "charge" allows a landowner to use the recreational use statute to lure persons onto the land in expectation of gain. Members of the public should not be expected to subsidize a legitimate expense of a commercial enterprise by absorbing the cost of expected accidents. Each of the Georgia cases involved entry of recreational users as an integral part of a commercial enterprise. Generation of sufficient monies to fund supervision of activities or inspection of the land, or to provide insurance would be expected as a result.¹⁰¹ Imposition of liability in such situations is not an undue burden.

The inappropriateness of such a narrow reading of "charge" lies in the fact that "charge," when it is interpreted only as a fee asked in return for entry upon the land, does not cover all the types of economic benefits which should preclude application of a recreational use statute. Two types of benefits must be covered.¹⁰² First is direct monetary consideration received in return for consent to entry. This would apply to private and commercial landowners alike. Second is the economic benefit received when recreational users are exposed to commercial activity carried on by the landowner. States which include "commercial" activity on any part of the land¹⁰³ or which add to the definition of "charge" "fee

99. See *id.* at _____, 216 S.E.2d at 885.

100. See *id.* at _____, 216 S.E.2d at 885-86.

101. For example, the West Virginia court in *Kesner* took special note that the resort was a "money-making business." See _____ W. Va. at _____, 216 S.E.2d at 885. *But see* *Bilbao v. Pacific Power & Light Co.*, 257 Or. 360, 479 P.2d 226 (1971) (Washington RUS applied by Oregon court to private beach opened to public by power company). The case report in *Bilbao*, however, does not contain any extensive description of the type of activities allowed on the land or whether the landowner gained any substantial business benefit from it.

102. See Note, *Liability of Landowner to Persons Entering for Recreational Purposes*, 1964 WIS. L. REV. 705, 710-11.

103. See, e.g., FLA. STAT. ANN. § 375.251(2)(b) (West Cum. Supp. 1976) ("any commercial or other activity for profit conducted on [part of the land]"). The statutes are

asked for services, entertainment, recreation performed, or products offered for sale on the land"¹⁰⁴ implicitly recognize this. In the absence of such language including commercial activity, therefore, a court must stretch the meaning of the term "charge" or "consideration" to include both types of benefits. This explains the approach taken by the Wisconsin and West Virginia courts. Amendment of the Minnesota statute to include the second class of benefits is recommended. Without such additional language, however, a court should not hesitate to use the technique used by the Wisconsin and West Virginia courts.

At the other extreme, benefits which are merely an incidental and expected part of the recreational use itself should not be included. A landowner may "benefit" by allowing hunting or trapping on his land, but not be outside the scope of the statute. By including these activities in the statute it must be assumed they are to be successfully performed. For example, the Wisconsin statute, which was passed to help forest owners thin existing deer herds by promoting hunting,¹⁰⁵ excludes from its definition of "valuable consideration" "contributions to the sound management and husbandry of natural and agricultural resources of the state resulting directly from recreational activity."¹⁰⁶ Delimitation of this concept is also necessary.

D. "Members of the Public"—the Persons Covered by the Recreational Use Statute

The most important issue to be resolved about the Minnesota recreational use statute is the persons it covers. A variety of positions is possible. Some would favor access to land while others would give greater weight to maintaining existing rights of entrants.

collected in note 81 *supra*.

104. See MD. NAT. RES. CODE ANN. § 5-1101(b) (1974) ("'Charge' means price or fee asked for services, entertainment, recreation performed, or products offered for sale on land or in return for invitation or permission to enter or go upon the land."). See also FLA. STAT. ANN. § 375.251(2)(b) (West 1974) ("Charge made or usually made") (emphasis added).

105. See *Garfield v. United States*, 297 F. Supp. 891, 897-98 (W.D. Wis. 1969); *Copeland v. Larson*, 46 Wis. 2d 337, 346, 174 N.W.2d 745, 749 (1970); Note, *Liability of Landowner to Persons Entering for Recreational Purposes*, 1964 Wis. L. REV. 705, 709-10.

106. WIS. STAT. ANN. § 29.68(5)(c) (West Supp. 1976). See also TEX. REV. CIV. STAT. ANN. art. 1b(4)(2) (Vernon 1969) (excludes from definition of charge "that levied against those who remove game from the premises in such sum as may reasonably be required for the replacement of such game").

The addition of this language in the Wisconsin statute was suggested by Note, *Liability of Landowner to Persons Entering for Recreational Purposes*, 1964 Wis. L. REV. 705, 710-11. See *Garfield v. United States*, 297 F. Supp. 891, 898 (W.D. Wis. 1965) (general discussion of provision); *Copeland v. Larson*, 46 Wis. 2d 337, 347, 174 N.W.2d 745, 750 (1970). It is the only state to have such a provision.

1. Generally

Under the Minnesota statute the owner of land does not confer on any person entering the property for recreational purposes the "legal status of an invitee or licensee to whom a duty of care is owed."¹⁰⁷ Interpretation of this language determines the persons to whom the statute applies. Access to land must be weighed against derogation of existing rights.

A variety of positions have been adopted in other states. The earliest recreational use statutes were classified as merely codifying the common-law.¹⁰⁸ Under this approach, such statutes encourage use of land by clarifying the applicable law, but they do not create any new

107. MINN. STAT. § 87.023(b) (1976).

108. See *Estate of Thomas v. Consumers Power Co.*, 58 Mich. App. 486, 492, 228 N.W.2d 786, 789 ("The act is merely a codification of tort principles which are universally recognized in common-law jurisdictions."), *aff'd in part, rev'd in part on other grounds*, 394 Mich. 459, 237 N.W.2d 653 (1975); *Rock v. Concrete Materials, Inc.*, 46 App. Div. 2d 300, 302, 362 N.Y.S.2d 258, 260-61 (1974), *appeal dismissed*, 36 N.Y.2d 772, 329 N.E.2d 672, 368 N.Y.S.2d 841 (1975). See also *Copeland v. Larson*, 46 Wis. 2d 337, 344, 174 N.W.2d 745, 749 (1970) (discussing preamble of New Hampshire statute which stated it was meant "to codify the common law, in respect to the duty of care owed by landowners towards others who may be on their premises for sporting and recreational purposes and not for purposes connected with the landowners' own business"). Although the Michigan Supreme Court adopted the lower court's view of the statute in *Consumers Power*, *supra*, at least three judges of the Michigan Supreme Court had taken a different view earlier. See *Heider v. Michigan Sugar Co.*, 375 Mich. 490, 508 n.1, 134 N.W.2d 637, 644 n.1 (1965) (O'Hara, J., concurring, joined by Black & Smith, JJ.) ("In view of the statute, it matters not whether [the entrants] were licensees, invitees or trespassers.").

Both the New Hampshire statute discussed in *Copeland*, *supra*, and the New York statute construed in *Rock*, *supra*, state only that the recreational user is not made an "invitee," and do not mention "licensee." See N.H. REV. STAT. ANN. § 212:34(II)(b) (Supp. 1975); N.Y. GEN. OBLIG. LAW § 9-103(1)(b)(2) (McKinney Supp. 1976-1977). Similar language is found in several other states. See ALA. CODE tit. 47, § 282 (Cum. Supp. 1973); KY. REV. STAT. § 105.645 (1970); ME. REV. STAT. tit. 12, § 3003 (1974); N.J. STAT. ANN. § 2A:42A-3(b) (West Cum. Supp. 1977-1978); TENN. CODE ANN. § 51-804(2) (1977); VA. CODE § 8.01-654.2(c)(2) (1977); WIS. STAT. ANN. § 29.68(2) (West 1973). The typical recreational use statute is more restrictive, however, and states the recreational user is neither an invitee nor a licensee, see note 110 *infra*. Thus, most statutes would not support a similar reading. Also, several other statutes which only refer to "invitee" have been construed to merge the categories of trespasser and licensee when recreational use is involved. See *Garfield v. United States*, 297 F. Supp. 891, 899 (W.D. Wis. 1969) (Wisconsin statute); *O'Connell v. Forest Hill Field Club*, 119 N.J. Super. 317, 320, 291 A.2d 386, 388 (Super. Ct. Law Div. 1972) (New Jersey statute).

The model act proposed by the Council of State Governments also intended to codify the common law. See Hustace, *Free Outdoor Recreational Areas for Missouri—A Law Limiting Landowners' Liability*, 25 J. Mo. B. 423, 425 (1969) ("not intended to modify or abrogate the common law rules of liability for injuries to trespassers or licensees"). The language of the model act, however, only stated the recreational user was not an "invitee." Many of the states following the model act, including Minnesota, state the user is not an "invitee or licensee." See MINN. STAT. § 87.023(b) (1976); note 110 *infra*.

categories of entrants. The principle problem with this approach is that it does not open the land to new categories of entrants. It preserves existing rights, but does not promote new use of land. For example, it is doubtful under such a reading a landowner could openly invite new members of the public to enter his land without adding new liabilities.

Other states classify the recreational use statute as merging the categories of licensee and trespasser¹⁰⁹ and also possibly invitees¹¹⁰ when recreational use is involved. Unlike the first approach, this modifies the common-law. The landowner is given less liability. In the states which have discarded the traditional common-law categories of invitee and licensee in favor of a single standard of reasonableness, the statute is recognized as a statutory exception to the general standard.¹¹¹ In diagram form this position would be illustrated as follows:

109. See *Garfield v. United States*, 297 F. Supp. 891, 899 (W.D. Wis. 1969) (Wisconsin statute alters duty owed to licensee but not to invitee); *O'Connell v. Forest Hill Field Club*, 119 N.J. Super. 317, 320, 291 A.2d 386, 388 (Super Ct. Law Div. 1972) (the act "alter[s] the duty owed to licensees"); *Krevics v. Ayars*, 141 N.J. Super. 511, 516, 358 A.2d 844, 847 (Salem County Ct. Law Div. 1976) ("the purpose of the act is to put trespassers and licensees on an equal footing"); *Denton v. L.W. Vail Co.*, ___ Or. App. ___, ___, 541 P.2d 511, 515-16 (1975) (alternative holding) (statute covers licensee).

The Wisconsin statute construed in *Garfield, supra*, and the New Jersey statute construed in *O'Connell, supra*, and *Krevics, supra*, only state the recreational user is not an "invitee." See N.J. STAT. ANN. § 2A:42A-3(b) (West Cum. Supp. 1977-1978); WIS. STAT. ANN. § 29.68(2) (West 1973). Other courts have construed the language as merely codifying the common-law, see note 108 *supra*. It also would be possible to construe this language as abrogating only the rights of invitees and not affecting licensees. See note 110 *infra*. Thus, three interpretations of this language are possible.

110. See *Bourn v. Herring*, 225 Ga. 67, 166 S.E.2d 89 (1969) (business invitee); FLA. STAT. ANN. § 375.251(3)(b) (West 1974) ("[the statute applies] whether the person going on [areas leased to the state] is an invitee, licensee, trespasser, or otherwise"). *Contra*, *Kesner v. Trenton*, ___ W. Va. ___, 216 S.E.2d 880 (1975) (business invitee); *Copeland v. Larson*, 46 Wis. 2d 337, 174 N.W.2d 745 (1970) (same).

Most of the statutes would support such a reading. The vast majority of the states have language which states that the landowner does not "confer upon [entrants] the legal status of an invitee or licensee to whom a duty of care is owed." See ARK. STAT. ANN. § 50-1104(b) (1971); CAL. CIV. CODE § 846 (West Cum. Supp. 1977); COLO. REV. STAT. § 33-41-103(1)(b) (1973); CONN. GEN. STAT. ANN. § 52-557g(b) (West Cum. Supp. 1977); DEL. CODE ANN. tit. 7, § 5904 (1974); GA. CODE ANN. § 105-406 (1968); IDAHO CODE § 36-1604(d)(2) (1977); ILL. ANN. STAT. ch. 70, § 34(b) (Smith-Hurd Cum. Supp. 1977); IOWA CODE ANN. § 111C.4(2) (West Cum. Supp. 1977-1978); KAN. STAT. ANN. § 58-3204(b) (1976); MD. NAT. RES. CODE ANN. § 5-1104 (1974); MASS. GEN. LAWS ANN. ch. 21, § 17C (West 1973); MINN. STAT. § 87.023(b) (1976); MONT. REV. CODES ANN. § 67-808 (1970); NEB. REV. STAT. § 37-1003(2) (1974); N.D. CENT. CODE § 53-08-03(2) (1974); OKLA. STAT. ANN. tit. 76, § 12(b) (West 1976); OR. REV. STAT. § 105.665(2)(b) (1975); PA. STAT. ANN. tit. 68, § 477-4(2) (Purdon Cum. Supp. 1977-1978); S.C. CODE ANN. § 51-84(b) (Cum. Supp. 1975); W. VA. CODE ANN. § 19-25-2(b) (1977); WYO. STAT. ANN. § 34-389.3(b) (Cum. Supp. 1975). Moreover, it also would be possible to construe those statutes which state a recreational user is not an "invitee" as derogating the rights of invitees only and not affecting rights of licensees. To date no state has adopted this approach, however. See notes 108-09 *supra*.

111. See *English v. Marin Mun. Water Dist.*, 66 Cal. App. 3d 725, 136 Cal. Rptr. 224

	Invitees	Licensees	Trespassers
Other Use			
Recreational Use	"Constructive Trespassers"		

Persons covered by recreational use statute ("constructive trespassers") include existing classes of licensees and possibly invitees.

The policy behind the recreational use statute—access to land—and the policy behind the duties owed to invitees and licensees—protection from needless injury—are balanced against one another. The immunity of the recreational use statute and the existing rights of invitees and licensees are antagonistic forces battling for the same ground. Application of the recreational use statute diminishes the duties owed to invitees and licensees.

The principal weakpoint of this approach is its treatment of social guests. In most states a social guest is classified as a licensee.¹¹² If the categories of licensee and trespasser are viewed as completely merged when recreational use is involved, the rights of social guests would be derogated. A possible rationale for this approach would be that the strong need for access to recreational land outweighs the need to retain the existing rights of social guests. Such an argument would have one flaw, however. The rationale behind the recreational use statute is that the acceptance of the lower standard of care by the entrant is the quid pro quo for a new right of entry. The statute thus attempts to open land to persons to whom it otherwise would be unavailable, *i.e.*, the general public. The typical guest, however, already enjoys the use of the land

(Ct. App. 1977) (adoption of single standard of care did not change recreational use statute because abolition of categories of entrants only changed common-law rules and not express legislative exceptions to them). At least three justices of the Wisconsin Supreme Court have taken a similar view. See *Antoniewicz v. Reszczyński*, 70 Wis. 2d 836, 865-66, 236 N.W.2d 1, 16 (1975) (R. Hansen, J., dissenting, joined by Hanley & C. Hansen, JJ.) ("[the Wisconsin recreational use] statute clearly established a group of licensees or guests to whom no standard of host care is applicable, and to which the [abolishment of the categories of invitee and licensee in favor of a single standard of reasonableness] as to guests or licensees does not apply").

112. See PROSSER, *supra* note 5, § 60, at 378-79. In a few states, however, the social guest is an invitee. *Id.* at 379.

for recreational purposes. Considerations of liability are unlikely to motivate the landowner's consent to entry. Moreover, once so viewed, including social guests in the statute would be open to at least a colorable claim of unconstitutionality for being either an unreasonable classification¹¹³ or denying a common-law remedy without supplying a reasonable substitute.¹¹⁴ Applying the statute to social guests who happen to engage

113. A current statement of the "rational basis test" by the Minnesota court is the following:

The rule is that legislative classification will be held to be constitutionally valid if—

(1) the classification uniformly, without discrimination, applies to and embraces all who are similarly situated with respect to conditions or wants justifying appropriate legislation;

(2) the distinction which separate those who are included within the classification from those who are excluded are not manifestly arbitrary or fanciful, but are genuine and substantial so as to provide a natural and reasonable basis in the necessity or circumstances of the members of the classification to justify different legislation adopted to their peculiar conditions and needs; and

(3) the classification is germane or relevant to the purpose of the law; that is, there must be an evident connection between the distinctive needs peculiar to the class and the remedy or regulations therefor which the law purports to provide.

Schwartz v. Talmo, 295 Minn. 356, 362, 205 N.W.2d 318, 322 (footnote omitted), *appeal dismissed for want of a substantial federal question*, 411 U.S. 803 (1973). This approach might be troublesome because it would be grossly overinclusive. The classification—all persons engaged in recreational use—would include many persons who already had access to the land.

Recreational use statutes have been held constitutional on several occasions. Only general claims of unconstitutionality are usually alluded to, however. *See English v. Marin Mun. Water Dist.*, 66 Cal. App. 3d 725, 730, 136 Cal. Rptr. 224, 228 (Ct. App. 1977) ("We may note that appellant does not launch a constitutional attack on the section and no basis therefor is apparent to us."); *Herring v. R.L. Mathis Certified Dairy Co.*, 225 Ga. 653, 171 S.E.2d 124 (1969) (equal protection claim dismissed as improperly raised); *Estate of Thomas v. Consumers Power Co.*, 58 Mich. App. 486, 494-97, 228 N.W.2d 786, 791-92 (does not unreasonably discriminate in favor of owners and against licensees), *aff'd in part, rev'd in part on other grounds*, 394 Mich. 459, 231 N.W.2d 653 (1975); *Anderson v. Brown Bros.*, 65 Mich. App. 409, 415, 237 N.W.2d 528, 530 (1976) (raised but not discussed); *Goodson v. City of Racine*, 61 Wis. 2d 554, 560-61, 213 N.W.2d 16, 19-20 (1973) (not a special law; limitation to private landowners is not unreasonable). The constitutionality of including social guests has not been raised. *But cf. Brown v. Merlo*, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973) (in bank) (automobile guest statute unconstitutional), *noted in 62 CALIF. L. REV.* 648 (1974) and 23 *DRAKE L. REV.* 216 (1973) and 53 *NEB. L. REV.* 267 (1974).

114. Article 1, § 8 of the 1974 Minnesota Constitution provides:

Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws.

The Minnesota Supreme Court interprets this provision to preclude the abolishment of a common-law remedy without providing a reasonable substitute. *See, e.g., Carlson v. Smogard*, 298 Minn. 362, 215 N.W.2d 615 (1974) (provision of workers' compensation statute

in some type of recreational use while on the land would deprive them of existing rights without granting a corresponding benefit—a *new* right of entry. Existing rights would be derogated and no new right of entry would be promoted. Similar problems would exist if business invitees are included in the statute.

A third approach is also possible and is presented here for consideration. It is suggested the dual goals of promoting access to land and also preserving existing rights are best served by limiting the application of the statute to persons who otherwise would not have had access to the land for recreational use. The recreational user would be a new class carved out of the public at large and separate from invitees and licensees. In diagram form this approach might be illustrated as follows:

Persons Allowed on the Land with the Consent of the Landowner			
Invitees	Licensees	"Constructive Trespassers"	Trespassers

Persons covered by recreational use statute ("constructive trespassers") are new class carved from the public at large.

The immunity of the recreational use statute and the rights of invitees and licensees do not overlap. Each is free to work in its own area. Permitting use by friends, neighbors, or business associates thus would not be sufficient to bring the possessor within the protection of the

which, in the absence of written agreement, extinguished third-party tortfeasor's common-law right of indemnification from negligent employer held unconstitutional). See also *Haney v. International Harvester Co.*, 294 Minn. 375, 201 N.W.2d 140 (1972). Abrogation of the rights of previous categories of persons who had access to the land for recreational purposes to bring an action against a landowner for negligence thus might be subject to this constitutional limitation. See, e.g., *Stewart v. Houck*, 127 Or. 589, 271 P. 998, opinion supplemented on denial of rehearing, 127 Or. 597, 272 P. 893 (1928) (right of guest to recover for a breach of duty of care, resulting in injury, owed by person transporting such guest without charge protected against legislative abolishment by state constitutional provision giving every person a remedy for every injury); 22 MINN. L. REV. 104 (1937). See generally Note, *Constitutional Guarantees of a Certain Remedy*, 49 IOWA L. REV. 1202 (1964).

statute because these individuals would have been given access to the land without the incentive of immunity offered by the statute. Under this approach instead of assuming that in the absence of a recreational use statute, a "constructive trespasser" would be an invitee or licensee, it is assumed that in the absence of a recreational use statute a "constructive trespasser" would not have been allowed upon the land at all. Existing rights would be left intact and use of the land would be promoted by allowing a landowner to "invite" new members of the public to use his land.

The language of the Minnesota recreational use statute would support this theory. The policy statement in the Minnesota statute promotes the use of land "by the public."¹¹⁵ Similar references to the "public" are found in many of the statutes of other states;¹¹⁶ in addition, at least one state expressly excludes social guests.¹¹⁷ This implies the new recreational user must *enter* as a member of the public and not as a social guest, business invitee or other category of entrant. Case law in other states supports this analysis. One court interpreted the term "public" to require the use of land "by the public generally or by a particular class of the public" rather than "classes of individuals" and held the recreational use statute was not meant "to apply to the friendly neighbor who permits his friends and neighbors to use his [land] without charge."¹¹⁸ Another decision involving a social guest appears to comport with this position.¹¹⁹

115. See MINN. STAT. § 87.01 (1976). See also *State ex rel. Tucker v. District Court*, 155 Mont. 202, 207, 468 P.2d 773, 775 (1970) ("[the Montana recreational use statute] creates a new category separate and distinct from those known at common-law as licensees or invitees").

116. See ARK. STAT. ANN. § 50-1101 (1971); CONN. GEN. STAT. ANN. § 52-557g(a) (West Cum. Supp. 1977); DEL. CODE ANN. tit. 7, § 5901 (1974); FLA. STAT. ANN. § 375.251 (West 1974); GA. CODE ANN. § 105-403 (1968); IDAHO CODE § 36-1604(a) (1977); ILL. ANN. STAT. ch. 70, § 31 (Smith-Hurd Cum. Supp. 1977); IOWA CODE ANN. § 111C.1 (West Cum. Supp. 1977-1978); KAN. STAT. ANN. § 58-3201 (1976); MD. NAT. RES. CODE ANN. § 5-1102 (1974); MASS. GEN. LAWS ANN. ch. 21, § 17C (West 1973); NEB. REV. STAT. § 37-1001 (1974); OR. REV. STAT. § 105.660 (1975); PA. STAT. ANN. tit. 68, § 477-1 (Purdon Cum. Supp. 1977-1978); S.C. CODE ANN. § 51-81 (Cum. Supp. 1975); WASH. REV. CODE ANN. § 4.24.200 (Supp. 1976); W. VA. CODE § 19-25-1 (1977). Reference to "public" is usually in the policy statement.

117. See IND. CODE ANN. § 14-2-6-3 (Burns 1973) ("the provisions of this [statute] shall not be construed as affecting the existing case law of Indiana of liability of owners or possessors of premises with respect to . . . invited guests"). See also CAL. CIV. CODE § 846 (West Cum. Supp. 1977) (excludes "any persons who are expressly invited"). But see MICH. COMP. LAWS ANN. § 300.201 ("[l]iability of landowners for injuries to guests"), .201(1) ("any person who is on the land") (West Cum. Supp. 1977-1978).

118. *Herring v. Hauck*, 118 Ga. App. 623, 624, 165 S.E.2d 198, 199 (1968).

119. See *Boileau v. De Cecco*, 125 N.J. Super. 263, 310 A.2d 497 (Super Ct. App. Div. 1973) (invited adult guest injured in neighbor's backyard pool), *aff'd mem.*, 65 N.J. 234, 317 A.2d 716 (1974). Few cases deal with social guests in any way. Moreover, those that

The "entry as a member of the public" approach initially may appear to be difficult to apply. Several techniques should help mitigate uncertainties, however. First, if, as suggested earlier, commercial enterprises, parks, and urban or residential areas are excluded from the statute, many potential problem areas would be avoided. Second, an express exclusion for social guests, such as already is used in one state, would further clarify the statute. Combined, these two types of exclusions would leave as the main problem area what might be described as "acquaintances." For example, a farmer may wish to allow local hunters to use his land. Some hunters might be total strangers while others who were known to the landowner might, if injured, later argue they were more than recreational users. A solution is suggested by the Maryland statute.¹²⁰ It prescribes the use of "permission cards" to be distributed to the public and to landowners. On one side is a grant of entry signed by the landowner. On the other is an acknowledgment signed by the user that he is entering on the basis of the recreational use statute.

In sum, it is suggested this approach also accords with the spirit of the recreational use statute. Identification of persons who would not otherwise have access to the land for such purposes may be aided by excluding social guests as well as certain land areas from the coverage of the statute and by other techniques. Under this approach, the statute would apply only to those members of the general public or a class of the general public who would not otherwise have access to the land for recreational use.

2. *Intent for Entry*

A second general problem area regardless of the approach adopted

do also generally involve urban land, which would provide an alternative basis for the decision. No cases have applied the statute to social guests, however.

120. MD. NAT. RES. CODE ANN. § 5-1108 (1974) provides:

(a) To facilitate a method of providing written consent, the Secretary shall distribute cards, to be available to the public and to landowners.

(b) One side of the card shall read:

PERMISSION TO ENTER

I hereby grant the person named on the reverse side permission to enter on my property, subject to the terms of the agreement, on the following dates:

Signed

(Landowner)

(c) The reverse side shall read:

AGREEMENT

In return for the privilege of entering on the private property for any recreational or educational purposes as defined in the Natural Resources Article § 5-1101, I agree to adhere to every law, observe every safety precaution and practice, take every precaution against fire, and assume all responsibility and liability for my person and my property, while on the landowner's property.

Signed

may be intent for entry.¹²¹ If a person is allowed to enter for both a recreational use and business reason, the question may arise whether the statute applies. A business-related hunting trip would be an example. A reasonable solution would find the recreational use statute inapplicable if the nonrecreational purpose alone would be sufficient to allow entry.¹²² This would be consistent with opening new lands only if they would not otherwise be available and also would guard against the erosion of existing rights.

E. "Recreational Use"—the Activities Covered by the Minnesota Recreational Use Statute

Generally, recreational activities are defined by listing activities typical of those intended. Minnesota, for example, lists hunting, trapping, fishing, swimming, boating, camping, picnicking, hiking, bicycling, horseback riding, and pleasure driving, including snowmobiling and the operation of similar motorized recreational vehicles. Pursuits such as nature study, water skiing, winter sports, viewing or enjoying historical, archaeological, scenic or scientific sites are also included.¹²³ The list of

121. This general issue has only been touched upon in *Lovell v. Chesapeake & O.R.R.*, 457 F.2d 1009 (1972) (interpreting Michigan law). An adult Boy Scout leader was taking a group of boys across a railroad trestle over a road and river to reach another Scout area when the group was caught by a train. The Scoutmaster attempted to save several of the boys, but was killed in the process. When the railroad company raised the recreational use statute as a defense, the Scoutmaster's widow argued her husband went on the premises not for recreational purposes, but in the course of a rescue. The court found the decedent "became a trespasser . . . before he became a hero," 457 F.2d at 1011, and held that statute applied. The court intimated, however, that the result would have been different if the rescue had drawn the decedent to the trestle. See also IOWA CODE ANN. § 111C.2(3) (West Cum. Supp. 1977-1978) (after listing of recreational purposes adds "while going to and from or actually engaged therein").

122. A strong analogy might be the "dual trip" concept in workers' compensation, under which an employee is in the course of his employment while making a trip partially for personal reasons if the business reason alone would have been sufficient to justify the travel. See, e.g., *Rau v. Crest Fiberglass Indus.*, 275 Minn. 483, 148 N.W.2d 149 (1967).

123. MINN. STAT. § 87.021(4) (1976). The inclusion of "sightseeing" activities has led one commentator to suggest the use of statutes to encourage the preservation of historic, private landmarks. See Beckwith, *Developments in the Law of Historic Preservation and a Reflection on Liberty*, 12 WAKE FOREST L. REV. 93, 124-26 (1976).

Nineteen other states use virtually the same list as the Minnesota statute. See ARK. STAT. ANN. § 50-1102(c) (1971); CONN. GEN. STAT. ANN. § 52-557f(c) (West Cum. Supp. 1976), as amended by Act of June 10, 1977, Public No. 77-393, 1977 Conn. Legis. Serv. 588 (West) (also includes cutting and removing wood); DEL. CODE ANN. tit. 7, § 5902(c) (1974); FLA. STAT. ANN. § 375.251(5) (West 1974 & Cum. Supp. 1977); GA. CODE ANN. § 105-404(c) (1968); IDAHO CODE § 36-1604(2)(c) (1977); ILL. ANN. STAT. ch. 70, § 32(c) (Smith-Hurd Cum. Supp. 1977); IOWA CODE ANN. § 111C.2 (West Cum. Supp. 1977-1978); KAN. STAT. ANN. § 58-3202(c) (1976); MD. NAT. RES. CODE ANN. § 5-1101(f) (1974); NEB. REV. STAT. § 37-1008(3) (1974); N.D. CENT. CODE § 53-08-01(3) (1974) (also includes viewing or enjoying geological sites); OKLA. STAT. ANN. tit. 76, § 10(c) (West 1976); OR.

activities is not intended to be exhaustive.¹²⁴ The activities listed typically are nonurban, nonresidential, active recreational pursuits undertaken in the "true out-of-doors." Courts in other states have noted this construction.¹²⁵ It relates closely to the proposition that "land" in a

REV. STAT. § 105.655(4) (1975); PA. STAT. ANN. tit. 68, § 477-2(3) (Purdon Cum. Supp. 1977-1978); S.C. CODE ANN. § 51-83(c) (Cum. Supp. 1975); WASH. REV. CODE ANN. § 4.24.210 (Supp. 1976); W. VA. CODE ANN. § 19-25-5(c) (1977); WYO. STAT. ANN. § 34-389.1(c) (Cum. Supp. 1975).

Thirteen others use the same general list but exclude the "sightseeing" activities of nature study and viewing or enjoying historical, archaeological, scenic or scientific sites, see ALA. CODE tit. 47, § 281 (Cum. Supp. 1973); CAL. CIV. CODE § 846 (West Cum. Supp. 1977) (also includes spelunking, animal and all types of vehicular riding and rock collecting); COLO. REV. STAT. § 33-41-102(5) (1973); IND. CODE ANN. § 14-2-6-3 (Burns 1973); ME. REV. STAT. tit. 12, § 3002 (1974); MICH. COMP. LAWS ANN. § 300.201 (West Cum. Supp. 1977-1978); MONT. REV. CODES ANN. § 67-809 (1970); NEV. REV. STAT. § 41.510(1) (1975); N.J. STAT. ANN. § 2A:42A-2 (West Cum. Supp. 1977-1978); N.M. STAT. ANN. § 53-4-5.1 (Supp. 1975); N.C. GEN. STAT. § 113-120.5 (1975); OHIO REV. CODE ANN. § 1533.18 (Page Supp. 1976); VT. STAT. ANN. tit. 10, § 5212(3) (1973) (also includes gathering wildflowers or berries and birdwatching); WIS. STAT. ANN. § 29.68(1) (West 1973 & Supp. 1976) (also includes berry picking).

Two states do not define recreational activity or list examples. See MASS. GEN. LAWS ANN. ch. 21, § 17C (West 1973); S.D. COMPILED LAWS ANN. § 20-9-5 (Supp. 1977).

Only one state expressly includes educational purposes, see MD. NAT. RES. CODE ANN. § 5-1101(c) (1974) ("nature study, farm visitations for purposes of learning about the farming operation, practice judging of livestock, dairy cattle, poultry, other animals, agronomy crops, horticultural crops, or other farm products, organized visits to farms by school children, 4-H clubs, FFA clubs and others as part of their educational programs, and viewing historical, archaeological, or scientific sites"). However, it appears some educational activities are intended to be covered in the states which include nature study and viewing historical, archaeological, and scientific sites.

Only one state specifically includes organized sport activities in its coverage, see N.J. STAT. ANN. § 2A:42A-2 (West Cum. Supp. 1977-1978) ("any other outdoor sport, game and recreational activity including practice and instruction in any thereof"). However, from an examination of the lists of recreational activities included, it would appear that most states implicitly include sport activities.

124. See MINN. STAT. § 87.021(4) (1976) (list of recreational activities preceded by "recreational purposes" includes, but is not limited to, any of the following, or any combination thereof"). All of the other states use similar inclusion language except for seven states. See COLO. REV. STAT. § 33-41-102(5) (1973); KY. REV. STAT. ANN. § 150.645 (1970) ("hunt, fish, trap, camp or hike"); LA. REV. STAT. ANN. § 9:2791(A) (West 1965) ("hunting, fishing, camping, hiking, sightseeing or boating"); N.H. REV. STAT. ANN. § 212:34(I) (Supp. 1975) ("hunting, fishing, trapping, camping, water sports, winter sports or [using snow traveling vehicles], hiking or sightseeing"); N.Y. GEN. OBLIG. LAW § 9-103(1)(a) (McKinney Supp. 1976-1977), as amended by Act of May 3, 1977, ch. 91, 1977 N.Y. Sess. Law News 153 (McKinney) ("hunting, fishing, canoeing, trapping or training of dogs"); TENN. CODE ANN. § 51-803 (1977) ("hunting, fishing, trapping, camping, water sports, hiking or sightseeing"); TEX. REV. CIV. STAT. ANN. art. 1b (Vernon 1969) ("hunting, fishing and/or camping"); VA. CODE § 8.01-654.2(c) (1977) ("hunt, swim, trap, camp, hike or sightsee").

125. See *Boileau v. De Cecco*, 125 N.J. Super. 263, 267, 310 A.2d 497, 499-500 (Super. Ct. App. Div. 1973) ("The activities listed are for the most part those conducted in the true outdoors, not in someone's backyard."), *aff'd mem.*, 65 N.J. 234, 323 A.2d 449 (1974); *Villanova v. American Fed. of Musicians Local 16*, 123 N.J. Super. 57, 59, 301 A.2d 467,

recreational use statute refers to rural, undeveloped areas.¹²⁶ Thus, unenumerated recreational activities should conform to such standards.

V. EFFECT OF THE STATUTE ON PERSONS ENTERING FOR RECREATIONAL PURPOSES

The recreational use statute is intended to ease landowners' concerns of liability if they consent to opening their land to the public. The statute gives assurances that consent, if granted, will not create new liabilities or interfere with property rights. This evidences an intent to give the landowner the same rights he would have if consent had not been given, *i.e.*, if the entrants were trespassers. The majority of statutes provide the possessor owes no duty of care to keep the premises safe for entry and use by the recreational user¹²⁷ or to give any warning of hazardous conditions present on the land.¹²⁸ In addition, many statutes

469 (Super. Ct. App. Div. 1973) ("Generally speaking, the activities specifically enumerated by the [statute] are more physical than not; are of a nature for the most part typically requiring the outdoors; and are not on the whole spectator sports, but rather activities in which the individual using the land is himself involved."). The *Villanova* decision, which involved a musician performing a concert in a public park, also discarded an argument that "other . . . recreational activity" was broad enough to include "forms of play, amusement, diversion or relaxation." 123 N.J. Super. at 59, 301 A.2d at 468.

126. See *Odar v. Chase Manhattan Bank*, 138 N.J. Super. 464, 468, 351 A.2d 389, 391 (Super. Ct. App. Div.) ("It is clear that the statute was intended to apply to nonresidential, rural or semi-rural land whereon the enumerated sports and recreational activities are conducted."), *petition for certification denied*, 70 N.J. 525, 361 A.2d 540 (1976).

127. "Owes no duty of care" is used in ALA. CODE tit. 47, § 281 (Cum. Supp. 1973); ARK. STAT. ANN. § 50-1103 (1971); CAL. CIV. CODE § 846 (West Cum. Supp. 1977); CONN. GEN. STAT. ANN. § 52-557g(a) (West Cum. Supp. 1977); DEL. CODE ANN. tit. 7, § 5903 (1974); FLA. STAT. ANN. § 375.251(2)(a) (West 1974); GA. CODE ANN. § 105-405 (1968); IDAHO CODE § 36-1604(c) (1977); ILL. ANN. STAT. ch. 70, § 33 (Smith-Hurd Cum. Supp. 1977); IOWA CODE ANN. § 111C.3 (West Cum. Supp. 1977-1978); KAN. STAT. ANN. § 58-3203 (1976); KY. REV. STAT. § 150.645 (1970) ("owe no duty to keep the premises safe for entry or use"); LA. REV. STAT. ANN. § 9:2791(A) (West 1965) (same); ME. REV. STAT. tit. 12, § 3002 (1974); MD. NAT. RES. CODE ANN. § 5-1103 (1974); MINN. STAT. § 87.022 (1976); NEB. REV. STAT. § 37-1002 (1974); NEV. REV. STAT. § 41.510(1) (1975); N.H. REV. STAT. ANN. § 212:34(I) (Supp. 1975); N.J. STAT. ANN. § 2A:42A-3(a) (West Cum. Supp. 1977-1978); N.M. STAT. ANN. § 53-4-5.1(2) (Supp. 1975) ("assume any duty of care"); N.Y. GEN. OBLIG. LAW § 9-103(1)(a) (McKinney Supp. 1976-1977) ("owes no duty to keep the premises safe for entry or use"); N.C. GEN. STAT. § 113-120.5 (1975); N.D. CENT. CODE § 53-08-02 (1974); OHIO REV. CODE ANN. § 1533.18.1 (Page 1964) (no duty owed); OKLA. STAT. ANN. tit. 76, § 11 (West 1976); OR. REV. STAT. § 105.655(1) (1975); PA. STAT. ANN. tit. 68, § 477-3 (Purdon Cum. Supp. 1977-1978); S.C. CODE ANN. § 51-83 (Cum. Supp. 1975); TENN. CODE ANN. § 51-803 (1977); VA. CODE ANN. § 8.01-654.2(b) (1977); W. VA. CODE ANN. § 19-25-2 (1977); WIS. STAT. ANN. § 29.68(1) (West 1973) ("owes no duty to keep premises safe for entry or use"); WYO. STAT. ANN. § 34-389.2 (Cum. Supp. 1973).

128. "No duty . . . to give any warning of a dangerous condition, use, structure, or activity" is used in ALA. CODE tit. 47, § 281 (Cum. Supp. 1973); ARK. STAT. ANN. § 50-1103 (1971); CAL. CIV. CODE § 846 (West Cum. Supp. 1977); CONN. GEN. STAT. ANN. § 52-557g(a) (West Cum. Supp. 1977); DEL. CODE ANN. tit. 7, § 5903 (1974); FLA. STAT. ANN. §

provide immunity for injury to persons or property caused by the conduct of the recreational users allowed on the premises. The only liability to the entrant is for willful or malicious failure to guard or warn against a dangerous condition.¹²⁹ This duty is equivalent to the duty owed a trespasser at common-law.¹³⁰ In effect, recreational use statutes (other

375.251(2)(a) (West 1974); GA. CODE ANN. § 105-405 (1968); IDAHO CODE § 36-1604(c) (1977); ILL. ANN. STAT. ch. 70, § 33 (Smith-Hurd Cum. Supp. 1977); IOWA CODE ANN. § 111C.3 (West Cum. Supp. 1977-1978); KAN. STAT. ANN. § 58-3203 (1976); KY. REV. STAT. § 150.645 (1970); LA. REV. STAT. ANN. § 9:2791(A) (West 1965); ME. REV. STAT. tit. 12, § 3302 (1974); MD. NAT. RES. CODE ANN. § 5-1103 (1974); NEB. REV. STAT. § 37-1102 (1974); NEV. REV. STAT. § 41.510(1) (1975); N.H. REV. STAT. ANN. § 212:34(I) (Supp. 1975); N.J. STAT. ANN. § 2A:42A-3 (West Cum. Supp. 1977-1978); N.Y. GEN. OBLIG. LAW § 9-103(1)(a) (McKinney Supp. 1976-1977); N.D. CENT. CODE § 53-08-02 (1974); OKLA. STAT. ANN. tit. 76, § 11 (West 1976); OR. REV. STAT. § 105.655(1) (1975); PA. STAT. ANN. tit. 68, § 477-3 (Purdon Cum. Supp. 1977-1978); S.C. CODE ANN. § 51-83 (Cum. Supp. 1975); TENN. CODE ANN. § 51-803 (1977); VA. CODE ANN. § 8.01-654.2(b) (1977); W. VA. CODE ANN. § 19-25-2 (1977); WIS. STAT. ANN. § 29.68(1) (West 1973) ("unsafe condition"); WYO. STAT. ANN. § 34-389.2 (Cum. Supp. 1973).

129. See ALA. CODE tit. 47, § 283 (Cum. Supp. 1973); ARK. STAT. ANN. § 50-1106 (1971); CAL. CIV. CODE § 846 (West Cum. Supp. 1977); COLO. REV. STAT. § 33-41-104(1)(a) (1973); CONN. GEN. STAT. ANN. § 52-557h(a) (West Cum. Supp. 1977); DEL. CODE ANN. tit. 7, § 5906 (1974); FLA. STAT. ANN. § 375.251(4) (West 1974) ("deliberate, wilful or malicious injury"); GA. CODE ANN. § 105-408(a) (1968); ILL. ANN. STAT. ch. 70, § 36 (Smith-Hurd Cum. Supp. 1977); IOWA CODE ANN. § 111C.6(1) (West Cum. Supp. 1977-1978); KAN. STAT. ANN. § 58-3206 (1976); KY. REV. STAT. § 150.645 (1970); LA. REV. STAT. ANN. § 9:2791(B) (West 1965); ME. REV. STAT. tit. 12, § 3004 (1974); MD. NAT. RES. CODE ANN. § 5-1106 (1974); NEB. REV. STAT. § 37-1005 (1974); NEV. REV. STAT. § 41.510(3) (1975); N.H. REV. STAT. ANN. § 212:34(III) (Supp. 1975); N.J. STAT. ANN. § 2A:42A-4(a) (West Cum. Supp. 1977-1978); N.Y. GEN. OBLIG. LAW § 9-103(2)(a) (McKinney Supp. 1976-1977); N.D. CENT. CODE § 53-08-05 (1974); OKLA. STAT. ANN. tit. 76, § 14 (West 1976); PA. STAT. ANN. tit. 68, § 477-6 (Purdon Cum. Supp. 1977-1978); TENN. CODE ANN. § 51-805 (1977); VA. CODE ANN. § 8.01-645.2(d) (1977); W. VA. CODE ANN. § 19-25-4 (1977); WIS. STAT. ANN. § 29.68(3) (Supp. 1976); WYO. STAT. ANN. § 34-389.5 (Cum. Supp. 1973).

Three states provide for liability for grossly negligent failure to guard or warn against a dangerous condition in addition to wilful or malicious failure. MICH. COMP. LAWS ANN. § 300.201(1) (West Cum. Supp. 1977-1978); S.C. CODE ANN. § 51-86 (Cum. Supp. 1975); S.D. COMPILED LAWS ANN. § 20-9-5 (Supp. 1977). Texas adds deliberate failure to the liability of the possessor. TEX. REV. CIV. STAT. ANN. art. 1b (Vernon 1969). Oregon imposes liability for reckless failure to warn. OR. REV. STAT. § 105.675(1) (1975).

130. A person who enters or remains upon land in the possession of another without a privilege to do so, created by consent or otherwise, is a trespasser. The possessor is not liable for injury to a trespasser caused by failure to exercise reasonable care to put the land in a safe condition for him, or to carry on his activities in a manner which does not endanger him. RESTATEMENT (SECOND) OF TORTS § 329 (1965). See generally PROSSER, *supra* note 5, § 13, at 63-65, § 58, at 357-65.

Three major exceptions exist: (1) the occupier must exercise reasonable care for the safety of the trespasser once his presence is known; (2) a possessor who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area of his land has a duty of reasonable care to discover and protect them in the course of any activities which the possessor carries on ("tolerated intruder"); and (3) reasonable care for the safety of trespassers on any part of the land must be exercised

than those viewed as merely codifying the common-law) give the recreational user the status of a "constructive trespasser."¹³¹

Application of the standard may raise issues with respect to general access to land, the specific duties of care owed to certain recreational entrants, and the doctrine of attractive nuisance. Also, the effect of the recreational use statute on property rights must be considered.

A. General Access to Land

The statutes do not entitle a person seeking recreation to enter land over the landowner's objection.¹³² Access must be given or acquiesced in by the landowner. Posting of land may affect entry.¹³³ Also, the statutes do not relieve any existing obligations of care owed by the entrants.¹³⁴

where their presence is to be anticipated and the activity carried on involves a high degree of danger to them. Thus a higher standard of care is owed to a known or tolerated intruder. See PROSSER, *supra*, § 58, at 360-64.

131. Although no RUS expressly adopts this analysis, it is implicit in their approach. The New Mexico, Texas, and Vermont statutes come closest to acknowledging this approach outright. See N.M. STAT. ANN. § 53-4-5.1 (Supp. 1975) ("[Owner of land under this section] does not thereby . . . assume any greater responsibility, duty of care or liability to such person or group, than if such permission had not been granted and such person or group were *trespassers*." (emphasis added)); TEX. REV. CIV. STAT. ANN. art. 1b(1)(2) (Vernon 1969) ("[Owner granting permission] does not thereby constitute the person to whom permission is granted one to whom a greater degree of care is owed than that owed to a *trespasser* on the premises." (emphasis added)); VT. STAT. ANN. tit. 10, § 5212(b) (1973) ("[Owners of land under this section] . . . shall owe the [recreational] invitee no greater duty except as to acts of active negligence than is owed a *trespasser*." (emphasis added). See also MINN. STAT. § 87.025(a) (1976) ("Nothing in this chapter limits in any way any liability which otherwise exists [f]or conduct which, at law, entitles a *trespasser* to maintain an action and obtain relief for the conduct complained of." (emphasis added)).

132. One state provides for this expressly. See ALA. CODE tit. 47, § 285 (Cum. Supp. 1973) ("Nothing in this chapter shall be construed as granting or creating a right for any person to go on the lands of another without permission of the landowner."). Even if a statute does not so provide, a contrary interpretation would encounter difficult constitutional problems. A very close analogy would be the Massachusetts "on-foot free right-of-passage" bill held unconstitutional in Opinion of the Justices, 365 Mass. 681, 313 N.E.2d 561 (1974). The bill proposed to grant the public free right-of-passage on private coastline areas and then apply the state recreational use statute to users. The court found this a "wholesale denial of an owner's right to exclude the public" and thus the appropriation of an easement for the benefit of the public which required compensation. 365 Mass. at 689-90, 313 N.E.2d at 568.

133. See Georgia Power Co. v. McGruder, 229 Ga. 811, 194 S.E.2d 440 (1972) (statute does not apply to posted land); MD. NAT. RES. CODE ANN. § 5-1107 (1974) (owner "may post in conspicuous places notices informing the public that the land is private"); VT. STAT. ANN. tit. 10, § 5212(a)(1) (1973) (statute applies to "unposted" land). *But see* N.J. STAT. ANN. § 2A:42A-3(a) (West Cum. Supp. 1977-1978) (no duty owed "whether or not posted"); N.Y. GEN. OBLIG. LAW § 9-103(1)(a) (McKinney Supp. 1976-1977) ("whether or not posted").

134. ARK. STAT. ANN. § 50-1107 (1971) (act does not "relieve . . . obligation . . . to exercise care in . . . use of such land and . . . activities thereon, or from the legal consequences of failure to employ such care"); COLO. REV. STAT. § 33-41-105(b) (1973) (same);

In this context, however, one inherent fault of the statutes becomes apparent—they might encourage trespass.¹³⁵ Since no greater duty of care is owed if the landowner consents to entry, the statutes may remove some incentive to ask permission. Civil¹³⁶ and criminal¹³⁷ penalties for trespass would still be available, however.

B. Duty of Care Owed to Adult Recreational Users

Under the Minnesota statute, the duty of care owed recreational users is determined by the joint application of two provisions. Section 87.025(a) (the "trespasser provision") specifies the statute does not relieve the landowner of conduct toward a recreational user which "at law, entitles a trespasser to maintain an action." This indicates an intent to set as a lower limit on conduct the common-law standards applied to trespassers. A second group of provisions is sections 87.022, 87.023, and 87.0221 (the "general duty provisions"). The first provides no duty of care to render and maintain the premises safe for entry or use by recreational users is owed by the landowner. The second states a landowner does not extend any assurance the premises are safe or confer on the recreational user the status of an invitee or licensee. The third makes specific this standard for snowmobiling and use of other motorized recreational vehicles. It states the landowner does not owe a duty to warn of any dangerous condition on the land, whether patent or latent; owe

CONN. GEN. STAT. ANN. § 52-557i (West Cum. Supp. 1977) (same); DEL. CODE ANN. tit. 7, § 5907(b) (1974) (same); GA. CODE ANN. § 105-409(b) (1968) (same); IDAHO CODE §§ 36-1604(f)(2) (same), -1604(g) ("liable for any damage to property, livestock or crops") (1977); ILL. ANN. STAT. ch. 70, § 37(b) (Smith-Hurd Cum. Supp. 1977) (act does not "relieve . . . obligation . . . to exercise care in . . . use of such land and . . . activities thereon, or from the legal consequences of failure to employ such care"); IOWA CODE ANN. § 111C.7(2) (West Cum. Supp. 1977-1978) (same); KAN. STAT. ANN. § 58-3207 (1976) (same); MD. NAT. RES. CODE ANN. § 5-1102(b) (1974) (same); MINN. STAT. § 87.02(b) (1976) (same); NEB. REV. STAT. § 37-1007 (1974) (same); N.D. CENT. CODE § 53-08-06 (1974) (same); OKLA. STAT. ANN. tit. 76, § 15(b) (West 1976) (same); OR. REV. STAT. § 105.680 (1975) (same); PA. STAT. ANN. tit. 68, § 477-7(2) (Purdon Cum. Supp. 1977-1978) (same); S.C. CODE ANN. § 51-87(b) (Cum. Supp. 1975) (same); W. VA. CODE § 19-25-4 (1977) (same); WYO. STAT. § 34-389.6 (Cum. Supp. 1975) (same).

135. See IDAHO CODE § 36-1604(g) (1977) ("with or without permission"); MICH. COMP. LAWS ANN. § 300.201 (West Cum. Supp. 1977-1978) ("with or without permission"); N.C. GEN. STAT. § 113-120.5 (1975) (no liability incurred for injury to person entering with or without permission); S.D. COMPILED LAWS ANN. § 20-9-5 (Supp. 1975) ("with or without permission").

136. See, e.g., MINN. STAT. § 548.05 (1976) (treble damages for destruction or removal of property); *id.* § 561.041 (treble damages for injury to trees or shrubs); PROSSER, *supra* note 5, at § 13.

137. See, e.g., MINN. STAT. § 84.90 (1976) (trespass by operators of recreational motor vehicles a misdemeanor); *id.* § 100.273 (misdemeanor to enter agricultural lands to hunt during hunting season without permission); *id.* § 609.605(5) (misdemeanor to "[t]respass upon the premises of another and, without claim of right, refuse to depart therefrom on demand of the lawful possessor thereof").

a duty of care toward such users except to refrain from willful action to cause injury; and owes no duty to curtail his use of his land during its use for recreational purposes. This third section was added in 1973 to ease the fears of landowners about allowing entry by snowmobilers and does not change the general standards which would otherwise apply under 87.022 and 87.023.¹³⁸ Thus, the general duty provisions provide the general rules while the trespasser provision sets the lower limit.

In most instances this "constructive trespasser" standard is easy to apply. The recreational user is treated the same as a trespasser would be under common-law. The general common-law rule is that a possessor of land owes no duty to keep his premises in a safe condition for trespassers.¹³⁹ In this case, the trespasser provision and the general duty provisions do not conflict. Both state, in effect, the same test. Each complements the other.

The trespasser and general duty provisions will not always dovetail, however. In some instances the common-law trespasser provision may require a higher standard of care than the general duty provisions. A question may then arise which prevails. Two exceptions to the general duty of care owed to a trespasser at common-law are the rules applied to continued trespass on a limited area and to discovered trespassers. Under the rule of the Restatement of Torts section 335¹⁴⁰ adopted by the Minnesota Supreme Court in *Hanson v. Bailey*,¹⁴¹ a possessor is liable to a trespasser if he knows or has reason to know trespassers constantly intrude on a "limited area" and fails to warn of dangerous artificial

138. See *Tapes of Hearings on S.F. 1351 Before the Subcomm. on Judicial Admin. of the Minnesota Senate Judiciary Comm.* (Apr. 11, 1973). In addition, the new section was subject to the previously enacted section, MINN. STAT. § 87.025 (1976), which reserved the rights of trespassers for all entrants.

139. See, e.g., *Trask v. Shotwell*, 41 Minn. 66, 42 N.W. 669 (1889).

RESTATEMENT OF TORTS § 333 (1934) provides:

Except as stated in §§ 334 to 339, a possessor of land is not subject to liability for bodily harm caused to trespassers by his failure to exercise reasonable care

- (a) to put the land in a condition reasonably safe for their reception, or
- (b) to carry on his activities so as not to endanger them.

140. RESTATEMENT OF TORTS § 335 (1934) provides:

A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area thereof, is subject to liability for bodily harm caused to them by an artificial condition thereon, if

- (a) the condition
 - (i) is one which the possessor has created or maintains and
 - (ii) is, to his knowledge, likely to cause death or serious bodily harm to such trespassers and
 - (iii) is of such a nature that he has reason to believe that such trespassers will not discover it and
- (b) the possessor has failed to exercise reasonable care to warn such trespassers of the condition and the risk involved therein.

141. 249 Minn. 495, 83 N.W.2d 252 (1957).

conditions on the land which the trespasser is unlikely to discover.¹⁴² Also, under the discovered trespasser doctrine if a landowner is aware or should be aware of the presence of a trespasser, he must exercise reasonable care not to injure him.¹⁴³ Thus, under common-law standards for trespass—the stated lower limit on action by landowners in the statute—persons who are part of a constant trespass on a limited area or who are discovered trespassers are owed a greater duty of care than trespassers whose presence are unknown or unexpected. If a landowner is aware of the presence of a recreational user it could be argued the landowner owes him the same duty as a discovered or tolerated trespasser because of the trespasser provision which preserves the common-law rights of trespassers. On the other hand, it could be argued this approach would require a landowner to give assurances of safety or to curtail his use of his land during recreational use contrary to the general duty provisions, and also place a greater burden on the landowner as a consequence of this consenting to entry, contrary to the spirit of the statute.

In such cases the higher trespasser provision standard would appear to govern. The general duty sections all contain provisos that make them subject to the trespasser provision.¹⁴⁴ In case of conflict the statute thus appears to require the trespasser provision to prevail. The general duty provisions govern unless the trespasser provision gives a higher standard. In states not using a trespasser provision to set lower limits, similar protection would appear to be provided to recreational users by provisions prohibiting “willful” conduct by landowners.¹⁴⁵

Although only three states join Minnesota in using a trespasser provision,¹⁴⁶ this approach has merit. Use of this standard to set the lower

142. *Id.* at 499-502, 83 N.W.2d at 257-58.

143. *See* *Sloniker v. Great N. Ry.*, 76 Minn. 306, 79 N.W. 168 (1899); PROSSER, *supra* note 5, § 58, at 361.

144. *See, e.g.*, MINN. STAT. § 87.022 (1976) (“[e]xcept as specifically recognized by or provided in section 87.025”).

145. Whether a willful standard gives the same protection as the trespasser provision is somewhat unclear. In *English v. Marin Mun. Water Dist.*, 66 Cal. App. 3d 727, 136 Cal. Rptr. 224 (Ct. App. 1977), the complaint of an injured motocyclist alleged the landowner “knew or [was] chargeable with knowledge that numerous cyclists used the trail for recreational purposes.” *Id.* at 727, 136 Cal. Rptr. at 226. This apparently was meant to allege constant trespass on a limited area. On discovery the plaintiff admitted the action of the landowner was not “willful.” *Id.* at 727-28, 136 Cal. Rptr. at 226. The trial court granted the landowner’s motion for a summary judgment on the basis of the recreational use statute and the appellate court affirmed. But in another case involving similar facts a New Jersey court found “willful” conduct. *See* *Krevics v. Ayars*, 141 N.J. Super. 511, 358 A.2d 844 (Salem County Ct. Law Div. 1976) (cable placed across trail used by motor-bikes).

146. *See* N.M. STAT. ANN. § 53-4-5.1(A)(4) (Supp. 1975) (no greater responsibility assumed than if “such person or group were trespassers”); TEX. REV. CIV. STAT. ANN. art. 1b(a)(2) (Vernon 1969) (permission does not “constitute the person to whom permission

limit of care avoids the vague "willful" language present in most statutes and also provides a certain, flexible, and familiar rule.

C. *Attractive Nuisance*

At common-law, child trespassers are accorded a higher standard of care than adults.¹⁴⁷ Under the early turntable doctrine¹⁴⁸ and later the attractive nuisance doctrine¹⁴⁹ liability was imposed if a child was "enticed" onto the land because of a dangerous "attractive" artificial condition appealing to his natural curiosity and naivete. A "foreseeability" formula proposed by the Restatement of Torts later supplanted these tests.¹⁵⁰ The Restatement test uses four conditions for liability: (1) the place where the condition is found must be one upon which the possessor knows or has reason to know that children are likely to trespass; (2) the condition must be one which the occupier should recognize as involving an unreasonable risk of harm to such children; (3) the child, because of his immaturity either does not discover the condition or does not in fact appreciate the danger involved; (4) the utility to the possessor of maintaining the condition must be slight as compared with risk to children involved.¹⁵¹

Artificial conditions are included in the Minnesota recreational use statute. The statutory definition of "land" includes "buildings, structures, and machinery or equipment when attached to the realty."¹⁵² The status of children under the statute therefore may be brought into question. Present authority suggests the statute should not derogate the

is granted one to whom a greater duty of care is owed than that owed to a trespasser on the premises"); VT. STAT. ANN. tit. 10, § 5212(b) (1973) (owner owes "the [recreational user] no greater duty except as to acts of active negligence than is owed a trespasser").

147. See generally Green, *Landowners' Responsibility to Children*, 27 TEX. L. REV. 1 (1948); Hudson, *The Turntable Doctrine in Federal Courts*, 26 HARV. L. REV. 826 (1923); Prosser, *Trespassing Children*, 47 CALIF. L. REV. 427 (1959).

148. See *Railroad Co. v. Stout*, 84 U.S. (17 Wall.) 657 (1873) (recovery allowed when trespassing child was injured while playing with a turntable on railroad property). This case originated the doctrine.

149. See *Keffe v. Milwaukee & St. P.R.R.*, 21 Minn. 207 (1875). See generally Wilson, *Limitations on the Attractive Nuisance Doctrine*, 1 N.C.L. REV. 162 (1923).

150. The Supreme Court of Minnesota discarded the attractive nuisance doctrine and adopted the rule set forth in the Restatement, see *Gimmetstad v. Rose Bros.*, 194 Minn. 531, 261 N.W. 194 (1935) ("the idea of invitation, express or implied, actual or factual, as condition precedent to liability in the case of young children injured . . . should be finally and emphatically discarded"). The Restatement rule has been consistently followed, see, e.g., *Crohn v. Dupre*, 291 Minn. 290, 190 N.W.2d 678 (1971) (Second Restatement); *Hocking v. Duluth, Missabe & Iron Range Ry.*, 263 Minn. 483, 492 & n.2, 117 N.W.2d 304, 308-09 & n.1 (1962) (Restatement); *Weber v. St. Anthony Falls Water Power Co.*, 214 Minn. 1, 4, 7 N.W.2d 339, 341 (1942) (Restatement).

151. See *Weber v. St. Anthony Falls Water Power Co.*, 214 Minn. 1, 4, 7 N.W.2d 339, 341 (1942); PROSSER, *supra* note 5, at § 59.

152. MINN. STAT. § 87.021(2) (1976).

attractive nuisance doctrine, however. Many recreational use statutes expressly leave the rules applicable to child trespassers intact.¹⁵³ Moreover, the case law reaches a similar result.¹⁵⁴ The effect is to leave the attractive nuisance doctrine unaltered. Thus, the constructive trespasser approach still can be applied here. The duty is still that owed to a trespasser; the only change is that the trespasser is a child. Nonetheless, an express provision in the Minnesota statute on attractive nuisance would be preferable.

Moreover, the attractive nuisance issue may not arise frequently. Since recreational use statutes should not apply to urban or residential areas, the likelihood of unsupervised children on rural land is slight, especially those who may be too young to appreciate danger. Also, on rural farm, mining, or industrial lands the utility of maintaining artificial conditions would likely outweigh the foreseeable risks to children.¹⁵⁵ Furthermore, the special rules on child trespassers apply only to artificial conditions;¹⁵⁶ the number of such dangers on the majority of outdoor

153. See COLO. REV. STAT. § 33-41-104(1)(c) (1973) (statute does not limit otherwise existing liability "[f]or maintaining an attractive nuisance"); IND. CODE ANN. § 14-2-6-3 (Burns 1973) (statute not to "be construed as [affecting] the attractive nuisance doctrine"); IOWA CODE ANN. § 111C.7(3) (West Cum. Supp. 1977-1978) ("Nothing in this [statute] shall be construed to . . . amend, repeal or modify the common law doctrine of attractive nuisance."); N.C. GEN. STAT. § 113-120.5 (1975) ("nothing contained in this [statute] shall be construed as limiting or nullifying the doctrine of attractive nuisance"); S.D. COMPILED LAWS ANN. § 20-9-5 (Supp. 1977) ("This [statute] shall not affect the doctrine of attractive nuisance or other legal doctrines relating to liability arising from artificial conditions highly dangerous to children."); TEX. REV. CIV. STAT. ANN. art. 1b(3) (Vernon 1969) ("The provisions of this act shall not modify, extend or change in any way the doctrine of attractive nuisance as interpreted and applied by the courts of Texas."); WASH. REV. CODE ANN. § 4.24.210 (Supp. 1976) ("nothing in [this statute] limits or expands in any way the doctrine of attractive nuisance"). *But see* ILL. ANN. STAT. ch. 70, § 32 (Smith-Hurd Cum. Supp. 1977) (covers "any person regardless of age, maturity, or experience, who enters upon or uses land for recreational purposes"); S.C. CODE ANN. § 51-82(e) (Cum. Supp. 1975) (includes "individuals regardless of age").

154. *Scheck v. Houdaille Constr. Materials, Inc.*, 121 N.J. Super. 335, 297 A.2d 17 (Super. Ct. Law Div. 1972) (Restatement rule unaffected); *O'Connell v. Forest Hill Field Club*, 119 N.J. Super. 317, 291 A.2d 386 (Super. Ct. Law Div. 1972) (same); *see Shepard v. Wilson*, 123 Ga. App. 74, 179 S.E.2d 550 (1970), *cert. denied*, 123 Ga. App. 872, 179 S.E.2d 550 (1971).

The Michigan courts purport to apply the recreational use statute to children; however, an examination of the decisions reveals a corresponding tendency in such cases to find "wilful" conduct. *See Magerowski v. Standard Oil Co.*, 274 F. Supp. 246 (W.D. Mich. 1967); *Taylor v. Mathews*, 40 Mich. App. 74, 198 N.W.2d 843 (1972); Forkosch, *Torts, 1973 Annual Survey of Michigan Law*, 20 WAYNE L. REV. 647, 691-92 (1970); Morris, *Gross Negligence in Michigan—How Gross is it?*, 16 WAYNE L. REV. 457, 471-73 (1970). *See also Georgia Power Co. v. McGruder*, 229 Ga. 811, 194 Ga. App. 562, 191 S.E.2d 305, *rev'g* 126 Ga. App. 562, 191 S.E.2d 305 (1972). Thus, these cases reach much the same result.

155. *See PROSSER, supra* note 5, § 59, at 375.

156. *Loney v. McPhillips*, 268 Or. 378, 521 P.2d 340 (1974) (specifically recognizing that such a holding would be against the policy of the recreational use statute); *see Odar v.*

recreational land would be minimal. Finally, any child operating a motorized recreational vehicle would probably be treated as engaging in an adult activity.¹⁵⁷

D. Property Rights

Protection of property rights is a necessary complement to tort immunity. Without it the landowner may risk the creation of prescriptive rights in his land or claims of dedication to the public. Incentive would thus exist to limit the use of land for such purposes.

Consistent with a policy of total protection for the landowner, Minnesota joins only two other states in protecting loss of property rights. Minnesota gives the least coverage of the three, however. Under the Minnesota statute, a landowner does not dedicate his land to the public by allowing such use.¹⁵⁸ A more complete, and thus preferable, approach is used in Oregon and Nevada. The Oregon statute protects the owner against both the possibility of dedication and the creation of prescriptive rights.¹⁵⁹ Under the Nevada statute a recreational user "does not acquire any property rights . . . or rights of easement."¹⁶⁰ With respect

Chase Manhattan Bank, 138 N.J. Super. 464, 351 A.2d 389 (Super. Ct. App. Div.), petition for certification denied, 70 N.J. 525, 361 A.2d 540 (1976).

A caveat to RESTATEMENT (SECOND) OF TORTS § 339 (1965) leaves open the application of the section to artificial conditions. Several commentators have urged the abandonment of the distinction between artificial and natural conditions in relation to this special duty to children. See, e.g., Batson, *Trespassing Children: A Study in Expanding Liability*, 20 VAND. L. REV. 139, 152-53 (1966); Prosser, *Trespassing Children*, 47 CALIF. L. REV. 427, 446-47 (1959); Rubin, *Torts: Attractive Nuisance Doctrine: Applicability to Natural Conditions*; 2 OKLA. L. REV. 537 (1949). Other writers and courts require an affirmative arrangement of the dangerous condition by some non-natural force. See, e.g., Green, *Landowner v. Intruder; Intruder v. Landowner, Basis of Responsibility in Tort*, 21 MICH. L. REV. 495, 520-21 n.104b (1923).

157. See *Dellwo v. Pearson*, 259 Minn. 452, 107 N.W.2d 859 (1961) (motorboat); PROSSER, *supra* note 5, § 32, at 156-57 & nn.76-78.

158. MINN. STAT. § 87.03 (1976) ("No dedication of any land in connection with any use by any person for a recreational purpose shall take effect in consequence of the exercise of such use for any length of time hereafter except as expressly permitted or provided by the owner or as otherwise expressly provided by . . . other legislative act.").

159. OR. REV. STAT. § 105.677 (1975) provides:

(1) An owner of land who either directly or indirectly invites or permits any person to use his land for any recreational purpose without charge shall not thereby give to such person or to other persons any right to continued use of his land for any recreational purpose without his consent.

(2) The fact that an owner of land allows the public to recreationally use his land without posting of fencing or otherwise restricting use of his land shall not raise a presumption that the landowner intended to dedicate or otherwise give over to said public the right to continued use of said land.

(3) Nothing in this section shall be construed to diminish or divert any public right acquired by dedication, prescription, grant, custom or otherwise existing before [the effective date of this section].

160. NEV. REV. STAT. § 41.510(2)(b) (1975).

to the creation of property rights in these two states, a recreational user thus has fewer rights than a trespasser entering for other purposes. In states not using such language, recreational entrants presumably could create prescriptive rights.¹⁶¹

VI. CONCLUSION

Recreational use statutes present a meritorious concept. Application of the statutes, however, involves a delicate and sometimes difficult balancing of deeply-held values. Preservation of existing rights of entrants must be weighed against the need for access to land. Moreover, this process must be tempered by the need for certainty of application to encourage use of the statute by landowners.

A well-defined theory of the application of recreational use statutes is crucial to their continued use. Much of the existing case law has developed in isolation. Also, courts have yet to explore in depth the theoretical underpinnings of the statute or to isolate the immediate factors which should affect their application. If applied mechanically, the statutes hold potential for mischief; however, if the policies behind their enactment are kept foremost, the statutes can begin to develop their full potential as a land use concept.

161. This may be difficult to do, however. Use must be "hostile" and not merely permissive or acquiesced in by the owner. This is particularly hard to prove when open, unimproved land is involved, as opposed to urban land. The general rule is well stated in *Lundberg v. University of Notre Dame*, 231 Wis. 187, 282 N.W. 70 (1938):

It is a matter of common knowledge that where there is uninclosed woodland, like that here in question, it is customary for the public for purposes of pleasure or convenience, to pass through it without express permission. So long as such use causes no inconvenience to the owner he would be regarded as unneighborly and churlish to forbid the use. In some parts of this state there are large areas of open woodland through which many persons pass without restraint. These lands are held by the owners with the expectation that when it is practicable they will inclose and cultivate them. It would be a harsh rule that the owners of such lands must stand guard over them or be deprived of valuable rights by those who have taken advantage of liberal treatment. It is for such reasons as these that it is generally held that the mere use of a passway through woodland will not give a right of way by prescription.

Id. at 200-01, 282 N.W. at 76-77 (quoting *Bassett v. Soelle*, 186 Wis. 53, 202 N.W. 164 (1925)). *Accord*, *Trunnell v. Ward*, 86 Idaho 555, 559-60, 389 P.2d 221, 223 (1964); *Johnson v. Hegland*, 175 Minn. 592, 595, 222 N.W. 272, 273 (1928); *State v. Town Bd.*, 192 Wis. 186, 195, 212 N.W. 249, 252 (1927) ("It is not necessary to penalize a considerate owner who has permitted travel over his uninclosed lands in order that the neighborhood may have highways.").