



Environmental Law Centre

**Managing recreation on public land:
How does Alberta compare?**

December 2015

Library and Archives Canada Cataloguing in Publication

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Managing recreation on public land : how does Alberta compare? / Adam Driedzic.

Electronic monograph in PDF format.

ISBN 978-0-921503-97-2 (pdf)

1. Public lands--Recreational use--Alberta. 2. Public lands--Management--Government policy--Alberta. I. Environmental Law Centre (Alta.), issuing body II. Title.

HD319.A4D75 2015

333.78'17097123

C2015-907576-9

The Environmental Law Centre (Alberta) Society is a charity incorporated in 1982 to provide Albertans with information on natural resource and environmental law and policy. Its mission is to educate and champion for strong laws and rights so that all Albertans can enjoy clear air, clean water and a healthy environment. The ELC's core activities include legal education services and law reform research and advocacy.

Core funding for the ELC is provided by the Alberta Law Foundation.



This publication is made possible by a grant from the Calgary Foundation



and a generous donation by Glen and Lois Mumey.

The ELC wishes to thank Jeff Surtees, LLM Candidate at the University of Faculty of Law, for his invaluable assistance with this publication.

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1. EXECUTIVE SUMMARY

Recreational use of public land in Alberta is creating significant management challenges as the demands for recreational opportunities and the impacts of recreational activity are increasing together. These challenges are shared by many western jurisdictions and have intensified in recent decades due to increases in motorized recreation.

This review by the Environmental Law Centre (ELC) compares the legal framework for recreation management in Alberta to other Canadian provinces and US jurisdictions. These comparisons include the provinces of Ontario, British Columbia and Nova Scotia, the US Bureau of Land Management, the US Forest Service, and the States of Colorado, Utah and Oregon.

The comparisons focus on three legal barriers to on-the-ground management actions in Alberta that were identified in advance of the research. These are:

- mandates to manage recreation on public lands;
- funding for recreation management programs; and,
- liability for injuries on recreation trails.

The review also explores two questions relevant to recreation policy development in Alberta:

- how motorized recreation is typically managed as compared to non-motorized recreation; and,
- how options for improving recreation management under existing legislation compare to the option of legislative reform.

The findings reveal that the legal framework for managing recreation in Alberta diverges significantly from those in jurisdictions that are ahead in responding to the challenges. Moreover, it most resembles those in other jurisdictions that are struggling to so respond.

Topic 1: Mandates to manage recreation on public lands

In Alberta the various powers, duties and functions related to recreation management are fairly fragmented. Parks recreation and conservation, access to public lands, roads, motor vehicles, and liability for injuries related to recreational use of public land are treated as fairly separate matters under separate pieces of legislation that are often administered by separate agencies. These pieces of legislation often do not provide strong direction or authority to these agencies, such that many recreation management decisions require the involvement of Ministers or Cabinet. This fragmentation is a contributing factor in unclear rules, lack of developed recreational amenities and difficulty in mitigating the negative impacts of recreation. It also engenders the politicization of many recreation management decisions.

The mandate model in Alberta diverges from most jurisdictions reviewed in several ways. For example, in several US jurisdictions and some Canadian provinces, several mandated powers, duties and functions

related to recreation management are consolidated under the same legislation and in the same agencies. These mandates included stronger legislated direction to prioritize recreation among multiple land uses, to actively develop recreational amenities and to directly tackle the negative impacts of recreation. Several jurisdictions had specific legislation to enable motorized recreation management programs on top of general or non-motorized recreation programs.

In all jurisdictions reviewed the majority of recreation management functions were assigned to government land agencies. The two most common models were:

- multiple agencies such as parks, public lands and forests would have similar recreation management functions on separate land bases; or alternatively,
- a parks agency housed within a larger public lands and resource agency lead on recreation programs outside of the parks land base.

All jurisdictions reviewed provided roles in program delivery to recreational user representatives and local authorities. However, none of the jurisdictions reviewed used delegated administrative organizations to manage recreation trails and services.

The comparisons also provide warnings that there is no utopic model or silver bullet solution to establishing recreation management mandates. Multiple jurisdictions have had the same debates as in Alberta. Moreover, there is further evidence that clear managerial mandates will not be met without practical capacity.

Topic 2: Funding for recreation management programs

In Alberta there is relatively little public funding for recreation management programs. Furthermore, the source of funds is general revenues and departmental budgets. This means that recreation management must compete for funds with many other governmental priorities.

In striking contrast, every other jurisdiction reviewed generated revenue from the recreating public and directed it towards recreation management programs. Examples included:

- user fees and permits;
- regulatory charges such as vehicle registrations, operator licensing, or user education;
- fines, restitution payments and community service for offenders;
- the percentage of fuel tax that can be attributed to recreational vehicle fueling; and,
- legislative allocations of gaming revenues and oil royalties.

Most jurisdictions used multiple tools from this spectrum to fund an array of recreation management programs. They had programs for general or non-motorized recreation, and separate programs for motorized recreation. Some motorized programs were further subdivided by machine type.

Motorized programs are usually called “off-highway vehicle (OHV)”, “off-road vehicle (ORV)” or “all-terrain vehicle (ATV)” programs. However, several programs cover a broader range of vehicles including snowmobiles, 4x4 trucks and street-legal vehicles used on public land. The diverse scope of OHV programs reveals at least three points of debate:

- what types of machines or operators should revenue be collected from;
- who should receive funding as between government agencies, recreational user groups, municipalities, other public service organizations or private sector service providers; and,
- what should funds be used for as between recreational opportunity development and impact mitigation activities?

Multiple Canadian provinces and US jurisdictions showed evidence of public debate over recreational user payments. However, the practical need for additional funding is real and the trend is definitely towards such user payment programs.

Topic 3: Liability for injuries on recreation trails

In Alberta the legal protection from lawsuits concerning trail-related injuries is stronger than it used to be because the provincial *Occupiers Liability Act* now reduces the duty of care owed to recreational users in some situations. However, this legislation is complicated and does not provide certainty.

There are not many court cases on liability for injuries on trails and extremely few in which public land managers or land users have been held liable. Nonetheless, government agencies, trail groups, industrial operators and other “occupiers” all perceive exposure to liability. Risk management practices vary between stakeholders and the insurance regime is not clearly adequate. While the current liability model is fairly enabling of recreational access, it is a deterrent to “proactive” management actions such as developing trail infrastructure or charging user payments.

The liability regime in Alberta is fairly similar to that in British Columbia and Ontario. In contrast, all American jurisdictions and the Province of Nova Scotia provided stronger liability protections in legislation. This usually involves broader reductions in the duty of care owed to users plus further provisions on voluntary assumption of risk for motorized use. Nonetheless, some uncertainty exists in all jurisdictions and trail proponents are calling for reforms. Given the trend towards increased protections, it is important to recall that recreational users of public land can be injured through the fault of others, and it is not good policy to remove all recourse in all situations.

Reform options and considerations

Several improvements in Alberta can be made without major reforms. Options to pursue include:

- creating a specialized public lands enforcement force with authority to levy fines;
- making more use of public lands regulations and providing guidance for use of regulations; and,
- making regional plans that set clear objectives and direction for decision makers.

However, the prospects of filling the key gaps concerning management mandates, funding and liability protections are all limited under existing legislation.

Mandates to manage recreation outside the parks system create the largest reform issues because all administrative powers and duties must come from legislation. Current provincial initiatives including regional planning, public land regulations and trails partnerships can help the existing reliance on shared responsibility work better. However, they cannot create legislated mandates that do not otherwise exist.

Funding for recreation management has some potential without legislative reforms:

- user fees can be implemented, but they require Ministerial involvement which invites politicized debate;
- permits and disposition fees can be charged by agencies but currently the revenue need not be directed to specific programs;
- obtaining revenue from vehicle registrations, operator licensing or mandatory user education would require legislative reforms; and,
- revenue from fuel tax attributable to recreational vehicles is collected but it is not parsed out and directed to recreation management; thus, without reforms it is likely that competing priorities for tax revenues will continue to prevail.

Liability protection presents a difficult reform issue because protections from lawsuits brought by recreational users are already stronger than in times past. Moreover, there are few examples of these protections actually failing in a court of law. Nonetheless, uncertain liability is deterring management action. The ideal would be reforms to clarify liability and provide stronger protections, but not to the extent of eliminating all recourse in all situations.

Overall, legislative reforms would be the best way to create clear mandates, adequate funding sources, and stronger protections from liability.

Motorized recreation: Managing motorized recreation is a universal challenge. However, our review indicates that Alberta is lagging behind other jurisdictions on this front. The question is how to proceed so as to align with other jurisdictions that are ahead on responding to this challenge.

Recent provincial initiatives including regional planning and the provincial trails partnership pilot imply a focus on OHVs at the outset of formalizing a management system. While the impacts of OHVs are certainly a leading concern, this latent focus on OHVs in Alberta is opposite from the jurisdictions reviewed in two regards:

- the legislation and management programs in other jurisdictions was often overtly clear regarding the specific types of uses or vehicles that the programs concerned; and,

- in many other jurisdictions the general recreation management systems were well established before motorized recreation became widespread, so it was more a matter of adding motorized-specific legislation and programs as this new challenge emerged.

Aligning Alberta with other more progressive jurisdictions will require developing a general recreation management system and clear program streams for multiple motorized and non-motorized uses simultaneously.

Recommendations for legislative reforms

As there are shortcomings on every major point of comparison, the best way to improve recreation management in Alberta is through legislative reform. There are multiple options for affecting such reforms. Examples include:

- targeted amendments to multiple pieces of existing legislation;
- overhauling the major public lands legislation in response to broader issues with “multiple use” of public lands; or,
- creating a new piece of legislation focused on recreation management.

While the need to improve the legal framework for recreation management in Alberta is significant, there are ample models to follow. The details in this review can help identify the most optimal features from other jurisdictions while avoiding the least optimal ones.

2. INTRODUCTION

Have you ever wondered if recreational use of public land is managed differently, and perhaps better, in places other than Alberta? Do you believe that the law is a factor in such differences? Our review compares the legal framework for managing recreation on public land in Alberta to other Canadian provinces and American states facing similar challenges. Its findings can help improve recreation management in Alberta by identifying the most optimal features to be imported while deliberately avoiding the least optimal ones.

Recreational use of public land poses complex management challenges. It promises the coveted “triple bottom line” of social, economic and environmental outcomes.

However, the negative impacts of recreation are diverse and potentially profound. The most commonly cited examples of these negative impacts include:

- health and safety risks;
- conflicts between land users;
- damage to the environment, natural resources, and property; and,
- decreased opportunities and quality of experience for some recreational users.

Like in Alberta, the trend in western countries is that recreational use of public land follows in the physical and socio-economic footprint of the natural resource industries. In many places the impacts of outdoor recreation and tourism are now surpassing the impacts of the traditional industries.¹ Sometimes the social and environmental concerns are with major tourism developments, for example ski resorts. In other cases, the concern is with unmanaged recreation or the absence of recreational infrastructure, for example “random” use of public lands. In recent years the challenges of responding to recreational impacts while recognizing demand for recreational opportunities have intensified due to the growth of motorized recreation.

Over the past decade in Alberta, numerous initiatives have pointed out the possibility that the challenge of managing recreation in our province is aggravated by the legal framework. Over this same period several new legal tools have become available, yet the issues continue to escalate. It is time to revisit the potential need for reforms by taking a closer look at the law in other jurisdictions.

Key questions for this review

- Does Alberta law resemble or differ from the law in other jurisdictions?
- What does the law look like in jurisdictions that are thought to be ahead on recreation management?
- How is motorized recreation typically managed?
- What are the options for improving recreation management in Alberta?

¹ Lester Brown et al., *State of the World, A Worldwatch Institute Report on Progress Toward a Sustainable Society, 1995* (New York: Norton & Company, 1995).

Some past findings in Alberta

- In 2003, the Recreation Corridors Legislative Review identified a long list of legislation relevant to recreation corridors. It concluded that no new legislation was required to establish recreation corridors but that amendments to existing legislation may be required.
- In 2005, the Recreational Access Management Workshop convened by the Federation of Alberta Naturalists and the Alberta Off-Highway Vehicle Association produced high consensus on the issues and identified numerous possible solutions that would be new to Alberta.
- In 2008, the Alberta Land Use Framework identified managing recreational use of public land as an area of provincial interest where there was a gap in existing policy. It proposed a “recreation management strategy” to tackle environmental impacts, increase public safety, reduce user conflict and promote cooperation between users.
- In 2009, a Review of Access Management Tools for the Foothills Landscape Managers’ Forum compared Alberta and British Columbia and concluded that public access to public land is managed through an uncoordinated patchwork of legislation. It identified Public Land Use Zones as a top option, but one the value of which may depend on the pre-existing footprint.
- In 2010, the South Eastern Slopes Task Force Report provided the view of rural municipalities that safety risks and user conflict are increasing despite the creation of the Land Use Framework. It noted public perception of there being “no rules” and saw much need for enforcement.

(a) The jurisdictions, agencies and topics for comparison

There are more legal frameworks for recreation management than we could ever review. The comparisons were chosen based on conversations with persons on the front line of recreation management issues and actions. These persons included provincial government staff, watershed stewardship groups, rural landowners, municipal officials, and recreational users from motorized and non-motorized sectors (collectively our “respondents”). This scoping exercise helped us establish:

- the jurisdictions and agencies for comparison; and,
- the topics for comparison.

I. The jurisdictions and agencies for comparison

Our review compares Alberta to the US Bureau of Land Management, US National Forest Service, the US states of Utah, Oregon and Colorado, and for a narrower range of topics, the provinces of Nova Scotia, Ontario and British Columbia.

The US jurisdictions were chosen because they were proposed by at least some respondents from every sector we canvassed. Strikingly, the same US jurisdictions were cited favourably by motorized and non-motorized recreational users despite the fact that these sectors often experience conflict with each other. In other words, these jurisdictions are doing something right. Other US states, provinces and western countries were mentioned by our respondents but not to the same extent as those selected. A further advantage of focusing on US states in the mountain west is the similar geographic and socio-economic context to Alberta. Concerning US law, most recreation management matters are dealt with under ordinary legislation just as in Canada so these models are potentially transferable.

The Canadian provinces are used for more specific comparisons. Nova Scotia is included because Eastern Canada has a long history of public land use and Nova Scotia has made notable reforms following a public inquiry into motorized recreation. Ontario and British Columbia are included to ensure significant Canadian content on the issue of liability where court cases are important. These Canadian provinces were not reviewed to the same extent on every topic.

The structure of government varies between jurisdictions and especially between Canada and the US. Therefore this review uses the term “agency” to describe any type of government ministry, department or branch. It uses the broader term “authorities” to include municipalities and delegated administrative organizations.

II. The topics for comparison

This review focuses on three major topics:

- mandates to manage recreation on public lands;
- funding for recreation management programs; and,
- liability for injuries on trails.

Concerns with the adequacy of the legal framework in these three areas were identified by our respondents as barriers to improving recreation management in Alberta. The similarity between these three topics is that strong mandates, sufficient funding, and clear liability regimes are all important to ensuring that recreation policies get implemented through “boots on the ground” activities like enforcement, education or trail enhancement.

These three topics also keep the focus on public land management. This review makes no attempt to tackle all of the issues related to outdoor recreation. For example, television advertisements showing off-roading activity that would be unlawful in many places is a serious issue. However, it is an issue beyond the reach of provincial public land law. Issues like vehicle registrations and operator permits may or may not fall under public land law: the models vary, and that is the point of this review.

3. MANDATES TO MANAGE RECREATION ON PUBLIC LANDS

This section compares the recreation management mandate in Alberta to the above US jurisdictions and the province of Nova Scotia.

(a) Mandates in Alberta

In Alberta the powers, duties and functions related to managing recreation come through multiple pieces of legislation. The three most important legislative regimes concern:

- parks and protected areas;
- public lands; and
- motor vehicles and roads.

Key questions concerning management mandates:

- Who should have a mandate to manage recreation?
- What are the specific powers, duties and functions involved in managing recreation?
- Should these functions be divided or consolidated?
- What agencies or authorities should these functions go to?

I. Parks and protected areas

The legislation that covers provincial parks and protected areas provides a general mandate to enable recreational use while pursuing preservation of the area.² This type of dual recreation-preservation mandate is common for parks and protected areas in many jurisdictions. The details of this mandate with respect to recreation vary with the specific legislation under which a protected area is created and with the specific type of area.³ The parks and protected area mandate is somewhat tied to the areas that are designated under this legislation because the legislation does not refer to agency activities outside of it. Consistent with this interpretation, the agency's current "plan for parks" does not expressly promote management activities outside of the land base.⁴

² *Provincial Parks Act*, RSA 2000, c P-35; *Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act*, RSA 2000, c W-9; See also: *Willmore Wilderness Park Act*, RSA 2000, c W-11, Not in force – but provides comparable mandate to preserve areas for use and enjoyment.

³ *Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act*, *ibid*; *Provincial Parks Act*, *ibid*.

⁴ Government of Alberta, *Plan for Parks 2009-2019* (Edmonton: Government of Alberta) available online: <http://www.albertaparks.ca/media/123436/p4p.pdf>.



Black Creek Heritage Rangeland (above) and many other protected areas are designated under the *Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act* which is more focused on preservation than on developing recreational opportunities. In contrast, the Provincial Park and Recreation Area designations under the *Provincial Parks Act* have enabled built infrastructure such as the Canmore Nordic Centre (below). Some designations such as Wildland Parks are somewhere in between, allowing use of traditional trails and some primitive trail development.



II. *Public lands*

Much recreation in Alberta takes place on public land outside of parks and protected areas. Most of these public lands are managed for “multiple use”. In Alberta, “multiple use”, which is not defined by legislation, is a concept endorsed by non-legislated plans, policies and administrative practice that often allow overlapping uses of the same land base.

The primary legislation for managing the “multiple use” land base is the *Public Lands Act*.⁵ This relatively old legislation lacks clear statements of purpose or policy. Its historical function of the *Public Lands Act* was to “dispose” of public land for settlement and development purposes.

The *Public Lands Act* predates the increase in issues with recreational use of public land. While it does not preclude recreation management activities, it does not provide specific direction to tackle the impacts of recreation or to actively develop recreational opportunities. Rather, it implies a more general mandate to manage access to public land and to prevent harm to the health of public land.

Two regulations under the *Public Lands Act* speak directly to recreation. The key distinction as to what regulation applies is between Green Area and White Area public lands. The Green Area is the “unsettled” region of the province, all of which is public land and most of which is forested. The White Area is the settled part of the province. It contains a mix of public and private lands. Public lands in the White Area are under agricultural dispositions (cropping and grazing dispositions).

The Green Area: Recreation on Green Area public lands is covered by the *Public Lands Administration Regulation*.⁶ This regulation was created in 2011 to consolidate numerous regulations applying to the Green Area. It includes new provisions as well. The regulation:

- makes vacant public land open to the public unless otherwise designated;
- prohibits the use of motorized vehicles in permanent water bodies unless authorized;
- provides agency staff with power to close areas, and,
- enables user fees and permits.

The baseline for recreational access under this regulation might best be described as “open unless closed”. This baseline can change in multiple situations. One situation is that public lands can cease to be vacant when it becomes occupied by authorized uses such as natural resource extraction. The *Public Lands Administration Regulation* also provides for three zoning designations that can change the baseline rules: Public Land Use Zones, Public Land Recreation Areas and Public Land Recreation Trails. For example, Public Land Use Zones prohibit the use of motorized vehicles unless authorized. The details of the specific Public Land Use Zone also prevail over the general provisions of the regulation.

⁵ *Public Lands Act*, RSA 2000, c P-40 [*Public Lands Act*].

⁶ *Public Lands Administration Regulation*, Alta Reg 187/2011, [*Public Lands Administration Regulation*].

Finally, the *Public Lands Administration Regulation* provides several new tools that do not directly concern recreation but could be used to manage recreation. These include:

- authority to alter reclamation standards, which could result in reclamation requirements being waived, or conversely in requiring “restoration”;
- authority to manage the collective footprint of land use activities; and,
- authority to issue new types of dispositions.

The decision-maker for use of the tools provided by the *Public Lands Administration Regulation* varies:

- permits and dispositions can be issued by the agency;
- user fees require ministerial decisions; and
- zoning designations require cabinet decisions.

Overall the *Public Lands Administration Regulation* is a significant attempt to respond to recreation issues. However, its usage is constrained by multiple factors which are discussed below.

The White Area: Recreational use of public land in the White Area is managed under the *Recreational Access Regulation*.⁷ The system requires recreational users to ask agricultural leaseholders for consent to enter. Leaseholders cannot unreasonably withhold consent but they can require that travel be on foot. Unlike the Green Area regulations, this system provides no recreation management tools other than control of access. It also suggests uncertainty about what access system would apply if the type of agricultural leases that fall under the *Recreational Access Regulation* were to be used in the Green Area.

Further legislation dealing with activities on public land has a similar history to the *Public Lands Act*. For example the *Forests Act* lacks clear statements of purpose, is silent on recreation matters, and mostly serves to manage timber production.⁸ Since the creation of the *Public Lands Administration Regulation* the *Forests Act* has had less of a role in managing recreational use of public land. Prior to this regulatory overhaul it enabled the creation of Forest Land Use Zones (now Public Land Use Zones under the new regulations).

III. Motor vehicles and roads

Vehicles and their operators are regulated under traffic and motor vehicles legislation.⁹ This regime defines OHVs in a way that covers dedicated off-road vehicles such as quads, dirt bikes, and side-by-sides (machines where multiple riders sit beside each other instead of straddling the machine). This definition does not cover 4x4 trucks, RVs or other highway vehicles driven on backroads or off-road.

⁷ *Recreational Access Regulation*, Alta Reg 228/2003.

⁸ *Forests Act*, RSA 2000, c F-22.

⁹ *Traffic Safety Act*, RSA 2000, c T-6 [*Traffic Safety Act*]; *Highways Development and Protection Act*, SA 2004, c H-8.5; Note that the prior *Alberta Off Highway Vehicles Act* has been repealed and replaced.

Roads are regulated depending on their classification. Highways are designated by the province under the *Traffic Safety Act* and include more roads than what laypeople might call a “highway”.¹⁰ This act also covers roads on public land that are permitted through a “license of occupation” under the *Public Lands Act*. These roads are typically built by natural resource industry operators. Depending on the physical location of a highway, the “road authority” responsible for such decisions can be the ministries responsible for the *Highway Development and Protection Act*, the *Provincial Parks Act*, the *Public Lands Act*, the *Special Areas Act* or a municipality.¹¹ Municipal authority is limited as municipalities cannot restrict road use in a way that conflicts with provincial permits. Off highway vehicles are prohibited on “highways” unless permitted under the *Traffic Safety Act*. However, use can be permitted by responsible road authorities.¹²

IV. Comments on the mandate model in Alberta

The mandate to manage recreational use of public land in Alberta could be described as “fragmented”. Due to the numerous pieces of legislation in play, the powers, duties and functions related to managing recreational use of public land are divided between numerous agencies:

- parks and protected area legislation is administered by a parks agency;
- public lands outside of parks and protected areas are administered by a public lands agency that may or may not be in the same ministry as the parks agency depending on the organization of ministries;
- motor vehicles legislation is administered by a transportation ministry that is always separate from parks and public lands;
- roads may be administered by an array of public authorities; and
- enforcement officers under the above legislation have been progressively transferred from their home ministries to the Ministry of Justice and Solicitor General in light of their public security functions.

There are also multiple provincial industry regulators with decision making authority on the “multiple use” land base whose decisions have an impact on recreation management.

Municipalities have minimal authority to regulate public land within or adjacent to their boundaries but they:

- can apply for Peace Officer authority to enforce provincial regulations;
- can regulate OHVs on roads over which they have authority; and,
- regulate private land used for recreational purposes such as campgrounds; or, and
- Provide recreational infrastructure and services on municipal lands or by leasing public lands.

¹⁰ *Traffic Safety Act, ibid.*, 1(1)(p).

¹¹ *Ibid.*, 1(1)(mm).

¹² *Ibid.*, 120(1).

Municipalities are also responsible for providing infrastructure and services that are not for recreation but are impacted by recreational visitors. Beyond roads, areas of municipal responsibility include drinking water, waste management and emergency response.

As with other areas of natural resource management, provincial policies emphasize “shared responsibility”. When it comes to recreation management, however, shared responsibility is a practical necessity flowing from the patchwork legislation. This fragmentation:

- makes recreation management vulnerable to competing priorities and administrative siloes;
- allows for inconsistent approaches, unclear rules and gaps on the physical landscape; and,
- creates barriers to establishing trail systems across lands under different legal designations and management authorities because the rules can change at the borders.

These effects are most acutely felt concerning motorized recreation on public lands outside of the protected area system. In other words, the legal barriers to effective recreation management are highest in the exact same situation where the issues are most serious. Some specific examples of the negative effects of this legal framework include:

- unsatisfactory access management planning;
- barriers to regulatory implementation; and,
- minimal recreational infrastructure.

Access management: Strikingly, one matter not clearly covered in the above legislation is recreational access management planning. The historical approach to planning and development of the “multiple use” landscape focused on the major natural resource industries. Recreational use of the same landscape was more of an afterthought. With public use increasing, “access management plans” and “designated trails” have been laid on top of the pre-existing industrial footprint in some places.



This newspaper article hanging in the Municipal District of Ranchland hall at Chain Lakes documents the concerns of rural municipalities with “mud bogging” along the Eastern Slopes.

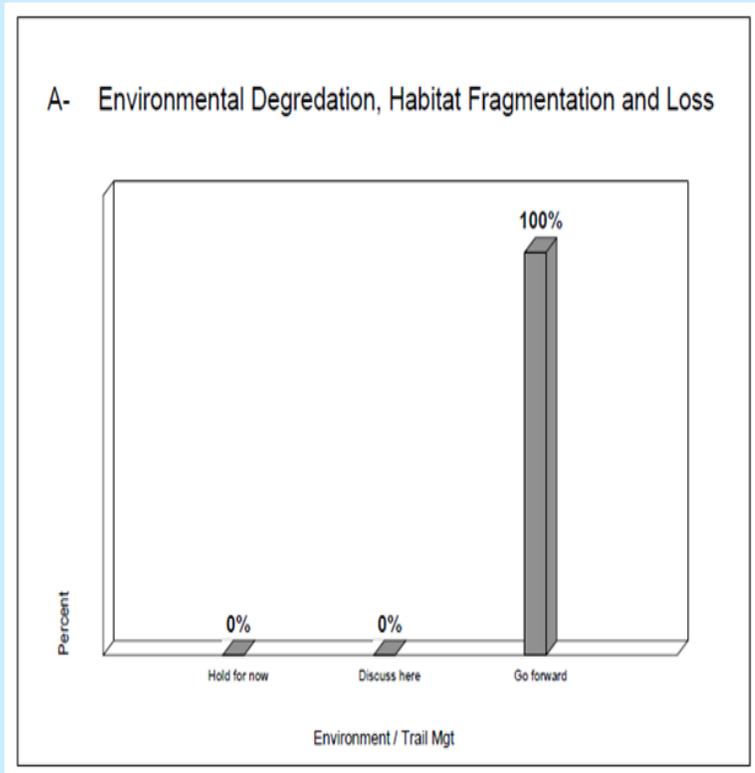
This historical approach to access management planning has been fairly ad-hoc and reactive to problems rather than proactive in anticipating future recreational use. This is the case in jurisdictions other than Alberta as well.

While unmanaged recreation is the larger issue, there are issues with current approach to access management planning as well.

These include:

- displacement of problem use to other areas of public land;
- participant dissatisfaction with the process and outcomes;
- difficulty maintaining functional stewardship groups; and,
- need to implement access management plans through regulations, as the plans have no legal weight on their own.

This graph from the Access Management Workshop (2005) shows strong consensus on the need to respond to the impacts of motorized use of public lands. The greater debate is about solutions.



Graph: Equus Consulting Group Inc., for Federation of Alberta Naturalists and Alberta Off Highway Vehicle Association.

Regulatory implementation barriers: As implementation of recreation plans and policies would occur through the *Public Lands Administration Regulation*, it is notable that this regulation creates barriers to its own use. The biggest barrier may be the access baseline of “open unless closed”. The implication of this approach is that that almost any management action can be perceived as a restriction by some recreational users. In fact most tools available to agency staff are blunt closures.

Enforcement of the *Public Lands Administration Regulation* is somewhat constrained as the regulation does not give front line officers authority to issue tickets (administrative penalties) for recreational infractions. The authority to issue administrative penalties, enforcement orders and stop orders is at the Director level.¹³ The other option for enforcement officers is to seek court prosecutions. Court processes

¹³ *Public Lands Act*, *supra* note 5, sections 56-59.92.

create higher evidentiary burdens, procedural costs, and vulnerability to political decisions. In fact the vast majority of enforcement action against recreational users is for tangential offences such as alcohol and motor vehicle offences rather than directly for public lands offences.

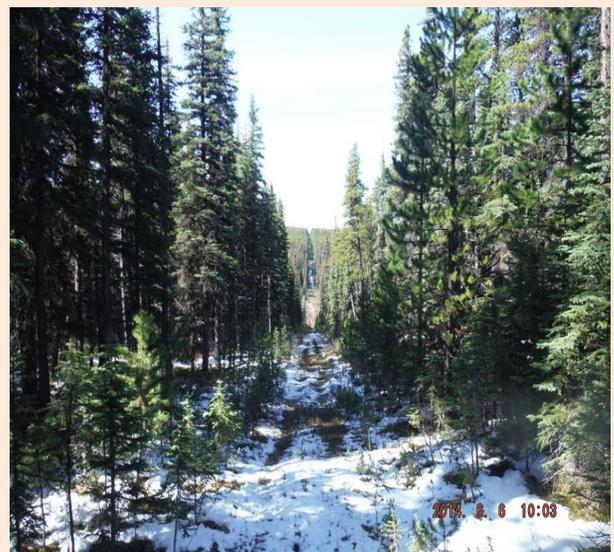
Overall the *Public Lands Administration Regulation* can be hard to deploy despite offering an array of promising tools. It can obscure the fact that access to public land is a privilege not a right. Moreover, it may even serve to affirm a culture of entitlement to access and use public lands.

Infrastructure needs: There is very little physical infrastructure or service provision on provincial public lands relative to the growth in recreational use. Much recreation use of public land makes use of a pre-existing industrial footprint that was not planned or built for recreation. Thus, in many places this footprint can neither withstand sustained use nor provide a quality recreational experience. The current practice of “designating” trails from the existing footprint does not necessarily result in physical enhancements to the designated trails, or closure and removal of the unsuitable ones. Trail and camp development is apt to be driven by users rather than by agency programs. Ironically, unauthorized trail and campsite development by users can be unlawful even though the baseline is random use. The tools in the *Public Lands Administration Regulation* that could respond to infrastructure needs all require the involvement of elected officials. Examples include user fees, public land use zones, recreation areas and recreation trails.

Overall, the Alberta model has a politicizing, polarizing, and paralyzing effect on management action. This appears to be the case regardless of whether the management action in question is “reactive” (such as area closures) or “proactive” (such as trail development).



The recreation trail above was planned and built for a quality user experience and to withstand sustained use. The industrial cut line below was not.



(b) Mandates in the US federal system

The US federal system provides a useful comparison for Alberta because much recreation occurs outside of parks and protected areas on public lands managed for “multiple use”. This includes lands managed by multiple agencies including the Bureau of Land Management and by the US Forest Service.

The details of these agency mandates differ. However, at the high level, the us federal land agencies are trusted with a mission to provide a land base for recreation, develop recreational opportunities and tackle the negative impacts of recreation. As in Alberta the high level mandates of the US federal agencies comes from general public land legislation. However, unlike Alberta this legislation contains statements of policy, purpose sections, definitions of “multiple use” and direction on recreation. Thus, it is important to recognize that the differences from the Alberta model begin with the general approach to public lands prior to considering the recreation management systems.

The most important piece of US federal legislation is the *Federal Land Policy and Management Act of 1976*.¹⁴ This act:

- includes a preamble stating that the legislation is to provide public land policy, guidelines for administration and to provide for the “management, protection, development and enhancement” of public land;
- makes a “declaration of policy” that public lands should be managed in a manner that will:
 - protect environmental values;
 - preserve certain lands in their natural condition; and,
 - provide for outdoor recreation.

This act also provides direction on the “multiple use” of public lands by:

- defining “multiple uses” as a combination that best meets present and future needs of the people, making the most judicious use of land;¹⁵
- stating the goal of “multiple use” as “coordinated management of resources without impairment of productivity of the land or quality of the environment”;¹⁶
- recognizing the watershed, natural, scientific and historical values of public land;
- providing a list of “principle or major uses” of public lands that includes “outdoor recreation” and “fish and wildlife”;¹⁷ and,
- states that decisions on land use must give consideration to the “relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return.”¹⁸

¹⁴ *Federal Land Policy and Management Act of 1976*, as amended (43 U.S.C. 1701 et seq. (43 USC 1701-2, 1711-23, 1732-37, 1740-42, 1744, 1746-48, 1751- 53, 1761-71, 1781-82)).

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

The act includes several more specific provisions on recreation. For example it:

- requires agencies to inventory resources including “recreation and scenic values, giving priority to areas of critical environmental concern”;¹⁹
- directly establishes some recreation areas on public lands outside of parks and protected areas;
- restricts sales of public land to situations where (i) important public policy objectives cannot be otherwise reached and (ii) these objectives outweigh the land’s recreation and scenic values; and,
- authorizes agencies to purchase lands which are primarily of value for outdoor recreation.²⁰

Regulations under the act:

- provide authority for access management and enforcement; and,
- direct the agencies to develop plans to protect areas of critical environmental concern.²¹

This focus on recreation in US federal legislation has a long history. The former head of the Bureau of Land Management describes how the desire to improve management of recreation activities on public lands was the focus of the first attempted bill that resembled the *Federal Land Policy and Management Act*. This bill was introduced following recommendations from a Public Land Law Review Commission that identified important issues including:

- lack of regulations and enforcement authority, thus leading to “vandalism and destruction of resources”;
- lack of sanitation facilities, thus creating health hazards;
- littering, overuse and neglect causing unsightly blights on the landscape; and,
- millions of acres of public land restricted to private use.



This photo of a degraded camping spot in BC went viral in 2015. The same problem occurs in Alberta. In the US, such concerns fueled legislative reforms many decades ago.

¹⁹ *Ibid.*

²⁰ *Ibid.* The funding of land acquisitions through the Land and Water Conservation Fund is discussed below.

²¹ *Ibid.*

The original US bill provided that land should be developed for multiple uses recognizing the value of outdoor recreation. It also provided that the Bureau of Land Management receive authority to regulate access, enforce against users and collect funds. While this original bill did not pass, the focus on recreation continued in the *Federal Land Policy and Management Act of 1976*. Numerous subsequent pieces of legislation have provided the the Bureau of Land Management and the US Forest Service with slightly different direction and details. Some of these differences are discussed below.

Other US federal legislation on recreation

- The *National Trails System Act* provides for the establishing national trails in response to population growth. It sets the considerations for trail establishment such as proximity to urban areas as well as more remote areas of high value. It also provides for components of the trail systems, cooperation with other authorities in trail development and maintenance, and volunteer involvement in “planning, development, maintenance, and management” of trails.
- The *National Parks and Recreation Act* establishes national historic trails that cross public lands.
- The *Wild and Scenic Rivers Act* provides for the protection and public use of river systems. It provides for volunteer assistance in the “development, maintenance and management” of trails, programs to supervise volunteer efforts, use of federal facilities and equipment.
- Numerous other federal statutes and executive proclamations concern specific locations and recreation areas on public land outside of the parks system.
- Legislation concerning reclamation of industry roads contemplates the conversion of decommissioned roads to recreational infrastructure.
- The *National Environmental Policy Act* requires that agencies integrate environmental values into their decisions making processes and consider reasonable alternatives to potential environmental impacts. Environmental impact assessments can be required for recreation projects that may have significant impacts on the environment.

I. **The Bureau of Land Management**

Details of the Bureau of Land Management mandate come through fairly prescriptive regulations on “recreation programs” that the agency is required to administer.²² There are separate, specific regulations for “visitor services”, “management areas”, “procedures” and “off-road vehicles”.

The *Visitor Services Regulation* provides for developed recreation sites and capital improvements including campgrounds, parking and boat launches. It also provides staff with authority to close areas and to make rules about user conduct, sanitation, noise, and public safety.

The *Off-Road Vehicle Regulation (ORV Regulation)* defines ORVs as vehicles capable of travelling over natural terrain, which is broad enough to cover street-legal 4x4 s used off road. The regulation is very detailed concerning the restriction of ORVs to designated trails and areas:

- the purpose of the regulation is to “establish criteria for designating public lands as open, limited or closed to the use of off-road vehicles and for establishing controls governing the use and operation of off-road vehicles in such areas”;
- officers are required to “designate all public lands” as either open, limited, or closed to ORVs;
- all ORV trail and area designations must be based on:
 - protection of the resources of the public lands,
 - promotion of the safety of all the users of the public lands,
 - minimization of conflicts among various uses of the public lands; and
 - in accordance with specific criteria listed below.

The specific criteria for trail and area designations are that:

- areas and trails shall be located to minimize damage to soil, watershed, vegetation, air, or other resources of the public lands, and to prevent impairment of wilderness suitability;
- areas and trails shall be located to minimize harassment of wildlife or significant disruption of wildlife habitats;
- special attention will be given to protect endangered or threatened species and their habitats;
- areas and trails shall be located to minimize conflicts between ORV use and other existing or proposed recreational uses of the same or neighbouring public lands, and to ensure the compatibility of such uses with existing conditions in populated areas, taking into account noise and other factors;
- areas and trails shall not be located in officially designated wilderness areas or primitive areas;

²² Electronic Code of Federal Regulations, Title 43—Public Lands: Interior, Subtitle B—Regulations Relating to Public Lands (Continued), Chapter II- Bureau of Land Management, Department of the Interior, Subchapter H – Recreation Programs, PROCEDURES, 8200— [8200.0-1 to 8224.2 \[Procedures\]](#); OFF-ROAD VEHICLES, [8340](#) to 8344.1 [Off-Road Vehicles]; MANAGEMENT AREAS, 8350, [8351.0-1 to 8351.2-1](#); VISITOR SERVICES- [8360](#) - [8360.0-3 to 8365.2-5 \[visitor services\]](#).

- areas and trails shall be located in natural areas only if the authorized officer determines that off-road vehicle use in such locations will not adversely affect their natural, esthetic, scenic, or other values for which such areas are established.

Beyond this designation system the regulation provides for closures, permit requirements and fines. Closures are required where ORV use would cause considerable adverse effects. Permits are required for certain types of ORV use and must be issued in accordance with legislated procedures.

II. The US Forest Service

The US Forest Service is a branch of US Department of Agriculture that is responsible for forests and grasslands. It also shares responsibility with state agencies for stewardship of lands outside of its own land base. The US Forest Service receives much of its mandate under legislation specific to the national forests. This legislation provides for forests to be managed using a “multiple-use” approach that sustains healthy terrestrial and aquatic ecosystems. It addresses the need for resources, commodities, and services.²³ Over time, the focus has shifted from timber to broader forest resources.

The original legislation providing the purposes for which national forests are administered is the *Forest Service Organic Administration Act*.²⁴ It aims at improving and protecting the forest and securing conditions for water flows and furnishing timber. It allows for regulation of occupancy and use and for the preservation of forests from destruction. The US Forest Service states that this original act must be read in conjunction with later acts that expand the purposes and uses of national forests.

The purposes of the national forests were expanded to include outdoor recreation, range, timber, watershed, and fish and wildlife through the *Multiple-Use Sustained Yield Act of 1960*.²⁵ It provides that the administration of national forests consider the relative values of resources in particular areas, and that the establishment of wilderness areas is consistent with the legislation.²⁶ This act continues the tradition of defining “multiple use” as using resources to best meet the needs of the people, making judicious use of resources, and not necessarily allowing those uses that provide the greatest dollar return.²⁷ It also defines “sustained yield” as the maintenance of the output of various renewable resources without impairing the productivity of the land (rather than simply as the sustained yield of timber).²⁸

²³ Amie M Brown, *Selected Laws Affecting Forest Service Activities, Forest Service* (United States Department of Agriculture, April 2004); United States, *The Principle Laws Relating to Forest Service Activities*, (United States, 1993), available online:

<https://ir.library.oregonstate.edu/xmlui/handle/1957/12129>.

²⁴ *Forest Service Organic Administration Act of 1897*, as amended, 16 U.S.C. 473-482 and 551.

²⁵ *Multiple-Use Sustained Yield Act of 1960*, 16 U.S.C. 528-531.

²⁶ *Ibid.*

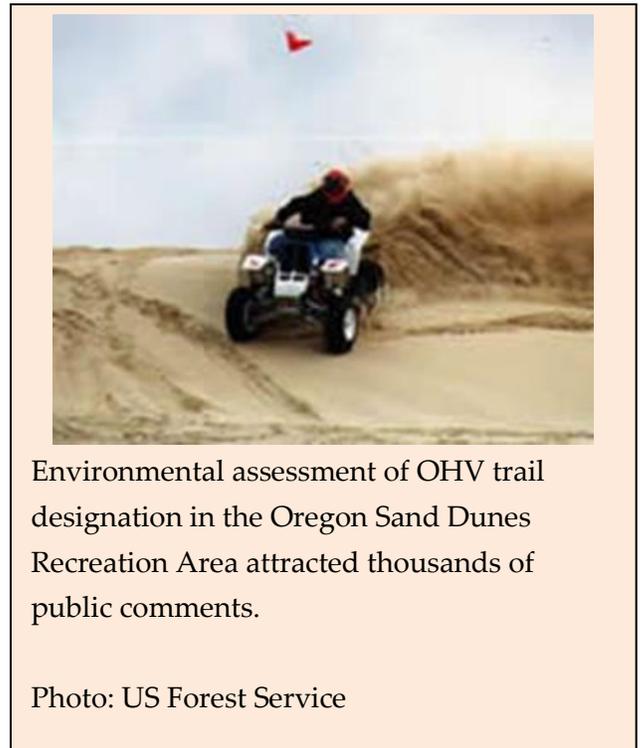
²⁷ *Ibid.*

²⁸ *Ibid.*

More recent legislation continues this evolution towards management of forests for multiple renewable resources. The *National Forest Management Act* requires the US Forest Service to assess forest lands and develop a management programs for multiple use sustained yield.²⁹ The *Forest and Rangeland Renewable Resources Planning Act* requires the agency to prepare strategic plans for all agency activities based on an assessment of renewable resources.³⁰ Further environmental legislation applicable to US Forest Service activities (not reviewed here) includes the *Healthy Forest Restoration Act*, the *Clean Air Act*, the *Clean Water Act* and the *Wilderness Act*.

One notable feature of the US Forest Service mandate concerning recreation is how it flows from the agency’s strategic planning as much as from prescriptive legislation. The mission of the US Forest Service is to “sustain the health, diversity, and productivity of the Nation’s forests and grasslands to meet the needs of present and future generations.” At the time of this writing, the agency’s strategic plan was focused on forest management for water, forest restoration and recreation. Its goal was to sustain and enhance outdoor recreation opportunities. This focus on recreation is not new as the agency has recognized the public demand for recreational opportunities since the early half of the 1900s.

Motorized recreation: In the early 2000s, the chief of the Forest Service proclaimed unmanaged motorized use to be one of the top threats to the health of public forests.³¹ This was followed by administrative directives requiring that motorized use be on designated trails and areas and requiring that staff designate all areas.³² The agency is involved in multiple education programs targeting OHV users and some evaluation is available.³³ The agency is also involved in trail programs which are discussed below with respect to funding.



Environmental assessment of OHV trail designation in the Oregon Sand Dunes Recreation Area attracted thousands of public comments.

Photo: US Forest Service

The US Forest Service is a very active recreation manager. According to the overview on its website it administers over 140,000 miles of trails, 14,000 recreation sites, and 374,000 miles of roads. It also counts 192 million visitors per year and has 737 law enforcement personnel. The comments of our respondents affirm an agency focus on “boots on the ground” activity.

²⁹ *National Forest Management Act of 1976*, P.L. 94-588 as amended, 16 U.S.C. 1600.

³⁰ *Forest and Rangeland Renewable Resources Planning Act of 1974*, as amended, P.L. 93-378, 16 U.S.C., 1600-1614, Chapter 36.

³¹ Blahna et al., *A Review and Analysis of Five OHV Communication Programs, Forest Service*, (United States Department of Agriculture, March 2005). [Review of OHV programs].

³² *Ibid.*

³³ *Ibid.*

(c) Mandates in three US states

The mandates to manage recreation varied between the three states we reviewed. However, there were some re-occurring features including:

- consolidation of management functions;
- direction to provide recreational opportunities while mitigating impacts;
- legislated management regimes outside of parks and protected areas;
- detailed rules and permit requirements; and,
- roles for recreational user groups and municipalities.

Consolidation: Matters of recreation use and environmental conservation were often consolidated. For example, Colorado legislation consolidates the subject matters of parks, fish and wildlife, and recreation.³⁴ The more specific items consolidated include motorized vehicles, land access, areas and trails, user rules, commercial operations, safety and enforcement.³⁵

Direction: In all states reviewed the legislation provided direction to tackle the negative impacts of recreation and to provide recreational opportunities. For example, in Utah the legislation concerning OHVs directs agencies to “protect persons, property and environment, and also to “develop trails and other facilities for the use of these vehicles”.³⁶ More specific provisions concern development of trails, restrooms, parking facilities, and education programs to promote safe and responsible use.

This direction to provide opportunities while also mitigating impacts was apparent in agency communications to users. For example the Utah Parks OHV website has a significant focus on OHV opportunity provision and it is fair to say that the State endorses motorized recreation tourism. However, the messaging towards users is fairly strong, telling users to “protect your privilege”. It is made clear that access is “a privilege not a right”, and that the agency has a mandate to protect safety and natural resources.³⁷ In other cases the focus was more on reducing impacts, with implied benefits to the users from doing so. For example in Oregon, the object of the “rules for recreational use of state forests” is to protect the resources, promote safety and minimize conflict.³⁸

Beyond parks: Legislation addressed recreation on public lands outside of parks and protected areas. In fact almost all US states have some form of “trails act”, recreational use statute or consolidated provisions on outdoor recreation in the State Code.

³⁴ Colorado Revised Statutes, Title 33, Parks and Wildlife, available online: <http://www.lexisnexis.com/hottopics/Colorado/> [Colorado Statutes].

³⁵ *Ibid.*

³⁶ Utah Code, Title 41, Chapter 22-1, available online: <http://le.utah.gov/UtahCode/title.jsp> [Utah Code].

³⁷ Utah Parks website, <http://stateparks.utah.gov/>.

³⁸ Oregon Administrative Rules, Chapter 629 (Department of Forestry), Division 25. [Oregon Administrative Rules].

Rules and regulations applicable to the recreational users and to the responsibilities of agencies were very detailed. For example, the Oregon *General Forest Recreation Rules* about camping on public land:

- provide for allowable locations, length of stays, sanitation and human waste disposal, restrictions on fires to fire rings, and prohibitions on tree cutting and trail building without permission;
- require forest agency staff to keep maps of designated areas; and,
- authorize staff to set campground types, quit hours, occupancy limits, post traffic rules, and control domestic animals.

Permit requirements and procedures were set by legislation in all states reviewed. For example, in Utah permits are mandatory for all OHV races and organized events.³⁹ In Oregon an “organized event” means any planned recreational activity that is “advertised or otherwise promoted” and “conducted at a predetermined time and place”.⁴⁰ Permits, which are mandatory for all organized events, include requirements for sanitation, policing, medical facilities, traffic control, and other necessary services.⁴¹ Permit applicants are required to provide a map of the area, the number of participants, a description of the activity and a plan for timely clean-up and restoration. Events can be cancelled due to law enforcement or public safety problems.⁴²

Volunteers and recreational user groups had program functions in every state reviewed. The most common roles were delivery of agency-approved trail projects and sitting on advisory committees to allocate funds for such projects.

Local authorities (counties or municipalities) played a role in providing recreational opportunities and had authority to enforce state regulations. Legislation also clarified limits on municipal authority. For example, Colorado and Oregon prohibit municipalities from charging fees for access to public land.⁴³ Colorado prohibits municipalities from imposing their own licensing and registration requirements on state-regulated vehicles. Oregon prohibits municipal regulation of machines or users in ways that conflict with the state system.⁴⁴ As in Alberta,



A role for volunteer trail groups was a feature of every jurisdiction including Alberta. However, the degree of formal engagement was higher in the US.

Photo: US Forest Service.

³⁹ Utah Code, *supra* note 36 , 41-22-15.

⁴⁰ Oregon Administrative Rules, *supra* note 38, 629-025-0005.

⁴¹ *Ibid.*, 629-025-0020.

⁴² *Ibid.*

⁴³ Oregon Vehicle Code, Chapter 801 – 801.040 [Oregon Vehicle Code].

⁴⁴ Colorado Statutes, *supra* note 34, 33-14.5-110, Oregon Vehicle Code, *supra* note 43, Chapter 801 - 801.040.

these states allowed municipalities to regulate OHV use on municipal roads but did not allow municipal rules to conflict with state regulations allowing OHV use.

I. State OHV legislation and programs

Every state reviewed has specific statutes or regulations on OHVs or motorized recreation more broadly.⁴⁵ Summaries of the legislation from these and other states are posted at the International Off-Highway Vehicle Administrator’s Association website.⁴⁶ Some states published detailed consolidations of their OHV laws for the general public, for example the Utah Off-Highway Vehicle Laws and Rules.⁴⁷ The OHV legislation generally spoke to impact reduction and opportunity provision. It also consolidated “motor vehicle” matters like vehicle definitions, registrations and operators permitting with “public lands” matters like user rules, trail designations and environmental impacts.

Definitions of OHVs, ORVs or ATVs: The definitions of vehicles varied notably between states.⁴⁸ All definitions would cover vehicles designed for off-road use such as quads, dirt bikes, dune buggies, side-by-sides and personnel carriers. Snowmobiles tended to be defined separately for vehicles registration purposes. The largest variations concerns street-legal vehicles. In Utah 4x4 trucks and other four wheel drive automobiles are caught by regulations for use of OHVs in state parks.⁴⁹ The Oregon definitions cover all vehicles “capable of cross country travel” on public lands.⁵⁰

What should OHV legislation include?

- Definition of OHVs?
- Environmental protection?
- Property protection?
- Public safety?
- Access to land?
- Trail and area designation?
- Facilities and services?
- Vehicle standards?
- User rules?
- Vehicle registrations?
- Operator permits?
- Education?
- Enforcement and penalties?
- Funding?
- Stakeholder involvement?

⁴⁵ Utah Code, *supra* note 36, 41-22.

⁴⁶ The International Off-Highway Vehicle Administrator’s Association (INOHVAA) is an association of OHV program managers and administrators. It should not be confused with the National Off-Highway Vehicle Conservation Council (NOHVCC) which is US national-level user advocacy organization. However there is some association between the two organizations as the INOHVAA meets at the conference of the NOHVCC. See: <http://www.inohvaa.org/Resources/Legislative>.

⁴⁷ *Utah Off-Highway Vehicle Laws and Rules*, (Utah State Parks, Department of Natural Resources, April 2013), available online: [DNRhttp://static.stateparks.utah.gov/docs/OHVcode.pdf](http://static.stateparks.utah.gov/docs/OHVcode.pdf)

⁴⁸ Utah Code, *supra* note 36, 41-22.2; Colorado Statutes, *supra* note 34, 33-14.5-101; Oregon Revised Statutes, Title 59, Chapter 801.190-194 [Oregon Statutes].

⁴⁹ Utah Board of State Parks and Recreation Rules, Utah Administrative Code, R651-411.1 [Utah Administrative Code].

⁵⁰ Oregon Administrative Rules, *supra* note 38, 629-025-0005.

Vehicle Registrations and/or User Permits were always required for machines covered by the definitions. Vehicle registrations and permit stickers on vehicles were required for use of public land in all three states reviewed.⁵¹ Oregon is notable for requiring vehicle permits and operator permits. All machines must be permitted for public land use and all operators must hold a Safety Certificate (operator's permit) for use of public land.⁵² The legislation provides the criteria for passing the safety exam.⁵³ Safety Certificates are not required to operate highway vehicles. However, persons whose driver's licenses are suspended may not operate vehicles of any class on public land.⁵⁴ Further preconditions to public land use were related to vehicles as property. Oregon requires that vehicles have a certificate of title.⁵⁵ Utah requires proof of payment of property tax on OHVs where applicable.⁵⁶



The legal definition of "OHV", "ORV" or "ATV" can be broad.

Photo: California parks OHV program

Exemptions to vehicle registration and user permit requirements were provided where OHVs were used on private land or for farming and ranching on public land.⁵⁷ The exact details of the exemptions vary from one state to another.

Machine standards: State requirements for on-machine equipment are fairly comparable to Alberta and other provinces. Examples included mufflers, spark arresters, and headlamps for use after dark. Utah regulations specify further equipment for street-legal OHVs.⁵⁸ In Oregon, riding in sand dunes requires extra equipment including roll bars, safety flags and secured fuel containers.⁵⁹

User rules: The topics of state user rules such as helmet requirements, age requirements and prohibitions on drugs and alcohol are comparable to Alberta and other Canadian provinces. However, like Canadian jurisdictions, the exact rules vary from one state to another. Helmets are typically required

⁵¹ Utah Code, *supra* note 36, 41-22-3; Utah Administrative Code, *supra* note 49, R651-401-1; Oregon Statutes *supra* note 48, 390.58 ; Oregon Vehicle Code, *supra* note 43, 821.143; Colorado Statutes, *supra* note 34, 33.14.5-112.

⁵² Oregon Administrative Rules, *supra* note 38 , 736-004-0060.

⁵³ Oregon Vehicle Code, *supra* note 43, 821.170 and 821.172; Oregon Statutes, *supra* note 48, 390.570, 390.075. Oregon Administrative Rules, *supra* note 38, 736-004-0080, 736-004-0085 and 736-004-0100.

⁵⁴ Oregon Vehicle Code, *Ibid.* 821.174.

⁵⁵ *Ibid.*, 803.025

⁵⁶ Utah Code, *supra* note 36, 41-22-3.

⁵⁷ Colorado Statutes, *supra* note 34, 33-14.5-102; Utah Code, *supra* note 36, 41-22-3 and 41-22-5.5 ; Oregon Vehicle Code, *supra* note 43, 821.170, 821.180 and 736-004-0115 .

⁵⁸ Utah Code, *supra* note 36, 41-6a-1509.

⁵⁹ Oregon Administrative Rules, *supra* note 38, 735-116-000.

for riders under a set age on public land but not always required for adults.⁶⁰ Oregon regulations also set the necessary fit between rider size and machine size.⁶¹ Multiple states set a minimum age to operate OHVs on public land and required supervision of children under a certain age. Utah prohibits persons under 8 years old from operating OHVs on public land unless they are in organized practices and events on closed courses.⁶² Utah and Oregon require adult supervision for persons under 16 and 18 respectively.⁶³ In Utah officers who stop impaired users can seize and impound vehicles.⁶⁴

Access, trails and areas: In every state reviewed the regulatory baseline for motorized access was “closed unless open”. The states varied in how notice of open trails or areas must be provided. Examples included posted signage, maps, and descriptions. In Utah there is a prohibition on OHV “cross country” travel (off-trail travel) on any public land not designated for that use. OHVs may be used on land or trails “posted by sign or designated by map or description as open” to OHVs.⁶⁵ Consistent with the mandate to tackle impacts and provide opportunities, Utah legislation directs agencies to “pursue opportunities to open public land to responsible off-highway vehicle use”.⁶⁶ In Oregon state forests there is a prohibition on any off-road vehicle use other than on designated trails.⁶⁷ Designated trails are defined as those that are suitable and cleared.⁶⁸ Areas are further broken down into “motorized off-road zones” where off-road use is permitted only on designated trails, and “non-motorized zones” where motorized use is restricted to roads. Motorized vehicles other than snowmobiles are prohibited in roadside ditches and banks.⁶⁹

Harm to property and environment: Every state reviewed had prohibitions and penalties for harm to property and environment caused by OHV use. For example Utah has:

- a prohibition on motorized “damage to the environment, which includes excessive pollution of air, water, or land, abuse of the watershed, impairment of plant or animal life, or excessive mechanical noise”;⁷⁰
- enhanced penalties for repeat offenders or anyone who “knowingly, intentionally or recklessly...” damages vegetation, trees, wetlands, riparian areas, fences, structures, or improvements” or “harasses wildlife or livestock”;⁷¹
- an additional penalty for damage to access signage; and
- regulatory offences for trespassing on private land.⁷²

⁶⁰ Utah Code, *supra* note 36, 41-22-10.8 ; Oregon Vehicle Code, *supra* note 43, 821.202.

⁶¹ Oregon Administrative Rules, *supra* note 38, 736-004-0115.

⁶² Utah Code, *supra* note 36, 41-22-29.

⁶³ Utah Code, *Ibid.* 41-22-30, 41-22-10.5; Oregon Vehicle Code, *supra* note 43, 821.170, 821.180 and 736-004-0115.

⁶⁴ Utah Code, *Ibid.*, 41-6a-502; 41-6a-526.

⁶⁵ *Ibid.*, 41-22-10.1.

⁶⁶ *Ibid.* 41-22-12.

⁶⁷ Oregon Administrative Rules, *supra* note 38, 629-025-0070.

⁶⁸ *Ibid.* 629-025-0005.

⁶⁹ *Ibid.* 629-025-0070.

⁷⁰ Utah Code, *supra* note 36, 41-22-13.

⁷¹ *Ibid.* 41-22-12.7.

⁷² *Ibid.* 41-22-12.5.

As another example, Oregon had prohibitions on:

- riding an ATV “in any area or in such manner as to expose underlying soil or vegetation or damage trees or crops”;⁷³
- riding ATVs with loaded firearms or arrows out of quiver, hunting from ATVs or harassing animals;⁷⁴ and,
- penalties of three times the amount of any damage to trees, shrubs crops or property in the event that rules are breached.⁷⁵

Enforcement: The power to enforce state regulations was typically provided to numerous types of officers.⁷⁶ Thus, parks officers, “game wardens” (fish and wildlife officers), municipal peace officers, and police would share these powers in addition to their separate functions.

Safety requirements were somewhat inconsistent between states. The variation in helmet laws was mentioned above. Some states, such as Colorado, required persons involved in accidents to notify officers.⁷⁷ Other states including Utah and Oregon had mandatory safety education based on rider age. Utah legislation, which requires agencies to create a safety education program, provides details on curriculum content and completion certificates.⁷⁸ Safety education is mandatory for persons under 16 years old. For rental operators there is a different system where a safety checklist is mandatory for the rental user to receive their temporary permit. In Oregon safety education is required of all users.

OHV Programs: The most significant effect of state legislation is to enable comprehensive OHV programs. The scope of these programs varies from one state to another due to the difference in definitions of OHVs, ORVs or ATVs from one state to another. OHV Programs also varied in the extent to which they focused on providing opportunities for OHV use as compared to mitigating impacts of OHV use. All programs were “trail programs” to some degree as they tended to pursue opportunity provision and impact mitigation through the use of physical infrastructure.

The lead agency on state OHV programs and other recreation programs on public land is typically the parks agency. This parks agency may in turn be housed within a larger natural resources department responsible for the public land base. Greater details of state OHV programs are discussed below with respect to funding.

⁷³ Oregon Vehicle Code, *supra* note 43, 821.280, 821.825.

⁷⁴ *Ibid.* 821.240; 821.260.

⁷⁵ *Ibid.* 821.310.

⁷⁶ Colorado Statutes, *supra* note 34, 33.14.5-111; Utah Code, *supra* note 36, 41-22-16; Oregon Vehicle Code, *supra* note 43, 801.540.

⁷⁷ Colorado Statutes, *supra* note 34, 33-14.5-113.

⁷⁸ Utah Code, *supra* note 36, 41-22-31.

Comparison of state OHV programs		
“narrow” scope	“middle” scope	“broad” scope
The Colorado OHV program covers dirt bikes, quads and other 4-wheeled OHVs. Snowmobiles had a separate program stream while street-legal 4x4 trucks and RVs were not included in the OHV program.	The Utah OHV program covers OHVs, snowmobiles and 4x4 trucks used off-road, but not highway vehicles.	The Oregon ATV program applies to all motor vehicles driven on public land including snowmobiles and highway vehicles used on forest roads.

(d) Mandate debates and reforms in Canadian provinces

One of the most important provincial models for comparison from a reform perspective is in Nova Scotia. Three notable features of this province include:

- a trails act;
- OHV legislation and OHV program; and
- an OHV enforcement force.

The Nova Scotia *Trails Act* provides for designated trails on public or private lands, closures, rules for user behavior, enforcement powers, penalties such as restoring land to their prior condition, and liability protections (discussed below). Unlike some US legislation it lacks specific provisions on trail maintenance, roles for the non-government sectors, or funding.

OHV legislation and OHV program: The Nova Scotia OHV program is the result of a large public inquiry in response to concerns with OHV use.⁷⁹ The provincial government accepted 37 of 39 recommendations focused on public safety, prevention of environmental damage and protection of property rights and wilderness areas. These recommendations became the basis of the government’s OHV plan.⁸⁰ The government website states that some recommendations were implemented exactly as proposed while others would be modified before being implemented.⁸¹ The lead agency on implementation of the provincial OHV plan is the Department of Natural Resources.

⁷⁹ *Final Report of the Voluntary Planning Off-Highway Vehicle Task Force*, (Province of Nova Scotia, Voluntary Planning: A Citizen’s Policy Forum, 2004), available online: http://novascotia.ca/natr/ohv/pdf/OHV_Final_Report.pdf . [Nova Scotia Task Force].

⁸⁰ Nova Scotia OHV Action Plan, available online: https://www.ecologyaction.ca/files/images-documents/file/Wilderness/OHV_Action_Plan.pdf.

⁸¹ Province of Nova Scotia news release, (October 12, 2005) <http://novascotia.ca/news/release/?id=20051012003>

The OHV plan resembles the US-style mandate as it suggests prohibitions on OHV use in some areas and development of trails elsewhere. Some further proposed actions that may not have been implemented at the time of this writing include:

- mandatory training and certification for OHV operators;
- Restrictions on OHV use among youth; and,
- strengthening legislation to protect property, wilderness areas and sensitive ecosystems.

Many aspects of the OHV plan have been legislated through the *Off Highway Vehicle Act*.⁸² Like the US state model, this act consolidates matters including:

- vehicle standards;
- operator licensing;
- trail designation;
- prohibitions on OHV use in wetlands and sensitive areas;
- fines and penalties;
- funding for the OHV program (discussed below); and,
- liability protections (discussed below).



Snowmobilers in Nova Scotia require permits to use the provincial trail system. Permits can be obtained through local clubs or trail wardens and enforcement is the function of provincial officers.

Photo: Nova Scotia Snowmobilers Association

Under this act, Nova Scotia has at least ten regulations on OHVs that provide the details of:

- prohibitions on OHV use in certain watersheds;
- insurance;
- public safety;
- permits and fees;
- closed course events;
- OHV program funding; and,
- trails (and the trail regulation includes trail maps).⁸³

⁸² *Off-highway Vehicles Act*, RSNS 1989, c 323.

⁸³ See Nova Scotia regulations under the *Off-highway Vehicle Act*, *ibid*. Not all of these regulations were reviewed for this publication. Available online: <http://www.canlii.org/en/ns/laws/stat/rsns-1989-c-323/latest/rsns-1989-c-323.html> .

Enforcement: The first major action under the OHV plan was the creation of a specialized OHV Enforcement Unit within the Department of Natural Resources. This unit is made up of officers dedicated exclusively to OHV enforcement activities. It has a mandate to blitz problem areas, enforce mandatory vehicle registrations, broadcast the results of enforcement action, conduct user education and outreach, and run an incident reviewing system. The OHV Unit also oversees partnerships programs with communities and OHV user groups intended to support self-policing. Such programs are eligible for funding through the OHV infrastructure fund.

The Nova Scotia OHV inquiry which led to establishment of this program was fairly realistic about some of its recommendations being compromise solutions that may not satisfy everyone.⁸⁴ This prediction may be accurate given some of the lessons learned where programs are more established. These lessons are discussed below following a brief comparison of the mandate model

Specialized Enforcement Forces

Like Nova Scotia, Ontario has a specialized enforcement force. The SAVE force is a unit of the Ontario Provincial Police committed to safety on trails and waterways. The officers are equipped with OHVs and motor boats. The force practices intelligence-led policing, sets its own priorities, targets high risk behavior and works with partners to raise awareness of legislation and to encourage compliance.

(e) Comparison of mandate models

This section compares the reviewed jurisdictions concerning:

- the assignment of functions;
- the details and direction provided to authorities;
- OHV management models; and,
- warnings or lessons learned concerning management mandates.

I. Assignment of functions

Legislation clearly has a significant impact on whether managerial functions are divided between agencies or consolidated within agencies. The jurisdictions reviewed suggest three basic models of recreation management mandates:

- “shared responsibility” where multiple agencies’ involvement is required;
- “parallel mandates” where multiple agencies have similar functions over different lands; and
- a “lead agency” model where one agency leads programs beyond its physical land base.

⁸⁴ Nova Scotia Task Force, *supra* note 79.

In reality, many jurisdictions display some elements of these models:

Comparison of mandate models		
Shared responsibility:	Parallel functions:	Lead agency:
<p>No single agency has all of the powers, duties, and functions related to managing recreation. Success depends on multiple agencies and on further stakeholders such as users, non-government organizations and the private sector.</p> <p>While Alberta relies the most heavily on shared responsibility, the other jurisdictions reviewed all involve multiple authorities in recreation management to some degree.</p>	<p>Multiple agencies responsible for different public land bases receive comparable powers, duties and functions to manage recreation on their own land bases.</p> <p>For example, the major US federal statutes provides the high level mandate for multiple agencies. Many details of each agency's mandate are provided by further statutes, regulations, directives and plans.</p>	<p>One agency leads on recreation management activities outside of its own land base.</p> <p>For example, in several US states the parks agency leads on trails programs on public land outside of parks and protected area system.</p>

One model not found in the reviewed jurisdictions is a “delegated administrative organization” or “delegated authority” model where a non-government organization would receive management powers, duties and functions normally held by a government agency. This model is discussed below in the section on reform options.

II. Details and direction to authorities:

The specific types of powers, duties and functions related to recreation management mandate are very similar across jurisdictions including Alberta. What differs most is the level of detail and direction in these areas. The chart on the following page shows these divergences. Nova Scotia, which is not included in the chart, most closely resembles the US state model.

Comparison of details and direction to agencies			
	Alberta Public Lands	US Federal System	Three US States
Multiple Use:	Legislation does not define “multiple use” or prioritize uses.	Legislation defines “multiple use” and prioritizes uses including recreation.	Not reviewed on this issue.
Land base for recreation	Recreation has little permanence against other land uses. Semi-permanent areas can be established by regulatory zoning designations.	Legislation restricts public land sales, enables land acquisitions for recreation, and creates permanent recreation areas.	There are permanent recreation areas outside of parks and protected areas.
Recreational opportunity development	Legislation does not provide clear direction to develop recreational opportunities.	Legislation provides direction to develop recreational opportunities.	Legislation provides direction to develop recreational opportunities.
Recreational impact mitigation	Regulations exist but guidance for their use is lacking.	Regulations provide guidance for their use. Environmental impact assessments may also be required.	Regulations provide guidance for their use.
Access to public land	Access is “open unless closed.”	Access is “as designated”. All public lands must be designated as open, closed or limited access.	Access is “closed unless open.” If open then use is restricted to designated trails unless areas are designated for “cross country” (random) use.
Enforcement	Authority to enforce regulations is not universal and officer powers are constrained.	Officers in all agencies have authority to enforce regulations.	Officers in all agencies and local authorities (counties) have authority to enforce regulations.
Stakeholder Roles	Stakeholder engagement is fairly ad-hoc.	Legislation provides for volunteer involvement and roles.	Legislation provides roles for user groups, municipalities and service providers.

Two matters where jurisdictions vary but which may not be apparent from the above table are:

- the focus on recreational opportunity provision vs. the focus on impact mitigation; and,
- whether recreation management decisions are political or administrative in nature.

Opportunity provision vs. impact mitigation: The details of a recreation management mandate affect the potential of a manager to balance competing demands for recreational opportunities and impact mitigation. The basic model of balance would be a “trade-off” where recreational trails, sites and areas are developed in some locations exchange for restrictions on recreational use elsewhere. On Alberta public lands, there is limited potential for balance. The baseline of open access combined with the lack of direction to develop recreational infrastructure means that all management actions can be perceived as restrictions with little to offer users in return for these restrictions. The US federal model shows more potential for balance as the system is access “as designated” and agencies have fairly equal direction to develop recreational infrastructure and to regulate recreational use. The reviewed US state models show notable potential for balance, at least on paper. Public land is “closed unless open” but some agencies are clearly directed to open land to recreational use where appropriate and to develop recreational infrastructure. This suggests that managers could offer recreational users new or better opportunities while coming from a position of impact prevention.

Political decisions vs. administrative decisions:

In Alberta, the need for leadership from elected officials is often necessary for effective recreation management. Cabinet decisions are required for numerous decisions including regional planning and the creation of regulatory zoning designations such as Public Land Use Zones, Public Land Recreation Areas and Public Land Recreation Trails. Ministers’ decisions are needed to implement user fees. Administrative agencies have the discretion to require permits or issue dispositions for recreation. However, they lack guidance to use these tools. The only tools clearly available to front line staff are the closure of areas. Changing this distribution of authority would require new legislation so political involvement is inevitable.

In several other jurisdictions there is some evidence of administrative agencies having more authority than in Alberta, but with greater guidance and accountability through legislation than that which exists in Alberta.



A proposed gondola from Canmore to Mount Lady MacDonald (pictured) would cross land administered by multiple provincial and municipal authorities. What would the permitting process be? What decision makers would be involved?

III. OHV management models

The comparisons show differences between jurisdictions on at least four matters concerning motorized recreation:

- the form of the OHV legislation (recalling that “OHV” is not a legal term of art);
- the definitions of the regulated vehicles;
- the clarity of focus of these initiatives; and,
- the timing of the OHV management initiatives.

Form of OHV legislation: There were at least three models of OHV legislation in the jurisdictions reviewed as indicated in the following chart.

Forms of OHV legislation		
Fragmented OHV matters	General legislation plus OHV details	Consolidated OHV legislation
Matters concerning OHVs are divided between multiple pieces of legislation including parks, public lands and motor vehicle legislation.	General public land legislation speaks to recreation generally. Numerous regulations, directives, orders and plans provide the agencies with more detailed direction on OHV matters.	OHV-specific statutes and regulations consolidate matters of motor vehicles, operator rules, land designations, access, trails, impact mitigation, opportunity development, enforcement and penalties.
Examples: Alberta Some other provinces	Examples: US federal system	Examples: US states Some provinces

Definitions of vehicles: Basically an OHV is what the legislation says that it is. Every jurisdiction has legal definitions of off-highway vehicles in statutes or regulations. However, there was considerable variation among them. Some definitions do not match what a layperson would call an OHV, ORV or ATV. As discussed above, all definitions would cover vehicles designed specifically for off-roading. Snowmobiles are always listed but not always in the same category as wheeled OHVs. The greatest variation was on whether definitions included 4x4 trucks and other highway vehicles used on backroads or off road. The legal definitions of OHVs have a direct effect on the type of vehicles targeted by management programs. There is much diversity of program models as discussed below.

Program focus: Every jurisdiction reviewed other than Alberta demonstrated greater clarity as to which management programs concerned what types of uses. In contrast, multiple initiatives in Alberta are vague as to whether they are general recreation management initiatives or OHV management initiatives. These initiatives are discussed further below under options for reform.

Timing of OHV management initiatives: A large difference between Alberta and other jurisdictions reviewed is the timing of OHV management initiatives relative to the establishment of a general

recreation management model. In the US especially, the legislated mandates to manage recreation were well established before the rise in OHV use. OHV-specific legislation and programs were created at later dates in response to emerging issues and were built upon this historic foundation. In Alberta the case is practically the opposite as OHV use has increased in advance of shifting towards a more formalized recreation management model.

IV. Warnings and lessons learned

Most of the reviewed jurisdictions provide some warning that strong mandates do not remove all challenges with managing recreational use of public land. Some notable challenges that can persist even in cases where agencies have clear direction include:

- capacity challenges;
- debates over access management planning; and,
- uncertainty concerning OHV program effectiveness.

Capacity challenges: The Bureau of Land Management and the US Forest Service face notable capacity challenges despite being large agencies with strong mandates that were recognized by our respondents as leaders in the field.

The US Government Accountability Office has previously found the Bureau of Land Management unable to sustainably manage OHV use. It found that the ability to comply with executive orders to manage OHV use was impaired by inadequate staffing, resourcing and higher priorities.⁸⁵ Interviews with agency staff indicated that enforcement is the greatest challenge. The reports advised the agency to increase priority on OHV issues, engage in strategic planning and look to “outside resources” (non-government funding).

Capacity challenges in Alberta

“Back when there was capacity the users didn’t want enforcement. Now the users want enforcement and there’s no capacity.”

-ELC interview respondent.

In recent years, it appears that the Bureau of Land Management has acted on this advice. Funding programs are increasingly established as discussed below. Close to the time of this publication the Bureau of Land Management released a Recreation Strategy (2014). While we could not review this strategy in detail prior to publication, we can say that it is focused on managing recreation resources to offer benefits to communities close to recreation opportunities. The stated benefits include competitive advantages to businesses. The intention is to look to local governments, the private sector and non-government organizations as potential recreation service providers.

⁸⁵ Government Accountability Office, *Enhanced Planning Could Assist Agencies in Managing Increased Use of Off-Highway Vehicles* (GAO-09-509 Federal Lands); for agency accounts see Ouren et al., *Environmental Effects of Off-Highway Vehicles on Bureau of Land Management Lands* (U.S. Department of the Interior / U.S. Geological Survey, Open-File Report 2007-1353), available online: <https://www.fort.usgs.gov/sites/default/files/products/publications/22021/22021.pdf> . [OHVs on BLM lands].

Likewise, the US Forest Service’s concern with unmanaged recreation persists a decade after the agency’s initial declaration. The practical capacity challenges faced by the US Forest Service are similar in nature to those faced by the Bureau of Land Management. The agency’s website notes that:

- the condition of recreation assets has steadily diminished, resulting in maintenance backlogs;
- unmanaged recreation has contributed to degraded settings, damaged sites, “unacceptable” resource impacts, and user conflict; and,
- traditional funding sources are inadequate to meet growing needs.

The US Forest Service recognizes that user fees and private sector service delivery remain controversial to some people. However, like the Bureau of Land Management it has developed plans and programs to address capacity challenges.

Access management debates: This review indicates that neither “reactive” restrictions on access nor the “proactive” development of recreation opportunities are guaranteed to solve environmental impacts, user conflict and competition for land.

An example of this dilemma is the Jordan River OHV State Recreation Area on the Wasatch Front in Utah. Like the Eastern Slopes of Alberta, this region is under pressure from urban growth, attracts a high number of users and experiences high levels of user conflict. The context, challenges, and management actions are documented in the 2002 Jordan River Area Management Plan.⁸⁶

In the 1970s the area was identified by OHV users who, over time, spent thousands of dollars plus in-kind donations constructing a riding area and additional facilities. In the 1980s, OHV pressure on the area increased as other previously open areas were closed due to industrial development, litigation, and private property issues. The State Parks Department recognized the displacement of OHV users and responded by designating the area as “shared use” but as a “primary location” for OHV use. However, intensified OHV use caused conflict with non-motorized users and adjacent landowners. It also fuelled concerns with impacts on a riparian corridor and wildlife. As municipal growth reached the area, responsibility for part of the area was transferred from the state to the municipality. The remainder of the area stayed with the state.



The Area Management Plan articulates the dilemma faced by the public lands agency created by its mandate to serve all users, by budget cuts, and by the loss of its land base to municipal growth. The plan

⁸⁶ Great Salt Lake State Park – Jordan River Shared Use Area, Area Management Plan, November 2002, available online: <http://static.stateparks.utah.gov/plans/JordanRiver AMP.pdf> .

also describes itself as necessary to avoid future “reactive” management actions. Prescribed actions include:

- the separation of motorized and non-motorized trail systems;
- location considerations including noise and critical wildlife habitat;
- prescribed separation methods including landscape architecture, natural barriers (vegetation screens) and fencing; and,
- the official endorsement of developed motocross tracks to attract users and generate revenue.

OHV program effectiveness: One Bureau of Land Management report notes that there is little evaluation of what works respecting OHV management. Its clearest statement may be that responding to OHV impacts with an excessive focus on OHVs can have the unintended consequence of causing lost support for the agency’s programs.⁸⁷ While the reasons for this negative outcome are not clearly stated, the report notes concerns with a perception of administrative preference for working with OHV users.

The US Forest Service has published an evaluation on the narrower topic of OHV user education.⁸⁸ This evaluation suggests that:

- OHV-specific education may be more effective and better received by all stakeholders than is general user education;
- there is a need to target youth and young adults;
- there is value in more participatory learning experiences; and,
- core messages should be universal and adaptable to more specific regions or contexts.

All of these reports are several years old so it is possible that more recent findings exist. There would be value in greater program evaluation in all jurisdictions including Alberta.

(f) Options and recommendations for recreation management mandates in Alberta

The Alberta model provides provincial agencies with a weak mandate to manage recreation on public lands outside of the parks and protected area system when compared to other jurisdictions. This is a barrier to implementation of existing policies and regulations as well as any that may be developed in the future. Reforms are necessary and this section evaluates the best-known options.

Options considered in this section

- Special enforcement force.
- Greater use of public land regulations.
- Regional planning.
- Recreation trails partnership pilot.
- Delegated administrative organization.
- Legislative reforms.

⁸⁷ OHVs on BLM lands, *supra* note 85.

⁸⁸ Blahna et al., *A Review and Analysis of Five OHV Communication Programs, Forest Service*, (United States Department of Agriculture, March 2005).

I. A specialized enforcement force

Greater enforcement is needed and challenging in every jurisdiction reviewed. However, the situation is acute in Alberta due to historic cuts to agencies and limits on officer powers under current regulations. The effect of recent transfers of officers from their home agencies to the Ministry of Justice and Solicitor General is not fully determined. These transfers reflect that fact that officers have public security functions and it could potentially assist with inter-agency cooperation on enforcement. However the transfers might create new challenges as public lands enforcement may be subject to competing public security priorities and the application of policing operations standards. Furthermore, municipal peace officers in Alberta do not have baseline authority to enforce provincial public lands regulations and they may face deterrents to applying for such authority due to lack of capacity to take on provincial functions.

These uncertainties could be settled by creating a permanent, specialized public lands enforcement force. A special enforcement force would be most effective with minor reforms to the *Public Lands Act* or regulations to provide officers with ticketing powers for recreational infractions. It would also benefit significantly from reforms to create new sources of funding as discussed below.

Recommendations:

The Province of Alberta should:

1. Create a permanent, specialized public lands enforcement force. This force should:
 - consist of officers dedicated solely to the cause;
 - have authority to set its own enforcement priorities;
 - be equipped with the necessary vehicles to respond to OHV issues;
 - use intelligence gathered through involvement in the recreation field; and,
 - engage recreational users to help with education about the rules, however maintain government authority over enforcement.
2. Amend the *Public Lands Act* or regulations to provide officers with authority to issue administrative penalties for recreational infractions.

II. Greater use of the Public Lands Administration Regulation

The *Public Lands Administration Regulation* represents a good effort to address recreational use of public land considering the limited mandate provided by the *Public Lands Act* under which this regulation is created. It includes numerous tools that are underutilized, including Public Land Use Zones, Public Land Recreation Areas and Public Land Recreation Trails, reclamation standards, permits, fees and dispositions. The need is for policies or plans to provide guidance on where, when, why or for what these tools should be used.

Dispositions: Using public land dispositions (i.e. permits, leases or licenses of occupation) for recreation trails is a concept with appeal for multiple reasons, but it should be treated with caution. One appeal of dispositions is hope that they could provide recreational trails with more permanence against other land uses that would otherwise damage trails and displace recreational users. This could encourage non-government investment in infrastructure development, assign maintenance responsibilities or enable service provision by non-government parties. There are similar precedents, such as the leasing of abandoned gravel pits on public land for motorsports facilities, ranges for gun clubs, and leases for commercial outfitters (whose operations may be located on nearby private land).

However, there was little evidence in any of the reviewed jurisdictions of using the stronger forms of dispositions for recreation trails. Most examples from other jurisdictions involved permits for events commercial operators, and trail projects under the agency programs. The types of dispositions that grant stronger legal interests in public lands were apparently unnecessary or undesirable as a tool to establish trails for public use.

It is important to recall that overlapping dispositions on public land are already the source of much conflict that has not been rectified by plans or policies to date. The effect of recreational dispositions against other uses is uncertain as the existing approach to “multiple use” does not enable other disposition holders to stop other developments. Commercial trappers, outfitters and recreational leaseholders already fare poorly against heavy industry in this situation and are often denied a hearing by the industry regulators.

Furthermore, reliance on dispositions exposes deeper questions around the distribution of public benefits, how these should be enforced and by whom. If the trails are to provide public benefits, then there is a problem with protection of this benefit depending on the disposition holders defending their private property rights against other private parties. If these disposition rights do prove to be strong enough to exclude other land users then the situation is one where access is “open unless sold”.

Finally, the appeal of dispositions can also be due to their perceived potential to assign liability, and this potential is not clear as discussed below. In sum, dispositions may create some level of complexity despite the intention for creating certainty.

Recommendations:

The Ministry responsible for the *Public Lands Act* should:

3. Develop policy to guide the use of existing tools in the *Public Lands Administration Regulation*, but exercise caution if exploring the use of dispositions for recreation trails.

III. Regional plans under the Alberta Land Stewardship Act

Regional planning under the *Alberta Land Stewardship Act* has an important but limited role in recreation management. Regional plans could provide greater direction to agencies by:

- prioritizing recreation management;
- setting objectives for recreational impact mitigation or opportunity provision;
- delegating authority to implement the regional plan;
- creating guidance for the use of regulations; and,
- coordinating multiple decision makers.

Regional plans offer significant potential to improve management of the industrial footprint. There have been proposals to make “integrated land management” (i.e. collective footprint reduction) mandatory for heavy industries. This practice of reducing industry footprint may reduce physical access for subsequent recreational users. However, if the roads do not meet the interests of recreational users then they may make their own tracks and there would be little reduction of the recreational footprint.

There have also been proposals to integrate recreation and industry planning but little indication of what that would actually resemble. Regional plans could require industry regulators to make decisions in a manner that helps rather than hurts recreation management efforts. Having industry regulators consider the prospect of recreational end use throughout the industrial planning, development and reclamation cycle would be a significant change from the historic approach. It could enable road building and reclamation with a view to “roads to trails” conversions. Alternatively, if recreational use is undesirable, then the creation of new industrial roads should be avoided or fully removed afterwards.

The value of regional plans may depend on plans receiving sufficient legal weight. Regional plans are Cabinet orders with potential to prevail over other types of regulatory instruments and decisions. They can be binding on decision makers, alter statutory consents, and trump other regulations that conflict with the regional plans. However, regional plans to date have not asserted this weight over other regulatory instruments and in fact large portions of the plans are deliberately non-binding. Furthermore, regional plans cannot alter statutes made by the legislature and therefore cannot alter the core mandates of many regulators. Consequently, if regional plans are not made legally binding on regulators then they might have little effect at all.

Regional plans can also create conservation directives, a new form of regulatory zoning tool to protect environmental, agricultural, or natural scenic values on public or private land. This tool has not been used to date, but it could foreseeably be of value on “multiple use” public lands. The value of the tool is that it could allow uses to continue while rectifying the lack of clear conservation purposes in the tools created by the *Public Lands Administration Regulation*.

Recommendation

Cabinet should make regional plans as follows:

4. Regional plans should:
 - set measurable objectives for recreational impact mitigation and opportunity provision;
 - provide guidance for use of tools created by the *Public Lands Administration Regulation*;
 - direct industry regulators to make decisions in ways that would assist with recreation management; and,
 - use conservation directives to assist with managing recreation on public land.

Recreation in the South Saskatchewan Regional Plan:

Recreational use of public land has been a significant focus of the South Saskatchewan regional planning process. The current regional plan has not realized its potential to improve matters and this potential, while important, is limited.

The plan sets some objectives for increasing recreational infrastructure but no measurable objectives for impact reduction. The plan is hardly binding on decision makers and relies heavily on existing tools for implementation. It provides some guidance for use of public land regulations but not for the full suite of tools.

The most relevant planning remains to be done. Several areas of the Eastern Slopes have been identified for a pending “recreation management” planning exercise and a linear footprint management exercise. These planning exercises are underway at the time of writing. Thus, it remains to be seen how they will differ from prior “access management” plans.

These plans could potentially move recreation management considerations to the front end of the industrial planning and development cycle. They could also be given a legal weight through the regional plan that would prevail over other regulations, decisions and instruments. However, without these novel features they may be little different than prior access management plans.

The South Saskatchewan Regional Plan only makes passing reference to working with trail groups, increasing enforcement capacity, and tools to address liability. In other words, regional planning cannot or has not filled the three key gaps identified in this review: a clear mandate to manage recreation on public lands, funding for management activities, and protection from liability.

IV. *The recreation trails partnership pilot*

The recreation trails partnership pilot was established in 2014 to assist with the development of a provincial recreation trails system. The organization was created by Cabinet order and was endowed with a budget of \$500,000 per year for two years. Its mandate was to make recommendations to the province and to work with local trail organizations on established trails. The members of the partnership included an MLA chair, the Alberta Off-Highway Vehicle Association, the Alberta Snowmobile Association, Alberta TrailNet, the Alberta Urban Municipalities Association, the Alberta Association of Municipal Districts and Counties, a tourism industry representative and staff from the public land agencies. While not apparent from official communications, the trails partnership could be considered a test run for a trails act and delegated administrative organization discussed below.

The potential of the trails partnership is uncertain. As a policy development tool it provides some formalized process for reform recommendations and recognizes the need to engage multiple stakeholders. As a trail development tool it could enable trail enhancements rather than merely designating trails from the pre-existing footprint, and in a manner that is more systems-focused than in the past.

However, the trails partnership faces a significant legal barrier to success as it is not supported by any legislation. Indeed, the lack of a legislated mandate is the main deficiency identified in this review. The proposed structure of the partnership is such that the land agencies resemble stakeholders at a table or at best project managers rather than authorities.

A further problem with the trails partnership as a reform model is the lack of clarity concerning the scope of recreational uses that it concerns. The pilot is not formally identified as an OHV initiative and its express mandate is to cover motorized, non-motorized and mixed-use trails. However, the partners include the provincial OHV and snowmobile associations who advocate for those users, and no analogous advocates for other user types. One reason to focus on OHVs and snowmobiles is that these are foreseeably the vehicles from which the government would generate revenue through vehicle registrations if reforms were to proceed. However, there are no official statements to that effect. Furthermore, using funds from OHVs and snowmobiles to fund trails for all types of uses would be divergent from the jurisdictions reviewed where funds from specific vehicle types were directed back to programs concerning those vehicle types. Overall, vagueness and non-transparency concerning the scope and purpose of the trails pilot makes this initiative vulnerable to governance issues, stakeholder conflicts and lack of public trust.

Recommendation:

The government of Alberta should:

5. Avoid using the recreation trails partnership pilot as a model for reforms, while continuing the pursuit of partnerships for recreation management purposes.

V. ***Delegated administrative organization***

A delegated administrative organization or “delegated authority” is a legal entity outside of government that receives authority to carry out functions under legislation that would otherwise be assigned to government agencies. Many delegated administrative organizations are non-profit corporations. The use of delegated administrative organizations can have multiple financial rationales. One is more efficient use of public funds or the prospects of a self-funding organization. Another would be to manage funds at arms-length from government, for example where funds are provided by outside parties for restricted uses.

Delegated administrative organizations in Alberta

While there are no delegated administrative organizations with broad recreation management functions in Alberta, there are some analogous entities worth noting. These include the Alberta Conservation Association and the Alberta Professional Outfitters Society.

The Alberta Conservation Association (ACA) uses revenue from levies on hunting and fishing licenses to fund conservation programs. Provincial authority to delegate such authority comes through the *Wildlife Act*. The ACA is a non-government organization whose status as a delegated administrative organization is established by the *Wildlife Regulation*. A Memorandum of Understanding between the ACA and the Minister responsible for the *Wildlife Act* has a purpose of clarifying the powers, duties and functions that have been delegated, the roles of the parties, and practices to achieve the outcomes sought by delegation. It also articulates specific programs for fisheries, wildlife, habitat, landowner compensation, information-education and poacher reporting. There are further program-specific agreements for several programs. These agreement documents are publicly available and posted on the ACA website at www.ab-conservation.com.

The Alberta Professional Outfitters Society administers the commercial hunting guiding and outfitting industry in the province. Like the ACA, the provincial authority to delegate authority comes from the *Wildlife Act* and the delegated administrative organization is established by the *Wildlife Regulation*.

Delegated administrative organizations are also used by the province for numerous unrelated matters under energy and environmental legislation, for example recycling, petroleum storage tanks, and the reclamation of orphaned oil and gas wells.

Other entities resembling delegated administrative organizations

One noteworthy entity, although not a delegated administrative organization, is NE Muni-Corr Ltd., which is the non-profit organization that owns and manages the Iron Horse Trail. This former railway in Northeastern Alberta has been turned into a multi-use trail that cuts through lands in multiple municipalities. The corporate entity is governed by a board representing the municipalities that acquired the land base from the former railway operator.

Proposals for delegated administrative organizations in Alberta

There have been multiple non-government proposals to create delegated administrative organizations with public land management functions in Alberta. The best known is a proposal from the Alberta Off-Highway Vehicle Association (AOHVA) to create a delegated administrative organization responsible for trail infrastructure and service delivery. The proposal is for the organization to be self-funding with revenue from levies on OHV registrations. As of 2015 the proposal is posted for comment on the website of the proponent at: www.aohva.com. The AOHVA proposal touches on the same major barriers to recreation management identified in this review-- mandates, revenue, and liability -- at least respecting OHV recreation. It also appears to have had influence on the creation of the recreation trails partnership pilot discussed above and on a bill for a trails act discussed below. This form of delegated administrative organization would require legislative reforms.

A second proposal which reoccurs periodically is to delegate authority for management of public lands to municipalities, a regional commission, or a new form of local or sub-regional authority. This type of delegated administrative organization might be possible to create through regional plans under the *Alberta Land Stewardship Act*. While the organization would need to have a narrow mandate of assisting in the implementation of regional plans, it could have the authority over a broad range of land uses. This form of delegated administrative organization is legally easier to create but it raises more questions as to what its functions would be.

Delegated administrative organizations in other jurisdictions

There were no clear examples of delegated administrative organizations in the eight jurisdictions reviewed. In all cases legislation provided mandates to government agencies and provided for stakeholder involvement in specific program activities and decisions. The most common stakeholder roles were to deliver projects funded through the trail programs and to represent users on advisory committees responsible for granting funds to these projects. Delegated administrative organizations for diverse functions have been debated and rejected in public inquiries in British Columbia and Nova Scotia.

The British Columbia Recreation Stewardship Panel rejected the option of a delegated administrative organization for parks, fish and wildlife conservation. It felt that the public had “loudly and clearly” shown that it was not prepared to risk compromising the existing conservation and protection priorities of the responsible ministry.⁸⁹ The panel also believed that the need to coordinate planning and management activities between multiple government agencies would be served by ministerial authority and accountability.

⁸⁹ British Columbia Recreation Stewardship Panel, *A New Management and Funding Model for Parks, Fish, Wildlife and Park Recreation* Final Report and Recommendations (British Columbia: Ministry of Environment, November, 2002) Available online: <http://www.env.gov.bc.ca/esd/recpanel/recpanel.html> .

The Nova Scotia OHV Task Force took a similar view respecting delegated administrative organizations. It believed that the advantages of delegated administrative organizations, particularly related to financial and funding issues, could be achieved through ministerial authority if the remainder of its recommendations were adopted. However, the Task Force suggested that some trail approval powers be attached to decisions to fund trail projects. As these approval decisions would involve advisory committees of users this model might imply some authority.

The context for debating delegated administrative organizations was different in Nova Scotia and British Columbia compared to that in Alberta. In both provinces, the government agencies had stronger mandates to manage recreation. Thus, several arguments for delegated administrative organizations related more to financial efficiencies and managing revenue from users than to filling a mandate gap.

It is possible that delegated administrative organizations with trails functions exist in jurisdictions not reviewed for this publication. For example, the Hatfield McCoy Trail System in West Virginia is a statutory corporation created by state legislation as part of a tourism economic development initiative.⁹⁰ This is an OHV trail system where users must acquire permits from the trail authority and commercial operators must be licensed by the state. Regulations applying to vehicles and user conduct are enforced by state officers.

While proposals for delegated administrative organizations have had some support in Alberta:

- precedents are rare in similar jurisdictions;
- delegated administrative organizations have been rejected by panels where publicly debated;
- the rationales for delegated administrative organizations in Alberta diverge from the common rationales for such entities;
- there are competing ideas for various delegated administrative organizations; and,
- the level of legislative reforms necessary to create a delegated administrative organizations would be sufficient to provide stronger mandates, funding tools and liability clarifications to government agencies.

Recommendation

The Province of Alberta should:

6. Avoid creating a delegated administrative organization for trail-related functions.

Delegated authority debates

“The panel recognizes that while the delegation of authority to a special operating agency or a commission may result in increased operating efficiencies, it may also result in the erosion of the province’s primary responsibility for environmental protection and conservation, especially if this new delegated authority becomes too revenue driven or manipulated by financial or special interests.”

-BC Recreation Stewardship Panel

⁹⁰ Hatfield McCoy Trails, <http://www.trailsheaven.com/>

VI. *The trails act bill*

During the course of this review the Province of Alberta prepared a bill for a “trails act” and regulations but this bill was not introduced in the legislature. The resulting legislation would have enabled the creation of a delegated administrative organization responsible for trails infrastructure as discussed above.

This bill was developed without public consultations, and, neither the intentions of creating a delegated administrative organization nor the background focus on OHVs were expressed in what minimal public communications occurred. This vagueness is comparable to that concerning the recreation trails partnership pilot discussed above, which could be viewed as a pilot for the trails act.

As discussed above, legislative reforms of this nature would be divergent from all jurisdictions reviewed and would leave uncertainty concerning the scope of programs enabled by the legislation. Such reforms would likely leave large gaps in the recreation management system which would be a highly undesirable outcome following the creation of new legislation.

Recommendation:

The Province of Alberta should:

7. Abandon the trails act bill as a model for reforms, but continue the pursuit of legislative reforms to enable recreation management.

4. FUNDING FOR RECREATION MANAGEMENT

This section compares funding for recreation management in Alberta to the US Bureau of Land Management, National Forest Service, the US States of Utah, Oregon and Colorado and the Province of Nova Scotia.

Key questions regarding funding for recreation management

- Where should funds come from?
- Who should funds go to?
- What should funds be used for?

(a) Funding for recreation management in Alberta

Recreation management in Alberta is very dependent on departmental budgets funded by general revenue. There is very little public revenue generated from recreational use of public land and even less of this revenue is used to fund recreation management.

The tools available to raise revenue from recreational users vary with the land designation. The most established practice currently is the use of hunting and fishing licenses under the *Wildlife Act* to fund fish and wildlife conservation activities. This was discussed above concerning delegated administrative organizations. However, it is important to emphasize that the legislative enablement of fees must come before any question of who administers the funds.

User fees are currently enabled but they are not charged in many situations. Under the parks and protected area legislation, user fees are most commonly charged for campgrounds and developed trail centres. It is also possible to charge user fees for public lands outside of the parks and protected area system. However, this tool is not used much if at all. Implementing user fees in parks or on public land requires involving the responsible minister.⁹¹ This means that attempts to implement user fees can invite political controversy.



Attempts to implement fees for groomed cross country ski trails in provincial parks have spurred public debate in Alberta.

⁹¹ *Provincial Parks Act*, supra note 2, s.13(1); *Public Lands Act*, supra note 5, s.9.1(1)(a).

Permits are required for some events and commercial activities on public lands. Some events and activities are permitted using a tool called a temporary field authorization. However, there is no clear public policy on recreational permits and it is possible that requirements are inconsistently applied.

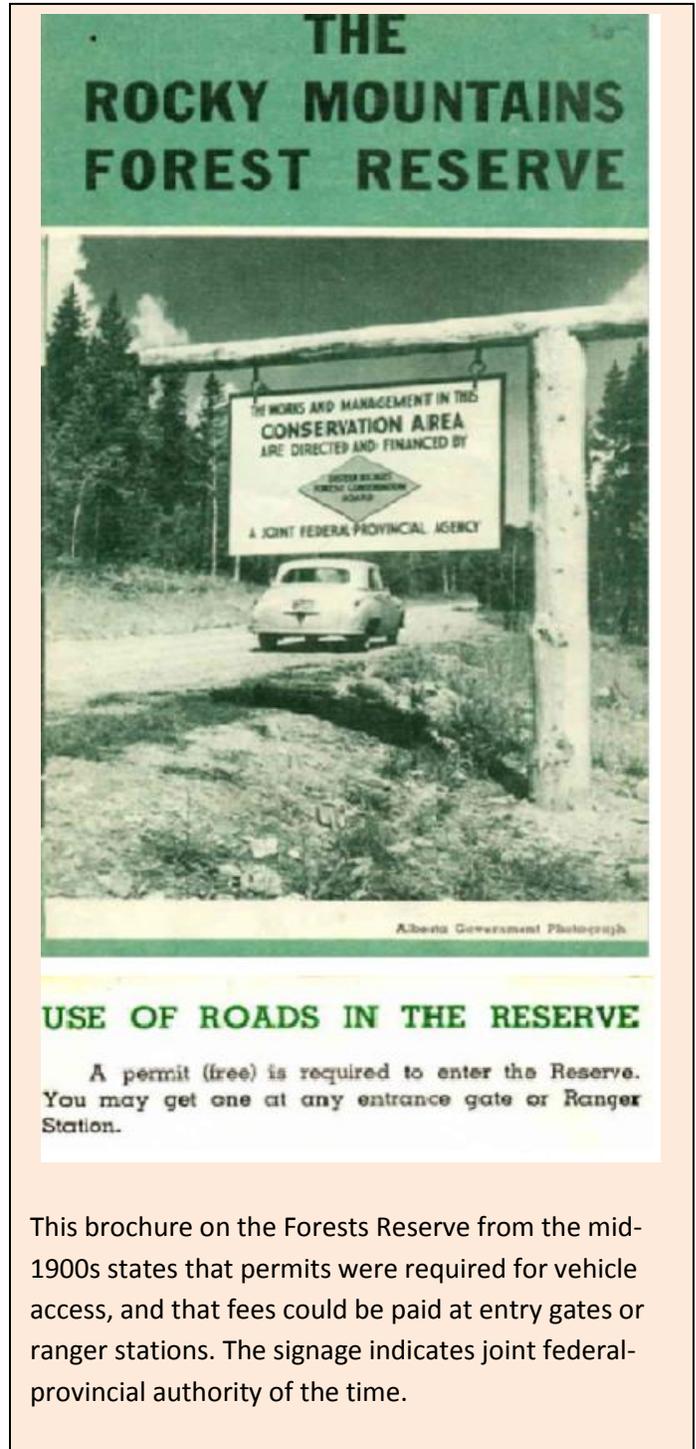
There is also no legal requirement or direction that user fees and permit be directed back to recreation management activities. In parks, some fees are used to recover the costs of management activities that benefit users, for example grooming ski trails and maintaining visitor facilities. However, the legislation does not establish special accounts or restricted funds for recreation management.

Some provincial revenues related to recreational use of public land may never be seen by the land agencies at all. Examples include:

- fuel tax that is attributable to recreational vehicles;
- registrations for OHVs; and,
- fines levied by the courts against recreational users for violations of public land legislation.

The effect of the Alberta model is reduced financial capacity for recreation management, especially the “boots on the ground” activities necessary to implement policies and regulations. The situation is aggravated by the fragmented mandate discussed above because multiple agencies with key roles in recreation management will compete against each other for funding from the provincial budget. Recreation management must then compete with other internal agency priorities.

The capacity of provincial agencies has been greater in the past. Several of our respondents noted that in prior decades there were more agency staff, government vehicles and ranger stations in the Forest Reserve, even though there were fewer users and problems back then.



This brochure on the Forests Reserve from the mid-1900s states that permits were required for vehicle access, and that fees could be paid at entry gates or ranger stations. The signage indicates joint federal-provincial authority of the time.

(b) Funding for recreation management in the US federal system

The US federal agencies have at least three legislatively enabled funding programs for recreation management. These are:

- user fees and permits;
- the Land and Water Conservation Fund, and
- the Recreation Trails Program.

I. *User fees and permits*

The Bureau of Land Management, National Forest Service and the National Parks Service all have powers to charge user fees and require permits under the *Federal Lands Recreation Enhancement Act*.⁹² The legislation specifies where fees and permits may be used.

Recreation fees may be charged for sites that provide services or facilities from a list of amenities. Examples of listed amenities include kiosks, parking, toilets, waste disposal or staffing. A “standard amenity fee” may be charged for sites with all listed amenities. An “enhanced amenity fee” may be charged where sites with a majority (i.e. 5 out of 9) of the listed amenities. Fees are limited to cost-recovery and consistent with the services and benefits provided. Fees may not be charged for general access to public land, undeveloped sites or geographically dispersed areas.

Recreation permits may be required for commercial use, competitive events, large groups, special uses or special areas. The purpose of the permit program is to protect resources, health and safety, to disperse use or to control user numbers. For example, this system is used for dedicated OHV areas.

Payment options for fees and permits include day-use fees, regional passes and multi-agency passes. All fee and permit monies are paid to the federal agencies even if other stakeholders or contractors are involved in service delivery.

The fee and permit money must be used to benefit the specific area, the paying user, or their clients in the case of commercial operator permits.



Events are an activity for which regulations may require permits.

⁹² *Federal Lands Recreation Enhancement Act of 2004*, 16 U.S.C. Chapter 87.

These benefits include impact reduction and opportunity development, for example: site enhancement, operations, interpretation, enforcement, and use of volunteers or partnerships. Fees may be used for habitat restoration if the recreational activities are wildlife dependent.

A permanent user fee program has been fully operational at multiple agencies since the mid-2000s. The federal user fee program was established after the lessons learned through a “Recreational Fee Demonstration Program” (Fee Demo Program). The Fee Demo Program was created by legislation and used to determine the feasibility of cost-recovery for the operation of specific recreation sites and areas. The main difference between the Fee Demo Program and prior agency authority to charge recreation fees is that the Fee Demo Program allowed agencies to retain all revenues, and to retain the majority of this revenue at the site where it was collected.

The scope of the current program is significant, with hundreds of user-pay sites hosting millions of users per year. Numerous reviews on the Fee Demo Program are available as well.⁹³ These reviews indicate that the program benefitted the agencies and that it was well accepted by the public where the public understood that the money was being re-invested in the site. Moreover, the implementation of fees did not negatively impact visitation. The reviews also indicate the importance of consistency between agencies and propose an “inter-agency” fee program. This has been implemented through the option for users to purchase an “inter-agency pass”.

II. The Land and Water Conservation Fund

The Land and Water Conservation Fund was established in the 1960s by the *Land and Water Conservation Fund Act* for the purpose of assuring the “quality and quantity of outdoor recreation resources” so as to strengthen the “health and vitality of the citizens”.⁹⁴ Revenue for the fund comes largely from offshore oil and gas royalties, and to a lesser extent from fuel taxes and sale of federal lands (federal abandoned railroads must be retained for recreation purposes or if they are sold then the revenue must go the fund). The legislation authorizes use of funds to purchase lands that are primarily of value for outdoor recreation. One pool of funds is directed to the federal acquisition and development of land and water areas. Another pool is awarded as grants to states to assist with similar effort at the state level. At the time of publication the fund is 50 years old and is set to expire unless it is renewed by Congress.⁹⁵

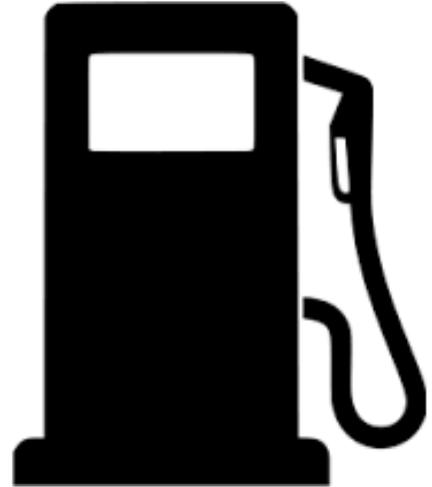
⁹³ Numerous reports to Congress from the U.S. Department of the Interior and U.S. Department of Agriculture are available online by searching for “Recreation Fee Demonstration Program”. See, for example: <http://www.fs.fed.us/passespermits/docs/accomps/wo-rpt-congress/fy03-a-title-pg-through-exec-summary.pdf>

⁹⁴ *Land and Water Conservation Fund Act of 1965* as amended, 16 U.S.C. s.4601-4 through 4601-11.

⁹⁵ Land and Water Conservation Fund Coalition: <http://lwcfcoalition.org/>

III. The Federal Recreation Trails Program

The Federal Recreation Trails Program is funded by fuel tax attributable to recreational vehicles, including street-legal trucks.⁹⁶ The fund is administered by the federal Department of Transportation who must work with the federal and state land agencies on delivery of trail projects. Most funds are awarded to state agencies for local project funding. Funds may be used for a very broad range of non-motorized and motorized recreation trails including water routes. Over time this has come to include front country projects like urban greenways, paved paths and nature centres. The current program expresses an interest in active transportation and accessibility for all including pedestrians and people with disabilities. This evolution stems from changes made to the enabling legislation over time. These changes are documented in the 2014 Annual Report.⁹⁷



(c) Funding for recreation management in three US states

Every state surveyed had at least three legislatively enabled funding programs for recreation management. These state programs include:

- funding for general recreation management and non-motorized opportunities, (which often included funding through the above mentioned federal programs);
- funding for OHV management programs through regulatory charges on OHVs and users; and,
- fines, restitution payments or other penalties for regulatory infractions.

The general nature of the state programs is similar. Non-motorized funding programs were larger but the revenues were less directly connected to the users. OHV funds were smaller but the revenues come more directly from the users. Fines are definitely a smaller funding and the actual state of enforcement is unknown. The details of all of these programs vary significantly as discussed below.

I. Funding for general recreation programs

Funding for general and non-motorized recreation programs was present in all states reviewed. As explained above the states are beneficiaries of the federal Land and Water Conservation Fund and federal Recreation Trails Program. All three states had their own legislated funding programs as well.

⁹⁶U.S. Department of Transportation, 2014 Recreational Trails Program Annual Report, available online: http://www.fhwa.dot.gov/environment/recreational_trails/overview/report/2014/page00.cfm

⁹⁷ *Ibid.*, citing an extensive legislative history of the Recreation Trails Program from 1991-2012.

Colorado: The Colorado Great Outdoors Program is significant respecting its democratic symbolism and financial impact. The program was created through an amendment to the state constitution.⁹⁸ This amendment was adopted by voter approval and consequently the program is said to exemplify democratic will and to be a source of pride for the state. The constitution provides that the net proceeds of every state supervised lottery is “guaranteed and permanently dedicated” to the “protection and enhancement of state wildlife, parks, trails, rivers and open space”. It also dictates some allocations of grant funds and allowable purposes. Forty percent must go to municipalities and counties for parks, and ten percent must go to the state parks department. Grants may be provided as matching funds for local investments by the public and private sector. Part of the program is to identify municipalities or non-profit conservation organizations for such cooperative investments. The purposes for which funds may be used include open space preservation, trails, local government park projects, and strategic planning.

The economic impact of the Colorado Great Outdoors Program is staggering. The 2014 annual review claims revenues exceeding \$900 million and grants of \$866 million since the program’s creation in 1992.⁹⁹ The review further claims that outdoor recreation contributes \$34.5 billion to the state economy and 313,000 in-state jobs. Nonetheless it notes that the challenge of meeting public demand for the great outdoors will continue to increase with population growth.

Utah: Utah provides an example of a standard state funding model. Like many states, the general state trails program is funded by the federal Land and Water Conservation Fund and federal Trails Program (discussed above), and by some matching state funds. The trail project sponsors enter into contracts with the state to access the federal funds channeled through the state. The state program also provides matching funds and technical assistance to the trail sponsors. Funding is specifically directed to trails not to campgrounds or enforcement. Funding decisions are made with an advisory committee including non-motorized users and municipalities.

Oregon: Oregon provides an example of state revenue collection for third party service provision. Revenue for general recreation programs is generated under state legislation through user fees, fuel tax and lottery revenue. Funds are provided to local governments (i.e. counties) as matching grants to acquire land for campgrounds and to develop campgrounds.

⁹⁸ Colorado Constitution., Article XXVI, I, available online: http://tornado.state.co.us/gov_dir/leg_dir/olls/constitution.htm#ARTICLE_XXVII; Great Outdoors Colorado: <http://www.goco.org/>

⁹⁹ Great Outdoors Colorado, 2014 Annual Report, available online: <http://www.goco.org/gallery/2014-annual-report> .

II. Funding for state OHV programs

Every state surveyed had legislated programs to fund motorized recreation management. This type of program was typically called an “OHV program” but as noted above the definitions of OHVs, ORVs and ATVS differ from one state to another and can include highway vehicles driven off road.

The legislation requires the funds to be kept in a separate account for specified program purposes.¹⁰⁰ The funds are typically allocated as grants made by advisory councils that include representatives of the paying users. The details of these three state programs varied concerning:

- the source of funds;
- the recipients of funds; and,
- the use of funds.

Source of funds: In all three states the key source of funds was regulatory charges against machines, users, or both. These regulatory requirements to pay into the fund only applied to recreational use of public land.¹⁰¹ In all cases there were exemptions or different rates for vehicles used for work purposes or on private land.¹⁰² The models reviewed diverge significantly over how broad to “cast the net” concerning types of machines and operator permitting. This is a critical debate because the type of vehicles or users from whom revenue is sourced determines what activities will be managed using the funds.

Recipients of funds: Who the money should go to was somewhat consistent between models. Recipients of funding always included federal and state government agencies, municipalities and recreational user groups that do trail work. The models vary on their inclusion of further service providers such as emergency medical services, search and rescue, and private landowners that provide recreational opportunities.

The nature of grant funding means that all recipients must apply for funding rather than being automatically entitled to funding. However, all models provided assurance that some types of recipients or uses would receive a portion of the available funds.



¹⁰⁰ See for example ,Colorado Statutes, *supra* note 34, 33-14.5-106 - Off-highway vehicle recreation fund - creation- use of moneys

¹⁰¹ Colorado Statutes, *Ibid.*, 33-14.5-102 - Off-highway vehicle registration - fees - applications - requirements - exemptions; Utah Code, *supra* note 36, 41-22-3, Registration of Vehicles.

¹⁰² Colorado Statutes, *Ibid.*, 33-14.5-102 - Off-highway vehicle registration - fees - applications - requirements - exemptions.; Utah Code, *Ibid.*, 41-22-5.5.

Use of funds: The use of funds varied significantly between models. Some models focus more on funding impact reduction, while other focus on providing benefits to users. These activities are not mutually exclusive if impact reduction improves user experience or if the provision of amenities and services helps to mitigate impacts. We did not find any examples of funds being used for land reclamation or environmental restoration activities beyond those related to the recreational activity from which the funds were gathered.

The greatest debate may be over the use of funds by government agencies. Many grants to agencies are used for “boots on the ground” work including enforcement, trail inventories, and trail crews. However, use of funds for administrative overhead or general operations is allowable in some models. In some models the use of funds for general operations is capped. In other models it exceeds funding for trail projects.

A comparison of state OHV funding programs

The variability of state OHV funding programs warrants a comparison. Programs will typically be “narrow” regarding revenue sources, recipients and use of funds, or “broad” on the same three variables. No programs were broad in one area yet narrow in another.

Colorado had the narrowest OHV program of the three states reviewed.¹⁰³ OHVs are defined as quads, dirt bikes and side-by-sides. The Colorado program does not include 4x4 trucks and snowmobiles. However, snowmobiles have a separate similar program.

The OHVs covered by the program must be registered for use on public land. OHV retailers must assure the registration of new vehicles they sell. The machine owner must also have a user permit displayed on the machine which allows for use of designated OHV routes. The charge is \$25 a year with different arrangements for OHV rental operations and out-of-state user permits. Revenue from the registration and permit requirements produces roughly \$3.5 to \$4 million a year for the OHV Recreation Fund.

Most grants go the Bureau of Land Management and National Forest Service for trail crew or sponsored trail projects. If this seems surprising it is important to recall that the federal agencies hold significant lands inside the states and have strong recreation management mandates. The next most common

What should OHV funds be used for?

- Land acquisition?
- Trail development and maintenance?
- Facilities, services and staging areas?
- Enforcement?
- Education?
- General operations?
- Administrative overhead?
- Emergency medical services?
- Search and rescue?
- Fire department?
- Other?

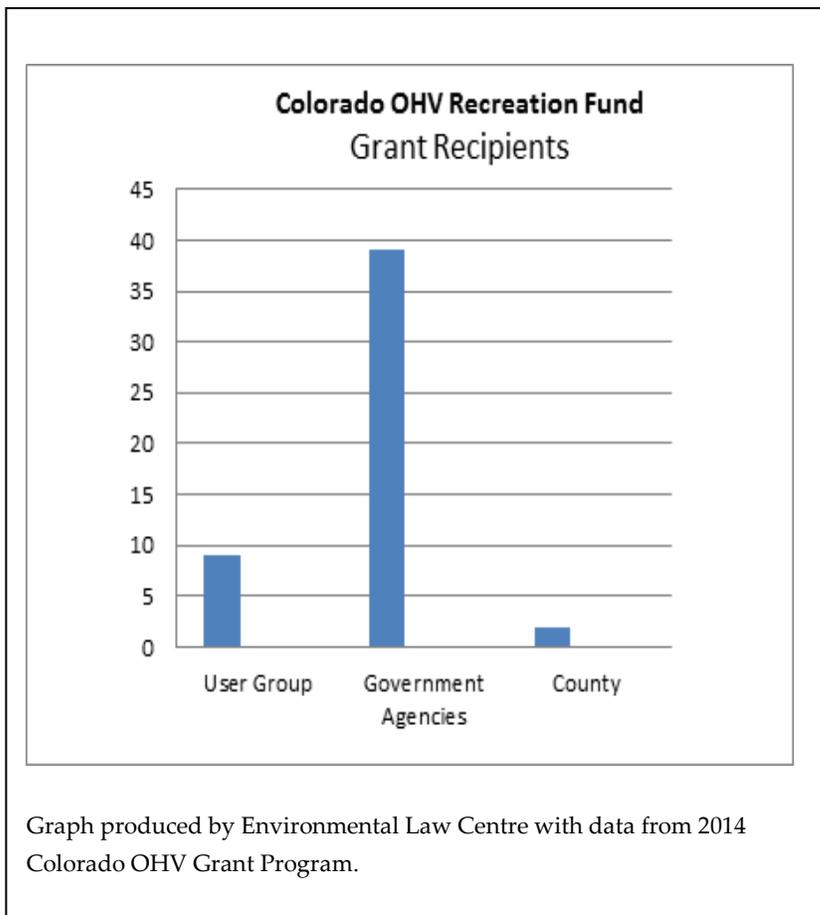
¹⁰³ Colorado Statutes, *Ibid.*, 33, 33-14.5.

fund recipients are the state recreation programs. In the most recent year reviewed, seven out of 57 grants went directly to OHV organizations rather than to public authorities acting as sponsors for the projects. Counties are also recipients.

The allowable uses of the fund are focused on opportunity enhancement, information and awareness of opportunities. Examples of uses include land acquisition, trail construction and maintenance, parking and other facilities, safety promotion, signage and maps. There are limits on allocation of funds to administrative costs rather than direct service provision. Enforcement is not listed as a use of funds but the program web site states that the funded activities “help law enforcement”. Directed fines in Colorado are discussed below.

Colorado has a separate Search and Rescue fund that goes beyond motorized use. The revenue comes from a 25 cent surcharge on OHV, snowmobile and vessel registrations, hunting and fishing licenses, and from the sale of Outdoor Recreation Rescue Cards to non-motorized recreationalists for the price of \$3.00. The funds are used to assist with the costs of search and rescue of the paying users.

Utah occupies a middle position between Colorado and Oregon respecting the breadth of revenue sources, recipients and uses of OHV funds. Like Colorado, the regulatory definition of OHVs covers quads, dirt bikes and side-by-sides but not highway vehicles.¹⁰⁴ However, the OHV program includes snowmobiles and street-legal 4x4s. Annual registrations of all classified OHVs and snowmobiles are required for recreational use of public land and the registration fee goes to the fund. The annual registration fee at the time of publication was roughly \$20 for OHVs and \$26 for snowmobiles. Machines used for farming and ranching are simply subject to a one-time registration fee of \$10 but if “also used for recreation” then the owner must pay the full registration.¹⁰⁵ The fund is also fed by permits for out-of-state users and fuel tax (which could be one basis for including 4x4s). User education is mandatory



¹⁰⁴ Utah Code, *supra* note 46, 41-22-9.

¹⁰⁵ *Ibid.*, 41-22-5.5.

for use of public land in Utah as well but this does not feed the fund. In 2013 the fund held \$1 million from registrations and \$448,000 from non-resident permits for a total of almost \$1.5 million.

Grants can be made to government agencies, local authorities (municipalities) and user groups. The grants may be provided as matching funds where another agency or a user group provides the other half of the funds. The program reports annual grants totalling \$175,000, an investment of \$225,000 in OHV infrastructure such as restrooms at trailheads, and the grooming of 25,000 miles of snowmobile trails.

The costs of collecting the registration fees are taken off the top of the fund. Allowable uses of the remaining funds show a balance between activities aimed at impact mitigation and opportunity provision. Portions of every registration fee are reserved for administrative costs, highway patrol, safety education and search and rescue. Allowable uses for the remaining funds include: enforcement, education, patrolling, equipment, maps, signage, publications, and the construction and maintenance of public facilities.

Utah also has an Off-Highway Access and Education Restricted Account separate from the state OHV Program. This account is funded separately by private contributions, donations and grants. The funds are distributed to charities with mandates to “protect access to public lands by motor vehicle operators” and to “educate the public about appropriate OHV use”. Funds may only be granted where both purposes are met.

Comparison of two OHV funds under Utah legislation		
	The State OHV Program	The OHV Access and Education Fund
Sources of funds:	Vehicle registrations. Permits. Fuel tax.	Private contributions. Donations. Grants.
Recipients of funds:	Government agencies. Local authorities. OHV user groups.	Charitable organizations.
Use of funds:	Administration of OHV legislation.	Access protection and education. (must serve both purposes)

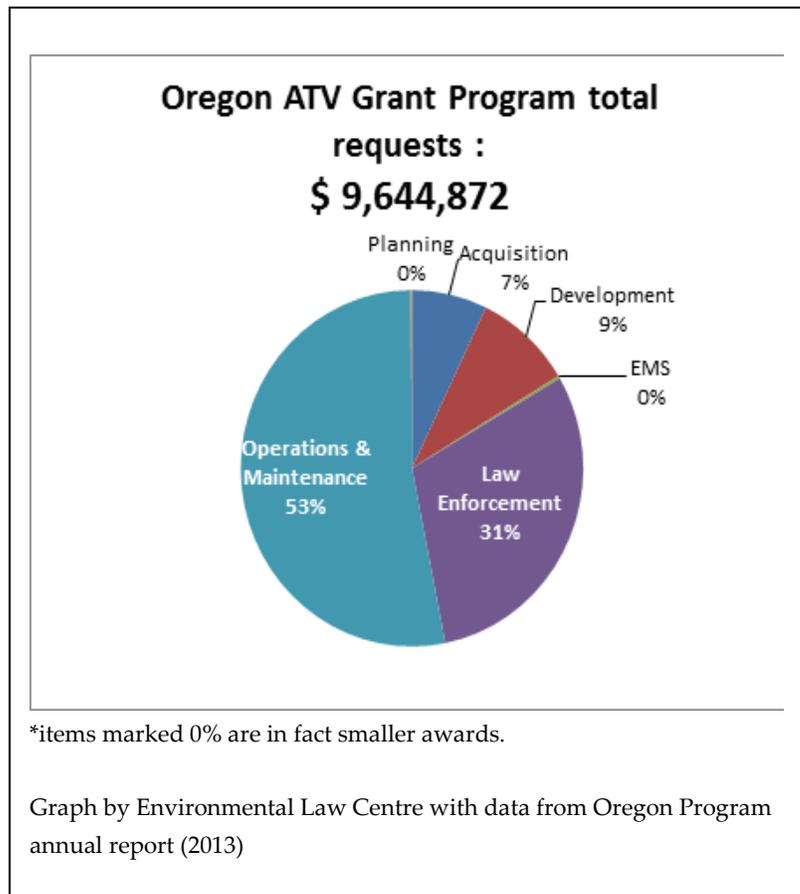
Oregon had the broadest model respecting revenue sources, eligible recipients and allowable uses as compared to the other two states. An ATV permit is required on all vehicles used on public land.¹⁰⁶ The term “ATV” is defined by regulations in a way that includes highway vehicles driven off-road. Snowmobiles registrations are mandatory and go to the same ATV program. Readers should note that the use of the term ATV in Oregon is different than in many states and Canadian provinces where ATV typically means double-tracked OHVs known as “quads”.

The Oregon ATV registration fee is lower compared to the other states, being only ten dollars. Like Colorado and Oregon, permits are required for out-of-state users. Safety education is mandatory for all operators and is confirmed through an “ATV Safety Education Card” (operator’s permit) for use of public land.¹⁰⁷ Fees from the education carding go into the fund. Fuel tax attributable to ATV use goes into the fund as well.¹⁰⁸

The grant allocation committee is required to have voting members from every ATV class. It also includes non-voting members from the federal and state land agencies. Snowmobiles have a voting member and a non-voting member.

The eligible grant recipients include private land managers that provide recreational opportunities, as well as government agencies, local authorities and user groups. Notably, the largest number of grants in the year reviewed went to local authorities, especially the county sheriff.

Allowable uses of funds include promoting and implementing the ATV program, coordination between user groups and land managers, as well as administrative costs. There is a notable focus on impact



¹⁰⁶ Oregon Statutes, *supra* note 48, 390.580.

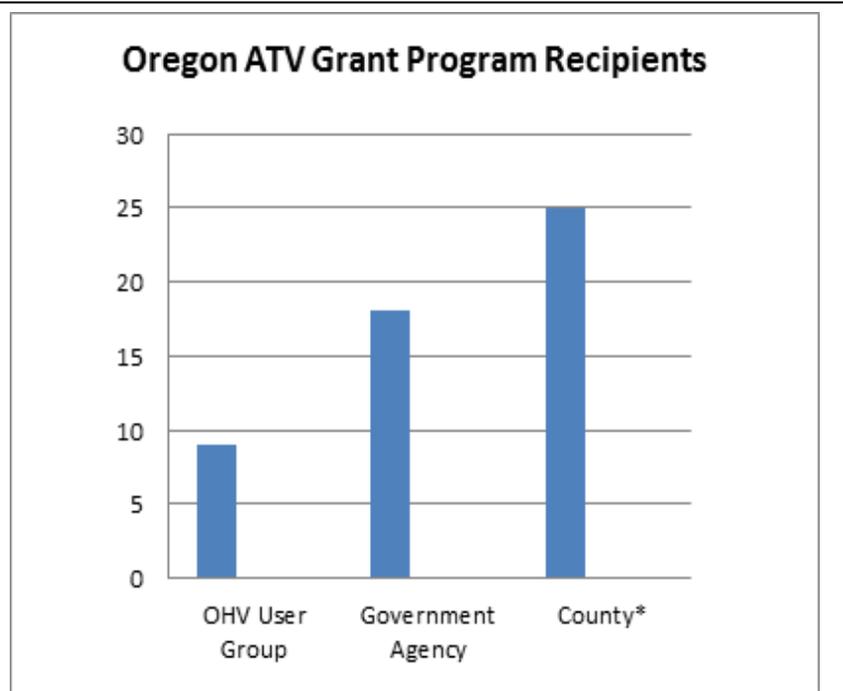
¹⁰⁷ *Ibid.*, 390.570 and 390.575.

¹⁰⁸ *Ibid.*, 390.555, 390.560

reduction activities. Safety education costs come “off the top” of the fund and other allowable uses include first aid, emergency medical services, and police.

Compared to the other states, the allowable uses of the Oregon funds show significant allocations to general operations. Following that, enforcement receives significant percentage of available funds. Much of this enforcement funding is allocated to local authorities (i.e. the County Sherriff) to enforce state laws.

The Oregon model makes the revenue potential of a “broad net” very apparent. Charges against all machine types and operators produced almost \$9.7 million in available grants funds in 2012. This is over twice as much as the \$4 million captured by Colorado and possibly ten times more than the annual revenue of the Utah program even though an Oregon registration is only \$10 as compared to roughly \$20 in Colorado and Utah.



*County recipients include: Sherriff (18), Parks (4) Fire Department (1), Forestry (1) and Other (1).

Graph by Environmental Law Centre with Data from Oregon ATV Program 2013 Annual Report.

Conversely, this broad program allows more funds to be used to fund general operations and impact mitigation rather than providing services to the payees. It is truly a regulatory charge and not a user fee. Nonetheless, the large size of the fund means that funding for recreational opportunity enhancement remains significant. For example the year reviewed saw grants of \$684,000 for land acquisition and \$890,525 for trail development. This is as large, if not larger, than the opportunity funding in the states that focus their funds on trails projects. There is also some legislated equity for trail user types as 10% of the revenue from snowmobile registrations is restricted to snowmobile infrastructure.

III. Fines and damage payments

State legislation provides numerous examples of directed fines, aggravated fines, restitution payments, environmental restoration payments, and community service. These penalties do not always provide revenue for the OHV programs the way that registrations and licenses do. However, they allow for some costs of OHV impacts to be recovered. The details of fine provisions vary significantly by state.

We did not find evidence or evaluations on the actual extent of enforcement and fine collection. This revenue is not a major part of the OHV programs for which annual reviews were readily available.

OHV damage payments

- In Colorado, 50% of fines for non-compliance with registration requirements is directed to the OHV Recreation Fund. Fines for regulatory infractions are also split. Half goes to general revenue and where the other half goes depends on the enforcement officer. Fines levied by Parks and Recreation officers go to the OHV Recreation Fund, Fines levied by Wildlife officers go to the Wildlife Fund, and fines levied by local authorities go to that authority.
- In Utah, persons convicted of OHV offences may be required to pay restitution for damages or perform community service.
- In Oregon, fines are tripled for riding off designated trails if it makes tracks that “remove vegetation to expose underlying rocks and soil”.

(d) Funding debates and reforms in Canadian provinces

The provinces of Nova Scotia and British Columbia showed some similarity to the US models. In the case of Nova Scotia this was an OHV program funded by registrations. In British Columbia it was the implementation of user fees for recreation sites on public lands outside of parks and protected areas.

I. The Nova Scotia OHV Infrastructure Fund

The Nova Scotia OHV Infrastructure Fund was established following the recommendations of a large public review conducted by the Voluntary Planning Task Force on Off Highway Vehicles as discussed above. Whether or not a funding program should be created was not the largest issue during the review as there were some precedents in place for snowmobiles and the panel focused on the extension of such models to OHVs.

The resulting legislation creates a special fund with the revenue coming from multiple sources connected to the users. Grants are made for prescribed purposes by an advisory committee representing the paying user sectors. The model is in the middle of the spectrum from “broad” to “narrow” concerning revenue sources, eligible recipients and allowable uses.

The details and impact of this program are documented in a detailed Summary Review (2006-2013) and official financial statements.¹⁰⁹ OHVs must be registered for use of public land unless exempted for work purposes. Snowmobiles are included but highway vehicles are not included. Regulations set a flat registration fee of \$40. Snowmobiles and visitors must pay an additional seasonal trail pass. Since 2006 the fund has collected approximately \$8.8 million. Currently about \$1.1 million a year comes from registrations while a low percentage comes from “other” sources unconfirmed by us, potentially fines or donations. The grant advisory committee includes representatives of the users requiring registrations, plus the general provincial trails federation.

The listed purposes for which funds may be spent are broad, including: trails, user organizations, health and safety, education, and “any other purpose”. The fund states its strategic priorities as:

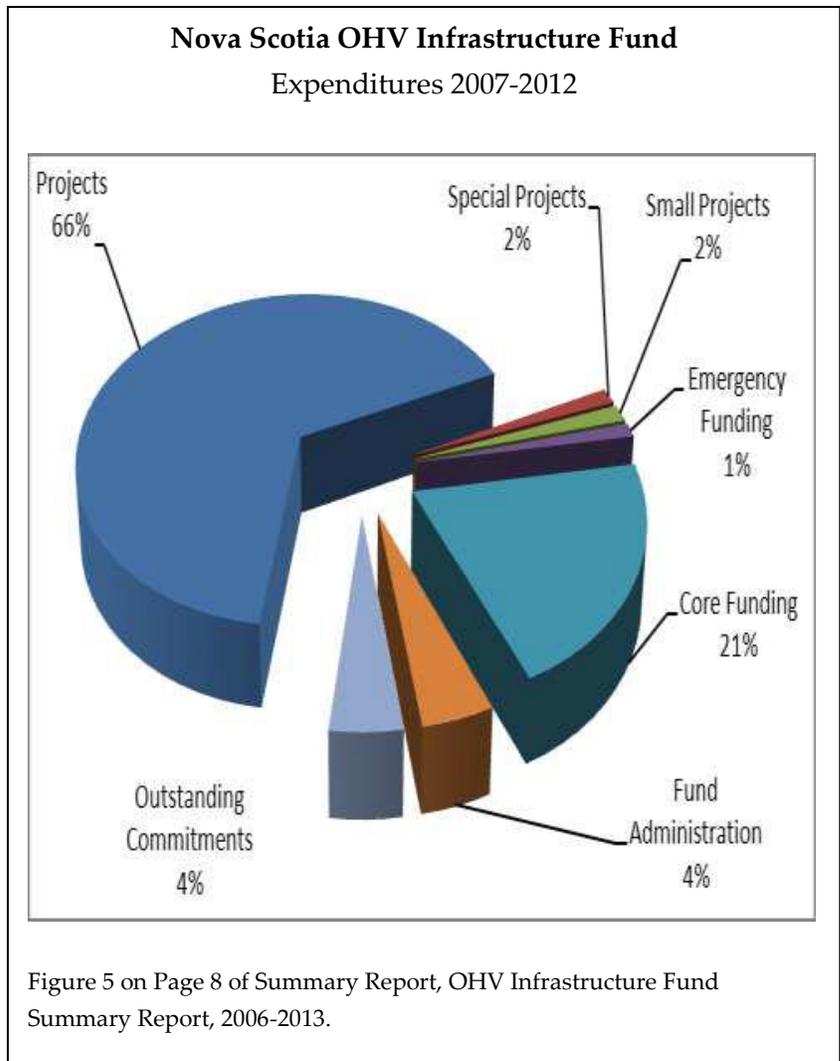
- responsible use (i.e. environmental protection);
- places to ride and not to ride;
- injury prevention; and,
- capacity building.

The actual purposes on which funds are being spent are somewhat different from the US states as there is more focus on environmental sustainability and on sustaining user organizations rather than directly developing new trail opportunities. Approximately \$ 1.3 million is allocated annually from the fund for uses including administration. Roughly \$400,000 of this allocation is reserved for safety training, emergencies and specific projects. Concerning capacity building, the fund provides about \$300,000 in annual core funding for three provincially recognized OHV umbrella organizations: the snowmobile association, the ATV (quad) association, and the off-road motorcycle (dirt bike) association. After these expenditures, the grant committee allocates roughly \$400,000 (5% of the fund) annually to municipalities and local clubs for trail and infrastructure projects. Trail and infrastructure grants are provided as 50/50 fund matching grants where the applicant shows funding for the other half of project costs.

¹⁰⁹ Nova Scotia OHV Infrastructure Fund, Summary Report, 2006-2013, available online: <http://novascotia.ca/natr/ohv/pdf/OHV-Funding-Summary.pdf>; Nova Scotia Infrastructure Fund, Statement of Financial Position as of March 13, 2013, available online: http://www.novascotia.ca/finance/site-finance/media/finance/PublicAccounts2013/Off-Highway_Vehicle_Infrastructure_Fund.pdf.

Trails and infrastructure projects come behind safety, emergencies, administration and core funding in terms of annual obligations. However, it is still an “infrastructure” fund and the largest percentage of funding over time goes to trail and infrastructure projects. To date the fund has allocated \$6.2 million in support of 295 trail projects. Local clubs are very involved in trail projects with the report listing over 80 such organizations.

Notably, 40% of these projects are upgrades to existing trails and facilities. Other notable percentages of the total projects are bridges (15%), connectors, rerouting and expansion (14%), maintenance (10%), and culverts and ditching (7%). Only minimal funds are allocated to planning and capital development.



II. The BC Recreation Stewardship Panel

The BC Recreation Stewardship Panel reviewed the funding model for parks, fish and wildlife recreation in BC.¹¹⁰ It identified three sources of user payment: “user fees”, “contributions” (i.e. donations and volunteer support) and “general taxation”. It recommended that basic infrastructure and enforcement be funded by general tax revenue while user contributions and fees should go to enhanced infrastructure. It also recommended that additional funding from permit and tenure sales go to a special account dedicated to opportunity provision.

¹¹⁰ BC Recreation Stewardship Panel, A New funding model for fish, wildlife and parks recreation, Final Report and Recommendations (British Columbia Ministry of Water, Land and Air Protection, November 29, 2002) .available online: <http://www.env.gov.bc.ca/esd/recpanel/finalreport.pdf>

The panel was opposed to user payments for basic parks and wildlife conservation activities out of concern that this could lead to diminished government responsibility and increasing fees over time. It also grappled with the question of whether user payments that were desired by users more closely resembled imposed charges or voluntary contributions. If the payments were akin to voluntary contributions, the argument was that these payments should go to enhancements for those users. The example given was surcharges on hunting licenses going to habitat enhancement which, as described above, is also the precedent in Alberta.

The panel also distinguished residents from non-residents and commercial users. It recommended that residents pay at a level to recover the direct costs of their use of services. Non-residents, commercial users and private tenure holders should pay market value for opportunities. It also proposed that user fees be charged through an annual pass as is done in the US federal system.

The panel is only one source of recommendations that have had influence on BC's current recreation strategy and the current Recreation Trails and Sites Program. The current program for public lands reflects some panel recommendations as fees are charged for enhanced amenity sites but not for low amenity sites or remote areas.

(e) Comparison of funding models

Every jurisdiction reviewed except Alberta used multiple tools to generate funds for recreation management. The chart on the following page suggests that the biggest difference between these various funding tools is the directness of the connection between the source of funds ("revenue") and the recreational users.

User-pay debates

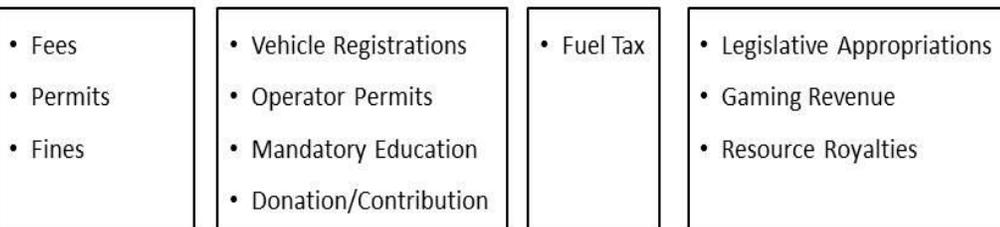
"Many submissions expressed concern about having to pay for "a walk in the woods." The panel shares that concern and believes that fees should be imposed only for opportunities where there is a direct incremental cost to the provincial government to provide that opportunity. The panel also believes that where the provincial government incurs a direct cost to provide a recreation opportunity, the user of that opportunity should contribute through user fees to its continued availability."

-BC Recreation Stewardship Panel

Spectrum of Revenue Tools

Connected to User

Disconnected From User



User fees and permits are the most direct type of user payments. These revenues are only collected in exchange for services, privileges and benefits to the paying users (though this may include impact mitigation). These funds are often restricted to site-specific management activities and in several cases fees were capped at cost-recovery.

Fines and penalties for environmental or property damage are directly connected to use that has already occurred. These revenues can be directed back to recreation management but there may be restrictions on use of funds. These restrictions recognize the fact that these payments are penalties and may help maintain the accountability of enforcement agencies. A percent of the revenues may be kept separate from user-funded trails programs or general agency operations. Funds will typically be used to fund enforcement agencies, environmental restoration, or restitution payments for property damage. Community service for offenders fits this model as well.

Vehicle registrations, operator permits and mandatory safety education are not technically user fees. They more closely resemble regulatory charges levied against an entire land use sector at the provincial or state level. Thus, they are more disconnected from an individual's use of specific sites. Regulatory charges can be used for nearly any purpose so long as it is related to managing the activity against which the charge is levied. Funds can be used for impact mitigation and general operations, and not merely for the provision of opportunities and services to users. Regulatory charges are not capped at cost-recovery and could theoretically be high. However, as a practical matter, they can be kept lower than user fees because the charges are dispersed among many payers.

Fuel tax attributable to fuel put into RVs, OHVs, snowmobiles, trucks and boats is a very indirect user payment. While it is connected to recreational use, tax revenue is not connected to one activity sector and is even less connected to specific sites and users. Taxes will go into general revenue and can be spent on any public purpose unless legislation dictates specific use of such funds.

Unconnected sources: several sources of revenue are not directly connected to recreational users and simply indicate political support for public spending on recreation management. Examples include legislative appropriations (legislation authorizing the spending of public funds for specific purposes), gaming revenue (casino and lottery revenue) and natural resource royalties.

How Alberta compares on funding

The comparisons make it clear that Alberta is very divergent in its lack of tools to fund recreation management. In fact the only current tools in Alberta are user fees and permits. While user payments attract debate everywhere, in many other jurisdictions the debate has already moved past the question of whether payments are needed to questions like: where revenues should come from, who should funds go to, and what should the funds be used for? Where these debates have been held in Canada, the results have trended towards US style models including user payments for enhanced amenity sites and OHV programs. Where funding programs are established, the evidence is that significant revenues can be generated through minimal charges that are acceptable if not desired by the users. While there appears to be a need for evaluation of program impacts, it is clear that funding programs provide capacity for management activities that is lacking and acutely needed in Alberta.



In Canadian provinces, hunting and fishing licenses are the main example of regulatory charges directed back to management activities, for example habitat enhancement.

Photo: southwestalberta.com

(f) Options and recommendations for funding recreation management in Alberta

There is current mixed potential to fund recreation management in Alberta. Fees and permits can be implemented now but other options would require legislative reforms.

I. User fees and permits

User fees: As stated above, user fees can be implemented for parks and public lands but need ministerial orders. This barrier to adoption is more political than legal so evidence on public support for user fees would be helpful. The use of the fees would be a factor in public acceptance as user fees create expectations of benefits to the users. A second barrier to user fees is concern with the increased risk of liability towards users in the event of injuries. This issue is discussed below.

Permits: As stated above, agency staff can and do require permits for recreational activities. The issue is lack of guidance regarding: when, where and why permits should be required, the application process and requirements, and how permit revenues should be used.

In the jurisdictions reviewed, user fees and permits were most common for enhanced amenity sites, high impact activities and motorized use. They were least common for general access, remote areas and non-motorized use.

II. Vehicle registrations and operator licensing

Revenue from OHV registrations, public land vehicle permits, public land drivers' licensing or mandatory user education would likely require legislative reforms. While OHV registrations are required for public land use, registrations are currently regulated under the *Traffic Safety Act* which does not contemplate recreation management purposes for the revenues.¹¹¹ Regional planning in Alberta has taken notice of the number of OHV and RV registrations in the province which may suggest an interest in this model. There has been at least one proposal for levies on registrations to fund OHV management as part of the delegated administrative organization proposal discussed above. These registration numbers may actually be low as OHVs owned in-province are not all registered. The diversity of such funding models in the jurisdictions reviewed foresees the need for a thorough and public weighing of options regarding the vehicles covered by such programs, the recipients of funding and uses of the funds.

¹¹¹ *Traffic Safety Act*, *supra* note 9, Part 6, s.119, 129.

III. Fines and damage payments

An offender-pay model would require legislative reforms as fines currently go to general revenue. Some of our respondents warned that allowing enforcement agencies to keep fines would be open to abuse. Other respondents favored offender-pay models as they saw potential for a green economy through increased enforcement activity. The economic benefits of enforcement to government and the public could further increase if legislation allowed private citizens or non-government organizations to prosecute offenders.

The jurisdictions reviewed favor a directed fine system, especially for OHV damage. They also demonstrate how abuse of power can be prevented. Examples include directing offender payments straight to environmental restoration or compensation for property damage, requiring community service, or setting the cut to be taken by enforcement agencies.

IV. Other sources: fuel tax, gaming revenue and oil royalties

Legislative reforms would be required to direct the use of revenue streams that are not related to recreational use towards recreation management as is done in other jurisdictions. Such reforms would warrant public debate as these revenues already exist and are put to other uses. Nonetheless, the jurisdictions reviewed show evidence of significant public support for the same where there is love for the great outdoors.

Recommendations:

The Ministry responsible for the *Public Lands Act* should:

8. Pilot user fees for enhanced amenity sites and high impact activities requiring built infrastructure to mitigate impacts.
9. Develop policy on the use of permits that covers where, why and when permits will be required, the process for permit applications and what is required of permit applicants.

The Government of Alberta should:

10. Reform legislation to create a broader spectrum of revenue tools and to require that the funds be directed to recreation management purposes.

5. LIABILITY FOR INJURIES ON RECREATION TRAILS

This section compares the liability regime in Alberta to the provinces of British Columbia, Ontario and Nova Scotia and to US jurisdictions generally. The focus is on Canadian provinces with similar legislation to that of Alberta. The Canadian focus for this section also ensures consideration of the Canadian court system as court cases are relevant to the issue of liability.

(a) Introduction to liability issues

Recreational use of public land creates numerous possible legal liabilities. A key difference is between “regulatory” liability imposed by governments when someone breaches regulations, and “civil” liability imposed by the courts when a person breaches his or her private duty towards another person.

This review concerns one situation of civil liability: where a person is injured on a trail or other recreational infrastructure and sues to recover financial loss. It is not a question of if, but when such injuries will occur. Whether lawsuits follow and how they are resolved is another matter.

The rules of liability are blunt tools for allocating responsibility for action. When these rules work well, (which does not always happen), liability for causing or not preventing harm will fall upon the party that is in the best position to take action to avoid that particular harm. This is an area of law where legal advice and representation are often sought and usually needed. Therefore it is crucial for readers to recognize that this review only provides legal information, not legal advice.

The basic principles and general rules of liability are fairly similar across jurisdictions. This introduction covers three such basics:

- negligence;
- risk management; and
- insurance.

Subsequent parts explain how these general principles can be altered by legislation. While legislation is jurisdiction-specific, there are trends. US jurisdictions usually have a “trails act”, or recreation-specific legislation that deals with liability. Many Canadian provinces including Alberta have an “occupiers liability act” that includes some provisions on recreational use. Despite the existence of this legislation it

Key questions concerning liability

- How do the rules for recreational injuries compare to the general rules of liability?
- How well are “occupiers” of public land protected from liability for a recreation-related injury?
- When do injured users have recourse?

is important to begin with the general principles because the legislation is not certain to apply in all situations.

I. Negligence:

Negligence means that someone can be at fault for injuries that they did not intend to cause. Fault is determined through a set process. These steps include:

- the ability to be sued;
- the elements of negligence, including the duty of care, the standard of care, and causation of harm;
- defences to negligence such as voluntary assumption of risk; and,
- apportioning liability between the parties.

It is important to follow this process in order and not skip steps.

Ability to be sued: Not everyone can be sued. Two important barriers to being sued are:

- government immunity; and,
- lack of legal entity.

Government immunity is a legal tradition of prohibiting lawsuits against government in order to protect the policy-making functions of government. This immunity only applies to policy decisions, not to operational decisions. Unfortunately the distinction between policy and operational decisions can be hard for courts to determine in practice. Government immunity can be affirmed or eliminated by legislation. In Alberta the *Occupiers Liability Act* (discussed below) applies to the Crown. This means that government can potentially be liable in many situations concerning use of public lands. Immunity for government would require that the government not be an occupier so that this act does not apply.

Only legal entities can be sued. Some trail groups are not legal entities. They are simply unincorporated groups of members or associated individuals. Such groups cannot be sued which means that the risk of liability might fall on their members and associates who could be sued as individuals. Groups that lack legal personhood also cannot legally own trail infrastructure or the rights and duties associated with holding permits and dispositions. Consequently they cannot take on the related risks even if they wish.

The elements of negligence: Once it is established that a person can be sued, the court must find that the elements of negligence are established. Three important elements of negligence for introductory purposes are:

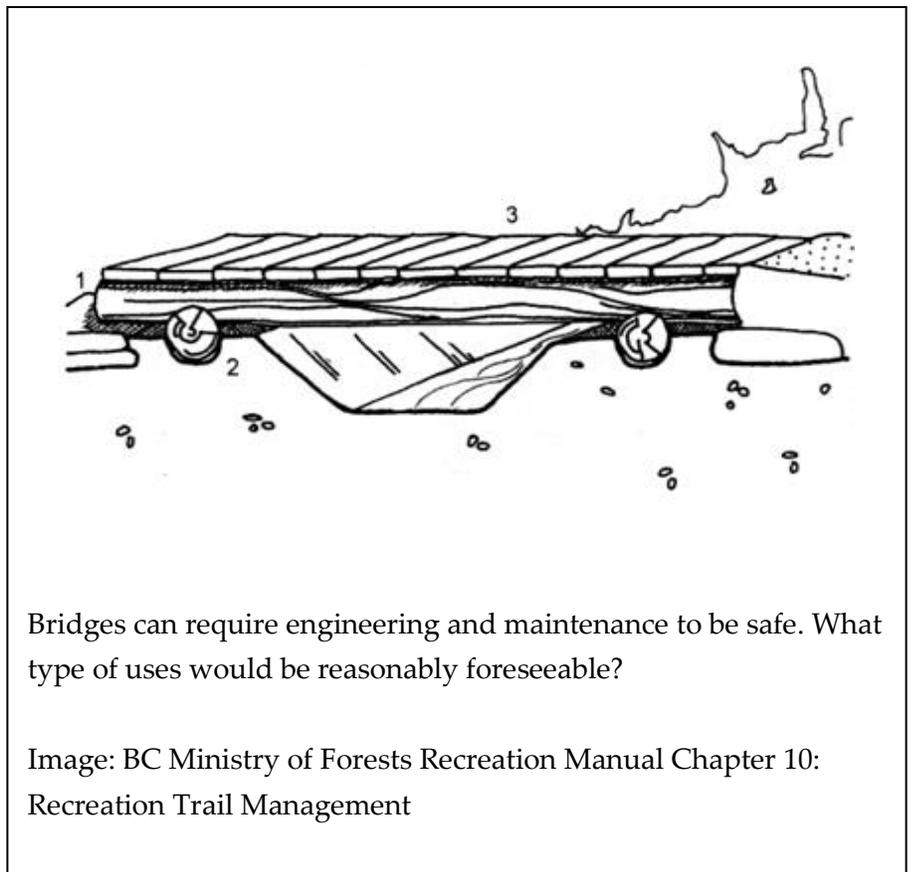
- the duty of care;
- the standard of care; and,
- causation of harm.

Duty of care: To claim negligence, the “defendant” (i.e. the person being sued) must owe a duty of care to the “plaintiff” (i.e. the person who is suing). A key factor in finding this duty is whether accidents would be reasonably foreseeable. However, there is usually no duty to neutralize naturally occurring hazards that would be foreseeable to the user. The greater risk of liability is with built infrastructure like campgrounds, roads, bridges and stunt features designed to test the skill of users.

Trail builders will almost definitely owe duties of care to foreseeable trail users. The larger uncertainties are with trail maintenance going forward. Whether or not there is a duty to do maintenance will depend on the situation.

Standard of care: If there is a duty of care then the defendant must meet the “standard of care”. Again, the larger uncertainties concern maintenance standards rather than building standards. There may be no duty to do any maintenance at all in some situations. However, if there is a duty, or if persons voluntarily do maintenance, then it becomes necessary to meet standards. There is no universal standard of care for trail managers. The standard of care is what an objective third party would find reasonable in the situation.

A further uncertainty concerns the standard of care required of trail groups. On the one hand, it is good policy to hold volunteer trail workers to lower standards so as to encourage volunteerism. On the other hand, groups in the business of trail building and maintenance might resemble “professional” trail builders and this could warrant higher standards, even if the group relies on volunteer labour. Another example is where a trail group trains volunteers in the use of equipment or techniques. There may be no duty to train volunteers for everything. However, if training occurs then it must be done to the proper standard.



Causation of harm: If the standard of care was breached then the question becomes whether this breach caused the injury. The historical approach was to require that the injury would not have occurred otherwise. However, today’s courts may simply ask if the breach contributed to the injury in some

material way. In other words, it has become easier to show causation in situations where there are multiple causes.

Defences to negligence: If negligence is established then the next step is to consider defences. The most important defence to recreational injuries is “voluntary assumption of risk”. This means that the injured person somehow agreed to the possible consequences of their activity.

Apportioning liability: If the defence fails, then there is liability for negligence on the part of the defendant(s). Thereafter the issues become the apportionment of fault and financial compensation. Two principles of apportionment that are important concerning recreational injuries are:

- contributory negligence; and,
- joint and several liability.

Contributory negligence means that the injured person contributed to his or her own injury. This will reduce the compensation payable. Examples include being impaired, not using safety equipment, or acting dangerously.

Joint and several liability means that if multiple defendants are at fault and one defendant does not have assets then the plaintiff can try to recover full compensation from the other defendants. This rule applies in Alberta and the other jurisdictions reviewed.¹¹² Plaintiff’s lawyers know that “you can’t get blood from a stone” so the lawsuits will likely name multiple defendants. This is a concern in situations where there are multiple potential defendants and some have deeper pockets than others. One foreseeable scenario is that trail groups will lack assets. This may expose their individual members, associates and directors, and may also expose government agencies and industry occupiers.

II. Risk management:

Risk management involves identifying risks, making decisions and taking actions in order to reduce those risks. Proper risk management is part of meeting the proper standard of care. A detailed look at risk management is beyond the scope of this review. In brief, some of the most established risk management practices are:

- inspection, monitoring and maintenance to alleviate hazards;
- attempting to transfer risks using legal tools such as waivers, agreements or statutory consents (dispositions, leases and permits); and,
- attempting to transfer risks to users on the landscape through signage and warnings.

Risk assessment, risk tolerance and risk management practices will vary between governments, trail groups, industry operators and further land users. One factor in risk tolerance is whether the party has a motivation to provide recreational opportunities. Another factor is whether the person is potentially an

¹¹² *Steele v. Burgos*, 2010 ABQB 327; *Contributory Negligence Act*, RSA 2000, c C-27; *Tort-feasors Act*, RSA 2000, c T-5.

“occupier”, as this will cause the general rules of negligence to be replaced by “occupiers liability” legislation for better or worse. This type of legislation is discussed below.

For trail groups, a full guide to Minimizing Risk and Liability is published by the Alberta government and distributed through Alberta TrailNet.¹¹³ Some risk management practices for trail groups include:

- seeking regulatory permits for trail work;
- retaining trained staff in areas such as first aid; and,
- adequately training volunteers for trail building.

For government agencies the available practices include, but are not limited to, denying recreational access, closing areas, designating trails or building safer trails. There is uncertainty regarding when it is riskier for agencies to develop trails and infrastructure as compared to when it is riskier to do nothing in the face of hazardous conditions. Some recent cases discussed below speak to this issue but it remains unresolved.

Industry occupiers can be in a unique situation as they may be disinclined to provide recreational opportunities and therefore have little incentive to assume risks. They may also face their own regulatory liabilities that are aggravated by recreational use, for example needing to keep soil on top of pipelines that are run over by OHVs. However, depending on their type of disposition, the industry operators may lack legal powers to control access.



III. Insurance:

Insurance is a circumstance in which one person pre-agrees to cover future loss incurred by another person. This usually involves purchasing insurance products from third parties. The use of indemnity agreements between recreation stakeholders is discussed separately below. It is also possible to self-insure by putting funds aside to cover future potential claims.

A detailed review of insurance issues is beyond the scope of this review. Nevertheless, we will reference the major review of this topic done by the Ontario Trails Council.¹¹⁴ This review found that the concerns in Alberta, Ontario and other provinces are all similar. Most importantly, the insurance regime is a deterrent to recreation stakeholders taking on management roles. If insurance premiums are high then

¹¹³ Alberta Tourism, Parks and Recreation, *Minimizing Risk and Liability Manual* (Edmonton: Government of Alberta, March 2011), available online:

<http://www.albertatrailnet.com/for-trail-builders/resources/print-publications/>

¹¹⁴ Ontario Trails Council, *Insurance Review: understanding and dealing with the challenges of insuring trails in Ontario*, [Publication details unavailable, copy on file with the Environmental Law Centre].

government agencies may carry higher deductibles and be advised to transfer risks to trail groups. Unfortunately trail groups face even greater barriers to obtaining insurance coverage. The necessary insurance products for trail groups are fairly specialized and the market is small so there may be few carriers and the available coverage may be inadequate or costly. The insurance regime may also distinguish motorized use as riskier than non-motorized use which contributes to even higher barriers.

The need for trail groups to carry insurance further varies with the coverage of the government agencies with whom they collaborate. If the agency with which they volunteer is registered with the Workers Compensation Board and pays premiums to cover volunteers, then the volunteers can claim compensation benefits much like the agency employees. However, if the workers compensation system is not available to the volunteers then the agency will require the trail groups to carry insurance.

It is worth noting that insurance to be relevant, the person seeking insurance must be at risk of legal liability to pay damages. If the basis for legal liability is removed, then third party insurance no longer plays any role. Likewise, if legislation were to restrict liability to situations where harm is intentionally caused, then no insurance would be available to purchase to cover such cases.

IV. Summary:

This introductory section establishes that there are various tools to assign liability, and various levels of liability protection. These principles are summarized in the chart below.

Liability terminology

- ❑ **No duty of care:** the defendant cannot be found liable and the claim will fail.
- ❑ **Low standard of care:** it is possible to claim negligence but hard to prove it.
- ❑ **Voluntary assumption of risk:** a defence raised by parties who could otherwise be found liable.
- ❑ **Waivers:** agreements used to create or confirm voluntary assumption of risk.
- ❑ **Contributory negligence:** reduces the compensation payable because the injury was partly the victims own fault.
- ❑ **Risk management:** analysis and actions to avoid potential liabilities.
- ❑ **Insurance:** a third party pre-agrees to cover another party's loss, in this case the compensation payable by the liable party.
- ❑ **Indemnity agreements:** Like insurance, but the agreements can be made between stakeholders instead of purchasing a product from a third party.
- ❑ **Self-insurance:** Setting aside one's own money to cover future loss.

This review does not make recommendations on the general principles of liability. The reason is that the general principles of negligence, risk management, and insurance apply beyond the subject matter of recreational use of public land. This introduction merely provides context for the recreation-specific legislation and court cases discussed below.

(b) Liability in Alberta

Protection from liability for recreational use of public land is stronger in Alberta today than it was in the past. The ELC's 1999 review of liability issues found that there was almost no protection against lawsuits brought by injured recreational users.¹¹⁵ This is no longer the case due to protections in the current *Occupiers Liability Act*. However, this legislation is complex and some legal uncertainty remains.

I. The Occupiers Liability Act

In Alberta, like many provinces, the provincial *Occupiers' Liability Act* alters the rules of negligence in specific situations. The act applies if someone is the "occupier" of a premises.¹¹⁶ Issues include:

- Who is an occupier;
- What is a premises;
- The common duty of care owed by occupiers to visitors; and,
- The reduced duty of care in certain recreational situations.

Who is an occupier? The most important indicator of occupier status is the level of control over access to, and use of, the premises.¹¹⁷ This is where public land differs from private land or buildings.

Trail groups that build or maintain trails but that do not control access might not be occupiers. Groups that hold leases or licenses of occupation are more likely to be occupiers. However, there would still be need to assess the control of access and use of the premises.

Industry operators could be deemed occupiers due to legislation or due to case facts. In some cases they are identified as occupiers by land and resource legislation. In other cases they may hold leases or licenses of occupation. However, the semantics of these permits do not make occupier status. Industry operators may have limited ability to control access or use. Their "occupier" status under resource legislation may relate more to rights to notice, process or compensation for other land use activities and decisions rather than to occupiers' liability.

¹¹⁵ Arlene Kwasniak, *Occupiers Liability, Trails and Incentives*, (Edmonton: Environmental Law Centre, 1999). [Occupiers Liability and Trails].

¹¹⁶ *Occupiers' Liability Act*, RSA 2000, c O-4.

¹¹⁷ *Occupiers' Liability and Trails*, *supra* note 115.

The provincial government could certainly be an occupier as the *Occupiers Liability Act* applies to the Crown. This is likely the case on public land as the government has control over access.

There can be more than one occupier, so it is possible that government, trail organizations, industrial disposition holders and further parties could all be occupiers of public land simultaneously. Even if other parties are occupiers, the government has ultimate control over access so it could still be an occupier in many cases.

What is a premises? Public land is different than private lots or buildings when it comes to the practical ability to control access. However, it likely still counts as a type of “premises” for the purpose of occupiers liability. The Alberta *Occupiers Liability Act* and that of other provinces contains recreation-specific provisions that contemplate undeveloped, forested and wilderness locations as a type of premises. These provisions are discussed below.

The common duty of care: if the *Occupiers Liability Act* applies on the facts, then it replaces the general rules of negligence with a common duty of care on occupiers to keep premises “reasonably safe” for purposes for which visitors have been permitted.¹¹⁸ The common duty of care applies to the condition of the premises, activities on the premises, and the conduct of third parties on the premises. Three issues concerning this duty that are important in recreation management contexts are:

- sufficiency of warnings;
- consents and agreements to alter the duty; and,
- limited liability for contractors.

Warning visitors of risks is not enough to discharge the common duty of care unless the warnings are enough to keep the visitors reasonably safe.

Consents and agreements: The common duty of care can be altered in situations where:

- the visitor “willingly” accepts the risks;¹¹⁹ or,
- the visitor and the occupier make an expressed agreement to alter the duty of care.¹²⁰

These ways to alter the common duty of care by consent or by agreement resemble the concept of “voluntary assumption of risk” in the general negligence rules. Agreements to alter the duty of care would not typically alter the duty owed to further persons that are not parties to the agreement. There is a general legal rule that persons who are not parties to a contract cannot enforce that contract unless the contract exists to benefit them. This rule is reflected in the *Occupiers Liability Act* which states that contracts requiring occupiers to grant access to “strangers to the contract” do not “enlarge or restrict” the duty of care to those persons.¹²¹

¹¹⁸ *Occupiers’ Liability Act*, *supra* note 116, s.5.

¹¹⁹ *Ibid.*, s.7

¹²⁰ *Ibid.* s.8

¹²¹ *Ibid.*, s.10.

Contractors: Occupiers are not liable for the negligence of independent contractors that they use on the premises. This is the case provided that the occupier took reasonable care to select and supervise the contractor, and that the contractor was doing work that should have been undertaken.¹²²

Reduced duty of care to recreational users: the second possible duty of care under the *Occupiers Liability Act* is that recreational users are to be treated like “trespassers”.¹²³ Trespassers are owed no duty of care unless the occupier has engaged in willful or reckless conduct.¹²⁴ The ability to claim reduced duty of care to recreational users varies with the occupier.

This ability to treat recreational users like trespassers is always available to holders of agricultural dispositions under the *Public Lands Act* to which the access system provided by the *Recreational Access Regulation* applies.¹²⁵ As discussed above this is the system of requesting consent to enter onto lands under cropping and grazing leases in the White Area. For other occupiers, there are two pre-conditions to treating recreational users like trespassers:

- the visitor must have been pursuing a recreational purpose; and,
- the premises must fit one of several categories, either:
 - rural premises used for agricultural purposes;
 - vacant or undeveloped premises;
 - forested or wilderness premises;
 - golf courses when not open to playing; or,
 - recreation trails reasonably marked as such.

Even if the visitor was pursuing a recreational purpose and the premises fit into one of the above categories, the protections are not available if:

- accommodation is provided; or,
- payment is received for entry, (unless that payment is received from a government agency or non-profit recreation club or association).¹²⁶

The wording of the provisions on accommodation and payment are fairly confusing respecting who must pay whom, as it suggests that the payment must come from government or a non-profit. However, similar provisions are common in occupiers liability legislation and the intention may be implied. The typical intention of such provisions is to enable the non-profit sector to provide recreational opportunities by reducing the risks to that sector, while not allowing for-profit entities to capitalize on reduced duties of care.

¹²² *Ibid.*, s.11.

¹²³ *Ibid.* s.6.1

¹²⁴ *Ibid.*, s.12

¹²⁵ *Ibid.*, s.11.1; *Public Lands Act*, supra note 5 s.62.1, *Recreational Access Regulation*, supra note 7.

¹²⁶ *Occupiers Liability Act*, supra note 116., s.6.1

**Liability for
Recreational injury
in Alberta:**



Did the injury occur on a “premises”?
-AND-
 Is there one or more “occupier”?

NO **YES**

Negligence:

- Duty of care?
- Breached standard of care?
- Causation?
- Not too remote?

If **YES** to all of the above...

Liable unless

- Agreement /waiver?
- Voluntarily assumed risk?
- Other defence?

If **NO** defences then. . . .

Occupier’s Liability Act

- Does the occupier hold an agricultural disposition under the *Public Lands Act* to which *Recreational Access Regulation* applies?

NO **YES**

- Did the visitor have a recreational purpose?

-AND-

- Were the premises:
 - Rural and used for agriculture;
 - Vacant or undeveloped;
 - Forested or wilderness;
 - Golf course when not open to playing;
 or,
 - Marked recreation trails?

NO **YES**

Apportion damages

- Contributory Negligence.
- Joint and several Liability.

Common duty of care

-UNLESS-

- Altered by consent or agreement.

Treat like a trespasser

-UNLESS-

- Willful and reckless conduct;
- Accommodation; or,
- Payment for entry 82 (unless to government or non-profit).



The complexity of the *Occupiers Liability Act* generates several questions in the public land context.

For the act to apply at all, these questions include:

- whether there are occupiers; and,
- whether public land counts as a "premises" (and it likely does based on the fact that the legislation contemplates recreational use of wilderness and rural areas).

If the common duty of care applies, the questions include:

- whether warnings and signage were enough to keep the visitor reasonably safe in the circumstances, or whether areas must be closed to provide such safety;
- how to create consents or agreements to risks; and,
- what steps must be taken to safely engage contractors for recreational service provision?

For the provisions on recreational users to apply, the questions include:

- whether the visitor had a recreational purpose;
- whether the premises fit one of the listed categories;
- whether there was willful and reckless conduct;
- when does camping amount to providing "accommodation" (for example, does accommodation mean providing amenities, or would simply permitting "random camping" qualify); and,
- how would user payments have to be structured so as to keep the protections in place?



The act implies that protection from true recreational users can be increased by taking certain management actions. These include:

- responding to situations that are known to be hazardous, including hazardous trail infrastructure or the hazards of random use; and,
- "marking" recreation trails, especially if the premises where the trail is located do not fit the categories of rural agricultural, forest, wilderness, or golf courses out of season.

II. Court cases in Alberta

In 2015 the Alberta Courts made the distinction between natural hazards and built infrastructure with respect to recreational injuries. In *Butler v Ma-Me-O Beach (Summer Village)* a person was injured by diving off a pier into a lake and hitting rocks under the water.¹²⁷ This scenario is a common source of occupiers' liability litigation. In this case the water was murky due to algae and the water level was low. The Court dismissed a claim for negligence against the government for failure to control the water level or algae in the lake. However, it allowed a claim to proceed with respect to rocks placed around the pier by the government.

The leading cases on recreation trails and facilities in Alberta pre-date the amendments to the *Occupiers Liability Act* that reduced the duty of care to recreational users. Therefore these cases should be treated with much caution. In *Christensen v. City of Calgary*, the Alberta Court of Appeal upheld a finding of liability against a municipality for injuries to in-line skaters (i.e. roller blade users) on a steep paved pathway.¹²⁸ The common duty of care applied, and warning signage erected by the municipality was not enough to keep the users reasonably safe. The court noted that the Act was later amended to reduce the duty to recreational users. This affirms that cases prior to these amendments may be unreliable precedents.

Several Alberta cases concern ski hills. Like the *Christensen* case on in-line skating, the ski hill cases concern the common duty of care and do not refer to the current provisions that remove the duty of care to recreational users. As for the common duty of care, the courts in the ski hill cases were concerned with whether or not warning signage was a reasonable step to keep visitors safe, and whether or not waivers created agreements to assume the risks.

The Alberta courts have considered the effect of user fees on the duty of care. In *Hussain v. Edmonton (City)* the court found the payment of user fees to a municipal recreation centre to be relevant to finding

Ski hill cases in Alberta

- In *Champion v. Ski Marmot Basin* a skier was injured falling from a lift. The court dismissed a claim against the national parks agency but allowed a claim to proceed against the ski area operator.
- In *Pelechytik vs. Snow Valley Ski Club* a skier was injured on an allegedly dysfunctional chair lift and the court allowed the claim to proceed against the ski area.
- In *Skroki v. Red Deer Ski and Recreation Area Ltd.* a skier was injured on deliberately manufactured moguls (snow bumps). The court allowed a claim to proceed against a ski area, a ski club and an umbrella association.

¹²⁷ *Butler v Ma-Me-O Beach (Summer Village)*, 2015 ABQB 364.

¹²⁸ *Christensen v. Calgary (City)*, 2011 ABCA 244.

a duty of care to a user who was injured by fitness equipment.¹²⁹ This is yet another case that does not concern the current provisions of the *Occupiers Liability Act* on recreational users.

There has also been litigation in Alberta concerning liability for a bear attack in a national parks campground.¹³⁰ The court found that the federal government agency met its duty of care by taking reasonable steps to manage risks and warn users. Thus the suit was dismissed. Bear attacks are beyond the scope of this review, but there are several reported cases in other jurisdictions and an analysis can be provided on request.

In sum, the Alberta cases suggest the following trends:

- the risk of occupiers' liability in the recreational context is more with built infrastructure than with natural hazards or "backcountry" situations;
- the reliability of risk assignment tools like waivers and signage varies with the specifics of the case; and,
- direct payments for access will likely be a factor in finding a duty of care.

However, there are few reported cases concerning recreation trails on public land in Alberta, and perhaps none since the current protections against recreational users have come into effect.

(c) Liability debates and reforms in Canadian provinces

This review includes legislation, cases and commentary from British Columbia, Ontario and Nova Scotia. All three provinces have, over the years, implemented legislative reforms. British Columbia and Ontario have similar occupier's liability legislation to Alberta's legislation.¹³¹ There are some minor differences as the focus is on users voluntarily assuming the risk rather than the occupiers having no duty of care as in Alberta. Nonetheless the result is similar: there are hardly any lawsuits and even fewer findings of liability. However, when lawsuits occur the complexity of the legislation creates uncertainty and the courts are wary of dismissing claims that may have merit. Nova Scotia provides a contrast as it has additional protections from liability in recreation specific-legislation, though we could not find any reported court cases.

British Columbia: Two BC cases featured factual disputes about whether or not persons injured while using OHVs were "recreational" users. Both concern rural locations where use of OHVs for transportation or work is foreseeable.

¹²⁹ *Hussain v. Edmonton (City of)*, 2004 ABQB 204.

¹³⁰ *Brodie v. Canada (Attorney General)*, 2010 ABQB 678.

¹³¹ *Occupiers Liability Act*, RSBC 1996, c 337 [BC Occupiers Liability Act]; *Occupiers' Liability Act*, RSO 1990, c O.2. [Ontario Occupiers Liability Act].

In *Skopnik v. BC Rail* the British Columbia Supreme Court found a railway company that maintained a right of way to be liable for an OHV injury.¹³² It found that the injured person was not a “recreational” user so the protections provided by the *Occupiers Liability Act* did not apply. In this case, a boy borrowed his mother’s OHV for transportation purposes and rode down the right of way where he unexpectedly hit a drop-off. Other boys who regularly rode OHVs there testified that they knew about the drop off and rode it without incident. Nonetheless the court held that the company did not meet the general duty of care (i.e. common duty of care) to keep the premises “reasonably safe”.

In *Hindley v. Waterfront Properties Corp.* the British Columbia Supreme Court allowed the lawsuit to proceed where the injured person was using an OHV as a work vehicle.¹³³ The court reviewed the public debates and recommendations from the time that the legislated protections were created. It concluded that these protections only applied to recreational users. The BC reform debates originated from concern about ski resorts using waivers to avoid liability. When the Law Reform Commission began investigating it discovered widespread concerns about the fear of liability leading to restrictions on recreational access to public land. The government at the time was concerned with establishing the Trans Canada Trail which, though not clear from the court records, likely made it interested in responding to the liability issues. Recreational user groups argued that users would accept lower safety standards in exchange for greater access, and the legislative reforms were made. Nowhere in these debates was there any mention of people being “deemed” recreational users.

Ontario: In Ontario there is some empirical data on liability available through various trails organizations.¹³⁴ The Ontario reviewers searched for court cases across Canada and concluded that landowners are rarely held liable for recreational injuries. Lawsuits in Ontario were infrequent and mostly minor. Overall the Courts saw recreational users as assuming the risks according to the *Occupiers Liability Act*. Factors that put more obligations on the users included:

- rugged terrain;
- motorized use; and,
- factors leading to accidents that flowed from the users themselves, including:
 - inexperience (66% of cases);
 - equipment problems (41%);
 - alcohol and drugs (32%);
 - interaction with other users (21%); and,
 - inadequate group leadership (19%).

The Ontario review claimed that no trail groups or individuals had lost a lawsuit in court and that only 6% had to settle a claim. As in Alberta, the details of out-of-court settlements are not publically available.

¹³² *Skopnik v. BC Rail Ltd.* 2007 BCSC 1340

¹³³ *Hindley v. Waterfront Properties Corp.* 2002 BCSC 885.

¹³⁴ Ian Attridge, *Trail Liability and Other Reforms in Ontario: A Discussion Paper*, (Haliburton Highlands Stewardship Council, October 2002) [copy on file with Environmental Law Centre].

Despite the above evidence indicating low chance of liability, the Ontario review concluded that uncertain risk of liability is definitely a problem from the perspective of trail organizations. Some more recent court cases affirm this conclusion. All of these cases since the date of the Ontario review concern popular but un-serviced recreation hotspots. A central issue in these cases is whether or not the premises were on of the listed types as needed to provide protection from recreational users under the provincial *Occupiers Liability Act*. Similar to Alberta, these categories of premises include premises that are “undeveloped”, “rural”, “forested”, or “recreation trails”.

In *Denis v. Ontario* the Ontario Supreme Court dismissed a lawsuit brought by an injured dirt biker against the provincial government and a municipality.¹³⁵ Dirt bikers were using an abandoned but un-reclaimed gravel pit that was owned by the province and operated by the municipality. The municipality’s permit required inspecting the pit and erecting signage. The rider’s footrest hit a protruding piece of wire which caused his bike to stop. He then went over the handlebars and broke his spine. The court found uncertainty as to whether or not the premises qualified as “rural” or “wilderness”. However it found backup protection through provisions for voluntary assumption of risk in the provincial OHV legislation.¹³⁶ It also looked at snowmobile cases from the 1980s where “reckless disregard” meant doing something or omitting to do something where it was recognizable that injury could occur, and not caring if injury occurred.¹³⁷

Two recent cases of *Leone v. University of Toronto Outing Club* concern a management arrangement between government and a trail group.¹³⁸ In both cases the Court held that the claim of an injured mountain biker had enough merit that it should be allowed to proceed against both defendants. This finding does not establish liability, only that the case should be heard.

The injury occurred in a popular mountain bike area advertised in magazines and bike stores. However, there were no facilities on site and no trail maintenance. The victim was an experienced rider familiar with the area who crashed on a trail that was open to use but badly worn. The government had issued a permit to the trail club to maintain cross-country ski trails in winter and charge fees for use. A side agreement provided that the trail club would indemnify the government if the government was held liable. Summer use of the same area took place under a government policy of free and open access with no restrictions on type of activity. The policy promoted trail development by the public but it did not require inspection or maintenance and none occurred. The policy also favoured erecting signage that said ‘use at own risk’. However, such signage was not legally required. The signage in place concerned ski trails and indicated that the trails were maintained by volunteers. Maps warned of hazards including OHV ruts.

¹³⁵ *Denis v. Ontario (Ministry of Natural Resources)*, 2005 CanLII 44410 (ON SC)

¹³⁶ *Off-Road Vehicles Act*, R.S.O. 1990, c. O.4, s.20.

¹³⁷ *Cormack v. Mara (Township)* (1989), 68 O.R. (2D) 716 (Ont. C.A.).

¹³⁸ *Leone v. University of Toronto Outing Club*, 2007 ONCA 323; *Leone v. University of Toronto Outing Club*, 2006 CanLII 34440 (ON SC), available online:

<http://www.canlii.org/en/on/onsc/doc/2006/2006canlii34440/2006canlii34440.html?searchUrlHash=AAAAAQATbGVvbmUgdj4gdW5pdmVyc2l0eQAAAAAB&resultIndex=12>

The court considered that the area had changed over the years and was not “wilderness” any more. Therefore there might be no reduction in the duty of care. Nonetheless, the court was swayed by the legislative intention that recreational users voluntarily assume risk unless there was reckless and willful disregard by the occupiers. However, in the second *Leone* case it found that the user never agreed to the risk of being injured by the presence of a hole in the trail.¹³⁹

The court in the *Leone* cases concluded that neither the government nor the trail group had summer maintenance duties. However, these cases imply that it might be worse to do nothing in the face of known hazards. The decisions recount how the provincial trails committee advised the responsible ministry about increasing summer use and impacts to the trails. The ministry acknowledged that a management plan was needed but no plan materialized. The committee urged the ministry to get on with it, noting further issues of uncontrolled camping and environmental damage. However, still no plan materialized. This lack of management planning did not decide the outcome of the *Leone* cases. However, it is noteworthy that the courts have considered this type of inaction as a potential indicator of disregard.

Nova Scotia provides a contrast to Alberta, British Columbia and Ontario. Rather than relying mostly on an *Occupier’s Liability Act*, this jurisdiction features three levels of legislative protection: an occupier’s liability act, a trails act, and an OHV act.

The Nova Scotia *Occupiers Liability Act* is similar to the other provinces. Under this legislation, risk is transferred to the users of listed premises including agricultural lands, vacant rural land, forest and wilderness land, utility right of ways and “reasonably marked” recreation trails.¹⁴⁰

The Nova Scotia *Trails Act* broadly limits the duty of care to trail users.¹⁴¹ If land has been designated as a trail then then owners, occupiers and their agents only owe a duty of care not to create a danger with the deliberate intent of doing harm or damage to persons or property. It further provides that a user of a trail voluntarily assumes all risks that may be encountered on the land when using a trail, whether the person is on the trail or not. This model simplifies who may be protected and avoids debate about whether the user was pursuing a “recreational purpose”, whether the land fits listed categories, and what counts as reckless disregard.

Like Ontario, the Nova Scotia *Off Highway Vehicles Act* which provides that OHV users voluntarily assume the risks unless dangers were created with a deliberate attempt to harm.¹⁴² We were unable to locate any court cases from Nova Scotia which might suggest that these “layered up” protections help deter lawsuits.

¹³⁹ *Leone v. University of Toronto Outing Club*, 2007 CanLII 20109 (ON SC).

¹⁴⁰ *Occupiers Liability Act*, SNS 1996, c 27.

¹⁴¹ *Trails Act*, RSNS 1989, c 476, s.18.

¹⁴² *Off-highway Vehicles Act*, RSNS 1989, c 323.

(d) Liability in the US

The ELC reviewed liability issues in the US for its 1999 publication *Occupiers Liability, Trails and Incentives*.¹⁴³ While legislation changes over time, the general picture will be the similar today. Nearly every state in the US has legislation that excludes recreational users from the general rules of negligence. The models vary but several resemble the Nova Scotia model in that the protections are fairly broad and layered up. Recreation-specific legislation provides a limited duty of care that does not depend on user pursuing a “recreational purpose”. Moreover, OHV legislation creates voluntary assumption of risk for that activity. Some models exempt landowners and occupiers from having to post signage or warn of hazardous conditions. This helps restrict liability to situations where dangers are being deliberately created. Some state legislation requires events and races to carry liability insurance and provides some specifics of the necessary coverage.

Of the states reviewed for this review, Utah had notable protections from OHV users. The state OHV legislation provides that: “liability may not be imposed on any federal, state, county or municipality relating to the designation or maintenance of any land, trail, street, or highway open for off-highway vehicle use.”¹⁴⁴ Additional legislation on OHV use in parks provides that “responsibility for any accidents or problems while using OHVs in state parks rests with the user”.¹⁴⁵

US legislation also addresses liability protections in user-pay systems. In several cases the loss of protection is limited to for-profit situations and direct user fees. Examples include:

- loss of protection only when admission fees are charged by businesses;
- loss of protection does not apply where only maintenance fees or administrative fees are charged; and,
- loss of protection does not apply when only voluntary contributions and donations are made.

Some other US models for the effect of user fees are more like the Canadian occupiers’ liability legislation. This model features vague provisions but basically implies that non-profit organizations that allow public access or provide public services should not be penalized for soliciting voluntary contributions or minimal payments for maintenance.

Despite the stronger protections in the US there is still uncertainty in the courts about when user fees will cause loss of protection. For example, in one case fees for vehicle entry to public parks were not considered user fees. However, in another case an entry fee for dirt bikes was found to be a user fee.¹⁴⁶ As in Canada, trail advocates in the US would like to see protections for landowners and occupiers more clearly extended to other parties with management responsibilities.¹⁴⁷

¹⁴³ Liability and Trails, *supra* note 115.

¹⁴⁴ Utah Code, *supra* note 36, 41-22-10.1(3).

¹⁴⁵ Utah Administrative Code, *supra* note 49, R651411.2

¹⁴⁶ Occupiers Liability and Trails, *supra* note 115.

¹⁴⁷ *Ibid.*

(e) Comparison of liability models and issues

All of the reviewed jurisdictions showed evidence of the same basic trends concerning liability issues. Three of these trends are that:

- recreation-specific legislation replaces the general rules of negligence and occupiers liability;
- there is a lack of court cases and determinations of liability; and,
- the trend to date has been towards increased protections from liability.

I. Recreation-specific legislation replaces the general rules:

Every jurisdiction reviewed is attempting to replace the general rules with recreation-specific legislation. The differences between jurisdictions are in the clarity around when this legislation applies, and in the strength of the protections from liability claims.

Alberta may be in the middle of the spectrum in terms of clarity and level of protection. The recreation-specific provisions of the *Occupiers Liability Act* apply in comparable situations to those in other provinces and the level of protection is comparable despite semantic differences. The Alberta model may actually be stronger than that in BC or Ontario as it more clearly removes the duty of care towards recreational users rather than trying to create voluntary assumption of risk. There are fewer court decisions in Alberta than in Ontario or BC which suggests some deterrent effect.

However, in all three provinces the legislation is complicated and this creates issues for the courts. Examples include:

- whether or not there was willful or reckless disregard of dangers;
- whether or not the injured person there for a recreational purpose;
- whether or not the premises was a marked trail or other listed category of undeveloped land;
- whether or not there were fees for access; and,
- whether or not the payment was to, or from, a government or a non-profit organization.

In contrast, the Nova Scotia legislation and much US legislation provides stronger protection than Alberta. This is done by recreation-specific legislation that:

- removes duties of care to recreational users regardless of the land designation (whether they were on or off a designated trail); or,
- removes duties to trail users regardless of whether or not they are recreationalists; and,
- provides backup protection by creating user assumption of risk for specific high-risk activities like OHV use.

We found no court cases from Nova Scotia and no greater proportion of cases from the US despite the reputed litigiousness of American society. This suggests that the stronger protections in these

jurisdictions may have deterrent effect. Nonetheless, the desire of trail advocates for reforms in the US suggests that legal uncertainties persist there as well.

II. Lack of reported court cases

There are very few lawsuits relative to the frequency of recreational injuries. The vast majority of reported court cases concern built facilities like ski resorts, motocross tracks and urban recreation centres rather than trails on public lands. Of the trails cases that are reported, several concern municipal pathways, industry right of ways and road allowances rather than backcountry trails. Furthermore, most personal injury cases never make it to a trial where the court determines fault and issues a written judgment that can be used as a precedent. Most written judgments are only preliminary decisions where the court simply decides whether or not the claim has enough of a chance that the plaintiff should be allowed their day in court. These preliminary decisions do not establish liability. The vast majority of claims settle out of court before the trial, which means that no one is found to be at fault and the records of compensation are private. When cases do go to trial, there are hardly any in which public land recreation managers have been found liable.



“Ticket waivers” used by ski operations are featured in several court cases.

The implication of all of the above is that there is uncertainty concerning what risks of liability actually exist respecting recreation trails on public lands. Trail proponents often feel that risk of liability is overstated, and this is likely true given the available evidence, but nonetheless some risk remains.

III. Focus on increased protections:

The focus of the liability debate as captured in law reform initiatives, secondary sources, and even some court cases has been on increased protection from liability rather than on rights of recourse for injuries. Earlier sources show a concern with liability risks acting as a barrier to recreational access to public lands. In multiple jurisdictions, prior barriers to access have since been removed by increased protections from liability. The contemporary concern is that risk of liability is acting as a deterrent to “proactive” management actions such trail building, trail maintenance, and charging user fees.

This deterrent effect is especially high where multiple sets of liability rules and risks assessments are in play, for example:

- where there is need for management partnerships;
- where trails cross land under multiple different legal designations and occupiers; or,
- where uses changes by season.

This deterrent to recreational infrastructure needs to be addressed. It is increasingly understood that good trails, sites and physical infrastructure can achieve the dual outcomes of providing desirable recreational opportunities and mitigating the negative impacts of recreation.

However, the focus on protection from liability overlooks another side of the story. The advantages of liability protections to recreation managers and trail proponents can come into conflict with demands on the legal system to maintain duties and repair harms. Protections from liability are already stronger than in the past as a result of reforms. Recreational access is already widespread on a land base that features unnatural hazards. Recreational users can be, and are, injured through the fault of other persons, through no fault of their own, and through risks that they did not agree to assume. If motor vehicle users are expected to cross a bridge instead of fording a river then they may expect that the bridge be safe to use. A skier who agrees to the risk of an expert downhill may not agree to maintenance equipment being left in the middle of the trail.



It is not good policy for legislatures or courts to remove all rights of recourse in all situations. The need for the law to strike a balance, and the challenge of doing so, is evident in the legislation and court cases discussed above.

(f) Options and recommendations on liability issues in Alberta

Liability for injuries to users of trails in Alberta is sufficiently uncertain that the use of additional legal tools may be needed to more clearly assign risks. Legislative reforms would be preferable or in addition to these tools.

I. “Marked trails” (*designated trails*)

Marking a trail can trigger the protection offered by the *Occupiers Liability Act*. Marking trails may be especially useful in specific situations:

- where occupiers are aware or should be aware of hazards with unmanaged use, and want to avoid allegations of “willful disregard”; or,
- where the premises would not fit the other categories that provide protection.

Showing that a trail is “marked” may require designating the trail and communicating this designation to users through signage or other forms of “marking”. No reforms are needed to mark trails as multiple tools are available under the *Public Lands Administration Regulation*. However, marking trails may warrant trail inspections and maintenance as there would still be a duty not to recklessly or wilfully ignore hazards.

Options considered

- Marked trails
- Waivers
- Signage
- Trail building standards
- Indemnity agreements
- Statutory consents
- Legislative reforms

Recommendation:

11. Recreation trails should be marked; especially where trails contain known hazards and the premises may not fit the other categories that offer protection.

II. *Signage*

Signage is one form of trail “marking” that provides further benefits. Signage that warns users of trail features so can help create or confirm “voluntary assumption of risk” in addition to whatever baseline protections exist. The limitations of signage are the same as with waivers, namely that the injured person must understand and agree to specific risks. Many trail users will not foresee hazards and may not agree to risks so signage must be fairly specific. This is why signage often warns of “mixed use” (motorized and non-motorized), expert trails, steep downhill, trail mergers and other hazards that would already be recognized and understood by experienced users.

Generic signage like “use at own risk” may be ineffective in creating user agreement. Location of signage is also important as it might not be noticed if the area is large and has multiple access points.

Signage has an additional function of enhancing the users' experience of the trail by assisting with orientation, navigation and expectations. Excessive or ineffective signage can have the opposite affects. Consequently a test of good signage is that which reasonable users appreciate.

Recommendations:

12. All designated trails should be "marked" by signage. The signage should identify specific hazards, regulations and expectations on users. Moreover, the signage should be designed to enhance user experience.



III. Waivers

Waivers for trail volunteers and users can create "voluntary assumption of risk" on top of the baseline protections. Waivers can work but there are limitations. The injured person must have agreed to the specific risks. This is the reason why waivers often list countless risks from insect stings to bad weather. Also, it is on the party assigning risk to see that the person signing the waiver understands the risks they are assuming and the implications of doing so. The numerous ski hill cases indicate that the effect of waivers can be uncertain.

Recommendations:

None. Persons or groups considering waivers should seek legal advice.

IV. Trail building standards

Trail building standards that are based on reasonably foreseeable risks and that are followed by the builders could assist in showing that a standard of care is met. Alberta has already published trail building standards for trails in parks there are no comparable standards for trails on public lands. The parks trail standards are focused on the suitability of trail for use type which, if done, should contribute to user safety. Trail standards can be developed by agency staff without need for legislative reforms.

Recommendation

13. Develop trail building standards for trails on public lands outside of the parks system.

V. **Indemnity agreements (aka “hold harmless” agreements)**

Two legal entities can agree for one to cover the other’s losses if the other is found liable. This is typically known as an “indemnity” or a “hold harmless” agreement. It is like insurance except that the agreement is made between stakeholders instead of by purchasing a product from a third party. These agreements have flexible uses as they could be made in relation to management partnerships or in association with trail development permits. For example a trail group that is a legal entity could agree to cover the losses of the land agency as a condition to getting a trail building permit. Alternatively the agency could agree to cover the losses of the trail group as a means to procuring maintenance work. The limit of this option is that the parties to the agreement do not escape their duties towards third parties. Recreational users are not “privy” to this contract so they can still sue whoever they believe is at fault. The parties to the agreement can still be found liable and it is up to them to seek reimbursement from each other. This can result in a damaged relationship or even a second lawsuit between the parties to the agreement. Moreover, it doesn’t change the fact that you can’t get blood from a stone.

Recommendation:

None. Persons or groups considering indemnity agreements should seek legal advice.

VI. **Statutory consents (dispositions)**

There are numerous forms of statutory consents under the *Public Lands Act* that could have impacts on liability in the recreation management context. These include:

- permits;
- licenses of occupation;
- leases; and,
- other dispositions.

Permits may be required to build trails. This provides the agency control over the existence of a trail and the building standards. However it does not make the trail builder an occupier and it might not assign maintenance duties. Therefore permits are mostly useful for reducing risks from poorly built infrastructure.

Licenses of occupation have the effect of making public land no longer “vacant” for the purpose of the *Public Lands Administration Regulation*. This can alter the baseline of open access but control of access remains with the agency not the license holder. A license of occupation holder might be found to be an occupier for liability purposes but this is not a given. Licenses of occupation may be useful for preventing the hazards associated with random use or recreation around industry operations. However, they do not clearly assign liability.

Leases provide the leaseholder with some control of access and temporarily remove some, but not all, of this function from the agency. The best example is the *Recreational Access Regulation* for the White

Area under which users must ask the leaseholder to enter. The leaseholder cannot unreasonably refuse access but they can require non- motorized travel. This type of leaseholder will likely be found to be an occupier. However, in exchange he or she can avail themselves of specific protections under the *Occupiers Liability Act*. Such leases can assist with assigning risk from the leaseholder to the users that are granted entry, but they may not assign risk as between multiple occupiers. Moreover, they do not assist with establishing recreational infrastructure.

Dispositions: The *Public Lands Administration Regulation* allows for the creation of new forms of dispositions but does not specify what they would be.¹⁴⁸ A new type of disposition for recreation could be more flexible than a lease regarding its ability to overlap with other dispositions and the level of control over access that it provides. The terms of the disposition could help establish whether the disposition holder is an occupier and could assign trail building, inspections and maintenance duties. Dispositions raise similar policy concerns as leases, namely with private control of access to recreational access to public land.

All of the above tools can be used by agency staff without need for political-level decisions or legislative reforms. However, there is a lack of policy to guide the use of these tools. Furthermore, statutory consents may not change the fact that the Crown is the primary occupier of public land. As noted above this is the key difference between public land and private premises. Thus the main effect of statutory consents may be to create additional occupiers. They do not necessarily transfer liability so much as increase the number of exposed parties. Furthermore, the principle of “joint and several liability” means that there may be no practical effect on damage payments through having added additional occupiers.

Recommendation:

The Ministry responsible for the *Public Lands Act* should:

14. Develop policy for use of statutory consents for recreation management purposes. Do not rely on statutory consents to remove occupier status of the Crown.

VII. Legislative reforms

None of the above options under existing legislation create certainty so much as they add complexity. Even if these options could help assign risk they could create other policy issues, most notably reliance on private parties to provide public benefits. Furthermore, none of the above options surmount the fact that trail groups are limited in their legal and practical capacity take on risks. The best solution is legislative reform.

¹⁴⁸ *Public Lands Administration Regulation*, *supra* note 6, s.144.

Recommendations:

The Government of Alberta should:

15. Reform legislation to increase clarity concerning the assignment of liability for injuries related to recreation trails and infrastructure, making the protections against liability stronger, but not eliminating all recourse in all cases.
16. Before settling on reforms, conduct an additional review of multiple options including:
 - removing the duty of care owed to recreational users whether or not they are on a listed type of premises;
 - removing the duty of care to trail users whether or not they are recreational users;
 - creating voluntary assumption of risk for specific activities like OHV use;
 - clarifying the intention of provisions on user payments; and,
 - defining “reckless disregard” as situations of deliberate hazard creation or willful blindness.

Summary of “piecemeal” recommendations, showing the need for comprehensive reforms

Mandates:

- Create a specialized enforcement force.
- Provide officers with power to issue administrative penalties.
- Develop policy to guide the use of tools in the *Public Lands Administration Regulation*, but exercise caution respecting the use of dispositions.
- Have regional plans set measurable objectives, provide guidance for regulatory tools, direct industry regulators to assist with recreation management and make use of conservation directives to assist with recreation management.
- Avoid using the recreation trails partnership pilot as a model for reforms.
- Avoid creating a delegated administrative organization for trail-related functions.
- Abandon the trails act bill but continue to **pursue legislative reforms**.

Funding:

- Pilot user fees for enhanced amenity sites and high impact activities.
- Develop policy on the use of permits for recreational activities.
- **Pursue legislative reforms** to create a broader spectrum of revenue tools.

Liability:

- Mark (designate) trails.
- Use signage to mark all designated trails.
- Develop trail building standards for public lands.
- Develop policy for use of statutory consents but do not rely on statutory consents to remove occupier status from the Crown.
- **Pursue legislative reforms**.
- Conduct an additional review of reform options.

6. RECOMMENDATIONS FOR COMPREHENSIVE LEGISLATIVE REFORMS

As there are shortcomings on every point of jurisdictional comparison and the options for improvement under existing law are limited in all cases, the best improvements to recreation management in Alberta would come through comprehensive legislative reforms.

Prior public panels such as the Nova Scotia OHV Task Force and BC Recreation Stewardship Panel discussed above focused on what reforms were needed, not how reforms should occur. However, it is necessary at some point to consider the implications of reform options.

One option would be to amend multiple statutes including the *Public Lands Act*, *Traffic Safety Act* and *Occupiers Liability Act*. All of these statutes have broader functions so opening them up to amendment could have broader implications.

A second option would be to pursue broader reforms to public lands legislation to resolve larger issues such as lack of conservation purposes and lack of direction or priority for “multiple use” of public lands. An argument against this route is that some of these larger issues could be resolved using existing legislation that has not been used to its full potential such as the *Forest Reserves Act* and *Alberta Land Stewardship Act*.

A third option is to create new recreation-focused legislation such as a “trails act” or “recreation management act”. This option could deal with most of the issues identified in this review while leaving the remaining public lands framework in place. This model has some support within government as evidenced by trails act bill that did not advance and by past ministry business plans favoring legislation to create a user-funded trail system. The problem with this option is lack of suitable comparative models prior to this review. As discussed above the anticipated reforms were to create a delegated administrative organization with details to be determined. This model was absent from the eight jurisdictions reviewed here, considered and rejected in multiple provinces, and we recommend avoiding it for reasons detailed above.

In sum, legislative reforms are necessary. However, the Government of Alberta lacks a fulsome understanding of the best options or models for affecting such reforms. The road to reform in Alberta should begin with a public panel or inquiry. This forum would allow for experts in the field to hear evidence, review proposals, and assess options with a level of detail, transparency and structure that have been lacking from existing provincial initiatives such as the trails bill, the trails partnership pilot and the regional planning consultations. This type of public review in other provinces has had influence on policy and legislation. Moreover, a similar exercise is underway in Alberta with respect to climate change policy and it is receiving positive reviews as a sound means to effect policy change.

Recommendations for comprehensive reforms:

The Government of Alberta should:

17. Hold a public panel review or inquiry on recreational use of public land to provide a basis and recommendations for reforms; and,
18. Pursue comprehensive legislative reforms that would:
 - allow for prioritization of recreational use on “multiple use” public lands;
 - create clear government agency mandates to manage recreation by developing recreational opportunities and tackling recreational impacts;
 - provide clear stakeholder roles in program delivery, more funding mechanisms for recreation management and stronger protections from liability;
 - move more recreation management decisions from the political realm into the administrative realm, but with greater legislated direction than currently exists; and,
 - enable the creation of vehicle-specific motorized management programs and non-motorized recreation programs all under the umbrella of a general recreation management framework.

7. CONCLUSIONS

This review affirms that the challenges of managing recreation on public land in Alberta are shared by numerous western jurisdictions. Moreover, these challenges have intensified with the increase in motorized recreation. Government agencies in numerous jurisdictions are facing competing priorities and lack practical capacity to respond effectively. While there could be more evaluation of what works, it is increasingly understood that agencies need strong mandates to manage recreation, access to funding sources outside of government, and clarity concerning the risks of legal liabilities associated with recreation management functions. There are also general needs to involve municipalities, recreational users and other non-government stakeholders in management regimes without allowing them to dictate the solutions.

What differs between the jurisdictions reviewed is the legal framework for recreation management. This framework in Alberta is most different from that in jurisdictions said to be ahead in responding to the shared challenges and most resembles that in jurisdictions experiencing similar struggles.

The largest difference is between Alberta and US federal jurisdictions where public land legislation defines “multiple use” of public lands in a manner that enables the prioritization of recreation. Alberta is also behind numerous US jurisdictions where agencies have clear direction to develop recreational opportunities and mitigate impacts, regulatory tools to generate revenue for these purposes, and protections from liability for recreational injuries. These models also provided greater guidance for specific agency decisions, formal stakeholder roles in program delivery, and accountability for financial decisions. These models, which come from ordinary legislation, can be replicated in Canada as apparent by developments in British Columbia and Nova Scotia. The Nova Scotia model is significant as it includes a general trails act, a specific OHV management program, and stronger liability protections. The British Columbia model is also noteworthy for developing recreation trails and sites outside of parks and protected areas.

Concerning OHV management, most jurisdictions reviewed that were thought to be ahead on this matter had a legislatively-enabled OHV program built on the foundations of an established recreation management regime. The OHV legislation frequently consolidated matters of vehicle definitions and standards, access to land, user rules, enforcement and penalties, commercial activities, trails and facilities, program funding and liability. During the drafting of this publication, British Columbia introduced a bill targeting the motor vehicle aspect of OHV management, while Nova Scotia and Ontario already have specialized OHV enforcement forces.

Where the Alberta model most closely resembles that in other jurisdictions is with respect to occupiers’ liability in Ontario and British Columbia. The complexity of this liability model creates potential litigation issues and can deter trail programs despite a fair lack of reported court cases.

Several options to improve recreation management exist under current legislation and should be pursued, but all have limited potential to fill key gaps in the legal framework. There is need for legislative reforms. However, recent reform initiatives and proposals are divergent from every jurisdiction reviewed and would leave undesirable gaps in the management system. Accordingly the best option is to explore further models for comprehensive reforms.

Without reforms the challenges of managing recreational use of public land will increase despite many valiant efforts to respond. Conversely, well managed recreation would provide one of Alberta's best opportunities to achieve environmental, social and economic outcomes from public land use. The legal framework is crucial to success and this review should be in hand as recreation management moves up the political agenda.