An Agricultural Law Research Article

Recreational Use of Agricultural Lands

by

Richard H. Krohn

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Recreational agricultural land use would appear to benefit everyone. The landowner receives additional income from his or her property, usually in a manner which does not interfere with the primary or historical agricultural uses of the property. Recreational uses (such as hunting) can be so lucrative that many farmers and ranchers earn as much or more from those uses as from agriculture. Some farmers and ranchers would be unable to continue agricultural operations without the added income generated from permitting or undertaking recreational uses of their property. State and local economies realize increased tourism and tax revenues. The public is benefited by access to private lands that would not otherwise be open and by wider access to public lands, both of which broaden the availability and quality of rural and wilderness experiences for an increasingly urbanized population.

Not everyone is in favor of the growth and promotion of recreational agricultural land use. Some interests see the increase in such uses as destructive of natural resources, detrimental to preservation of wilderness areas or animal habitats or otherwise environmentally undesirable. Some landowners feel that the commercialization and increased public presence associated with these uses threatens historical agricultural land uses, family values and the rural atmosphere which are viewed and valued as an important part of Colorado culture. Others object simply because of the loss of privacy from the many additional people drawn to rural areas.

Governments in heavily populated or environmentally protective areas often decry the loss of agricultural land use and natural resources which frequently results from the opening of desirable rural or wilderness areas to increased public presence and development. This reaction may take such forms as limitations, restrictions or outright bans on certain types of development (zoning and land use restrictions) or impact fees for use or conversion of agricultural lands.

PRIVATE PROPERTY RIGHTS

It is clear that private landowners have the right to exclude the public from access to their private lands for recreational purposes. Both civil and criminal remedies are available to protect landowners from trespass.[1] However, recreational use of water overlying private land constitutes a special situation.

In *People v. Emmert*,[2] the Colorado Supreme Court (over the vigorous, separate dissents of Justices Groves and Carrigan) affirmed the trespassing convictions of recreational rafters who had attempted to float a portion of a non-navigable stream crossing private lands. In affirming the trial court, the Supreme Court combined the general rule of property law that land underlying non-navigable streams is subject to private ownership vested in the owners of the adjoining lands with the common law rule that the owner of the surface has the exclusive right to everything above it.[3] More importantly, the Court rejected constitutional challenges asserting a public right to recreational use of all waters in Colorado.[4]

The situation is much more complex where the issue concerns the right to recreational use of water in a man-made reservoir. Whether the landowner or storage right holder has the right to recreational use of the surface of the reservoir depends on the nature, language and basis of the grant creating the reservoir right.[5]

LIABILITY ISSUES

If landowners wish to open their land for recreational use, their chief concern is likely to be the avoidance of potential tort liability for injury to the property users. Facing increasing political pressure from both providers and users, and recognizing that tapping the self-interest of landowners would further encourage these types of uses and generate additional revenue, Colorado has provided landowners and certain types of recreational providers with enhanced statutory shields from liability applicable to recreational use of private agricultural lands.[6]

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Public Recreation Access Law

In 1965, the Council of State Governments promulgated a model act which would treat consensual, nonpaying recreational users as trespassers for liability purposes, thereby minimizing landowners' exposure to personal injury claims. A number of states, including Colorado, now have public recreational use statutes encouraging private landowners to allow public use of their lands by limiting their liability in this fashion.[7] By permitting such recreational use, landowners do not extend any assurance that the premises are safe for any purpose, confer on users the legal status of an invitee or licensee to whom a heightened duty of care is owed, or assume responsibility or incur liability for any injury to person or property caused by an act or omission of the user.

The Colorado statute protects landowners who directly invite or permit "any person" to use their property for recreational purposes. This could conceivably mean that landowners are protected whenever a specific person is invited or permitted on the property or that a general invitation is required. However, it appears to be necessary for landowners to invite or permit recreational use by the general public in order to enjoy the protection of this liability limitation statute, rather than extending the invitation on an individual basis.[8]

Interpreting this provision to require general public invitation also is the only means to harmonize it with the tiered liability structure codified in the premises liability statute described in further detail below. In that manner, landowners may have limited liability to members of the general public admitted by generalized permission for recreational purposes under this statute, while still owing a higher standard of care to specific nonpaying individuals (such as social guests) utilizing the property at the express invitation of the landowners.

The protection of this statute is lost where a fee is charged for the recreational use. There are exceptions for consideration received by landowners for leasing land to the state or its political subdivisions and for consideration received from any federal governmental agency for admitting any person to the landowners' land.

The protection of the statute is also lost where, though use of the land is free of charge, there is a relationship between a business or commercial use of the property and the use giving rise to the injury.[9] Landowners are not exempt from liability where willful or malicious misconduct is involved or where landowners maintain an attractive nuisance.[10] The protection of the statute applies only to the landowner and not non-owner recreational providers.

Most landowners opening their land to recreational use by limited or general elements of the public do so with the intent of monetary gain. For that reason, the user-type and activity-based statutes described below are of much broader application. The premises liability statute enhances the duty of landowners to permissive users over that owed to trespassers and increases it further to business users. The skier and equine statutes are geared to protect providers and landowners associated with specific recreational activities viewed as sufficiently important economically or from a public policy standpoint to merit special protection.

Premises Liability Law

Landowner liability to users of real property in Colorado has historically been governed by common law. This premises liability statute[11] attempts to codify standards for the liability of landowners to the various classes of users of their property. The statute as originally enacted in 1986 was declared unconstitutional in 1989[12] and was amended significantly in 1990 for that reason. It defines three classes of land users: invitees, licensees and trespassers.

An invitee enters on the land of another to transact business in which the parties are mutually interested or in response to the landowner's express or implied representation that the members of the public are requested, expected or intended to enter or remain on the landowner's property. Recreational customers on agricultural property will fall within this class. A licensee enters or remains on another's lands for the licensee's own convenience or to advance his or her own interests pursuant to the landowner's permission or consent (including social guests). A trespasser enters or remains on the land of another without the owner's consent.

A landowner's liability under the statute differs as to each of the three classes of potential users of the owner's property.[13] A trespasser may recover only for damages for personal injury that is willfully or deliberately caused by the landowner. A licensee may recover only for damages caused: (1) by the landowner's unreasonable failure to exercise reasonable care with respect to dangers created by the landowner of which the landowner actually knew; or (2) by the landowner's unreasonable failure to warn of dangers not created by the landowner which are not ordinarily present on property of the type involved and of which the landowner actually knew.

An invitee may recover for damages caused by the landowner's unreasonable failure to exercise reasonable care to protect against dangers of which the landowner actually knew or should have known. However, if the landowner's real property is classified for property tax purposes as agricultural land or vacant land, an invitee may recover only for damages caused by the landowner's unreasonable failure to exercise reasonable care to protect against dangers of which the landowner actually knew.[14]

Note that the standard of care of landowners to an invitee is differentiated and diminished where the property is assessed as agricultural land. The apparent legislative intent is to encourage the willingness of owners of agricultural land to accept business visitors on their property by specially limiting their liability. Property tax assessment classification was undoubtedly chosen as the class-defining criterion to provide a bright line test. Once a person enters on agriculturally assessed land, the statute does not differentiate as to the nature of the use being made of the property at the time of the injury, so the standard of care is the same whether the business purpose is agricultural, recreational or of some other type.

Although there is not yet an appellate case addressing the issue, it seems arguable that holding landowners to different standards of liability for injury to recreational invitees based solely on whether the land is classified for property tax purposes as agricultural property may constitute a denial of equal protection where the injury arises from activities unrelated to property tax classification of the property.

The statute provides that the circumstances under which an invitee may recover include all of the circumstances under which a trespasser or a licensee could recover. This makes the landowners of property classified for property tax purposes as agricultural land liable to their invitees for:

1) damages willfully or deliberately caused by the landowners;
2) unreasonable failure to exercise reasonable care concerning dangers of which the landowners actually knew (whether or not created by the landowners); and
3) unreasonable failure to warn of dangers not created by the landowners, not ordinarily present on the property of the type involved, and of which the landowners actually knew.

One commentator has stated that the legislative change from "deliberate" failure to exercise reasonable care to "unreasonable failure to exercise reasonable care" is "unintelligible and sure to raise constitutional issues."[15] Also, the duties to "warn" and to "protect" apply to different types of dangers and constitute different standards. Given the use of the reasonableness standard, questions will certainly arise based on the factual circumstances concerning what constitutes a sufficient warning.

The statute applies where the injury arises from the condition or circumstances of the property or activities conducted on it.[16] *Geringer v. Wildhorn Ranch, Inc.*[17] concerned a vacationer at a guest ranch who drowned during a boating accident. The accident occurred on a lake at a ranch at which paddle boating was among the recreational activities offered by the resort to its guests. Interpreting this statutory language narrowly, the court held that the premises liability statute did not apply to the landowner's negligence in providing a defective chattel to an invitee. The court based its holding on the theory that the legislature intended to re-establish the common law distinction of premises liability which traditionally made a landowner liable for activities inherently related to the land.[18]

In the 1990 amendments to the premises liability statute, the Colorado legislature took the unusual step of stating its legislative intent both in policy terms and with reference to the appellate cases named in the statute. The stated intent was to protect landowners from liability in some circumstances when they were not protected at common law and to define the instances when liability will be imposed in the manner most consistent with the policies set forth in those amendments.

There is as yet no Colorado appellate case law interpreting the 1990 amendments. Therefore, it remains uncertain

which activities may be excluded from coverage by the premises liability law.

Equine Activities Statute

The equine activities statute,[19] enacted in 1990, represents one area in which the Colorado legislature has acted to limit exposure to liability associated with a specific category of activities often related to recreational use of agricultural property. The statute may be roughly summarized as providing that certain parties (such as sponsors, instructors and lessors) engaged in specified activities relative to horses or llamas are not liable for the injury or death of a person involved (whether or not a fee is paid), where the injury or death results from the inherent dangers or conditions of such activities.

The statute lists as examples of such inherent dangers: the propensity of the animals to behave in ways which may result in injury, harm or death to the persons on or around them; unpredictable actions of the animals to sound, movement and unfamiliar objects, persons or animals; surface condition hazards; collision with other animals or objects; and the potential of a participant to act in a negligent manner contributing to the injury of that participant or others.[20]

A number of limitations on this bar against liability are also enumerated, chiefly related to intentional or reckless conduct. Exceptions to the protection afforded by the statute include: providing equipment or tack known (or which should have been known) to be faulty, where this fault caused the injury; failure to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the activity and to manage the animal, based on the participant's representations; owning, leasing, renting or otherwise controlling the land on which injuries are sustained resulting from a dangerous latent condition known to the service provider and for which warning signs are not conspicuously posted;[21] committing an act or omission causing injury which constituted willful or wanton disregard for the safety of the participant; or intentionally injuring the participant.[22]

Warning notices meeting specific criteria are required to be posted in specified areas and contained in the contract pursuant to which the activities are undertaken in order for the protections of the statute to be effective.[23] While the statute mandates posting and inclusion of this warning in contracts, it does not specify the penalty for failure to comply. It is arguable that failure to comply could deny the party the protections of the statute which might otherwise be realized by compliance. It also could be argued that failure to give the statutorily mandated warning in and of itself constitutes negligent failure to warn, subject to ordinary comparative negligence standards, if the failure to warn could be shown to constitute proximate cause of the injury. This complex statute should be reviewed in detail if counsel's client plans to undertake activities it governs.

Ski Safety Act of 1979

The Ski Safety Act[24] legislates limits on the liability of providers for personal injury in another recreational activity of great public interest and economic importance. It specifies detailed warnings, notices and information concerning the risks associated with this activity which must be posted by ski area operators and mandates certain operational requirements.[25] It provides that violation of any of the requirements of the Act which causes personal injury or property damage constitutes negligence on the part of the violator.[26] In an apparent effort to further limit the liability of operators complying with the statutory notice and operational requirements, the latest amendments enumerate in detail the inherent risks associated with skiing. They also confirm that skiers assume the risk of injury to person and property resulting from those inherent risks of the activity with regard to any claim against the operator.[27] A damages cap also is included.

Expanding outdoor recreational activities and continuing concern over imposition of liability for personal injury will undoubtedly cause proponents of other types of recreational activities to seek legislation limiting their liability. The pattern of the existing legislation suggests they will attempt to identify the risks inherent in the particular activity, impose specific duties to warn and charge participants with assumption of the risk where proper warnings have been made and gross negligence or intentional conduct are absent.

PRACTICE CONSIDERATIONS

Whatever recreational activity is undertaken, counsel for the landowner leasing to or contracting with a service provider should consider a number of possibilities for protecting the client from liability.

Indemnification

One approach for landowners seeking to protect themselves in a situation where a third party is providing recreational goods or services for the landowners or on the landowners' property is to require indemnification from providers in which the providers promise to defend the landowners and reimburse them for any losses suffered relative to the providers' operations. Indemnifications may be narrow or broad and specific or very general. To maximize the landowners' protection, the indemnity should broadly define the parties protected (including, for example, agents and insurors) and expressly include the obligation to defend against claims asserted and to repay losses incurred, as well as provide for recovery of the owners' attorney's fees and litigation expenses. Many variables are possible, and the indemnification should be tailored to the particular situation.

Indemnifications have serious limitations and should be coupled with other appropriate contract language to extend the scope of protection to landowners as much as possible. For example, in the case of personal property leased with real property to outfitters, owners would certainly want representations and promises in the agreement that (1) all equipment was in good operating condition at the time received by lessees; (2) it would be maintained at all times in good and safe operating condition and in compliance with any applicable industry or legal standards or regulations; (3) it would be repaired and replaced at lessees' expense as necessary to meet these requirements; and (4), if appropriate, it would be inspected before each use.

Licensing may be required and casualty and liability insurance should not be overlooked. Counsel should carefully consider whether and how to provide for or undertake inspection of the equipment.[28] While providing some assurance of safe operation, it also may expose landowners to additional liability if negligently performed or not acted on or may change the relationship of the parties from mere lessor and lessee to members of a business enterprise.

Probably the major limitation of the indemnification is that it is only as good as the source of indemnification. Prudent landowners' counsel should require a verified financial statement when con-

sidering the ability to repay a claim under an indemnification. Naturally, indemnifications from partnerships are dependent on the assets of the partnership and its general partners. Indemnifications from corporations and limited liability companies are generally limited to the assets of that entity, which may well be dissipated or nonexistent when recovery on an indemnification is sought.

Releases

Another means of seeking to reduce or eliminate exposure to liability claims associated with recreational use of agricultural property is to obtain a release from each recreational user. By signing a release, the parties enter into an agreement which will result in one party being free from the consequences of conduct which would otherwise constitute negligence. A release in this context is a contract by the participant in an activity to release claims for personal injury the participant might otherwise have against the provider of goods or services, a landowner, other potentially liable parties or all of them. As such, it must comply with all of the normal requirements of a contract, such as valid consideration and a meeting of the minds (generally expressed in the case law as assessment of the intent of the parties). While it is crucial that each release be tailored to the particular operations and activities which are its subject, some general comments may be helpful.

The Colorado Supreme Court in *Jones v. Dressel*[29] stated that there are four factors which a court must consider in determining whether an exculpatory agreement is valid: existence of a duty to the public, nature of the service performed, whether the contract was fairly entered into and whether the intention of the parties is expressed in clear and unambiguous language.[30]

Utilizing this test, the court in *Jones* denied the claim of a parachutist injured in the crash of an airplane used to ferry the skydivers to the jump site. The court found that the agreement expressed the parties' intention in clear and unambiguous language because of the use of the term "negligence" and specific reference to injuries sustained while in the provider's aircraft. The court also found it significant that the service provided was not an essential service to members of the public; that the company did not possess a decisive advantage of bargaining strength over the injured party; and that the contract was not an adhesion contract.[31]

An exculpatory agreement seeking to insulate parties from liability for their own negligence will be closely scrutinized by the courts.[32] Extrinsic evidence or presumptions in aid of construction will not be permitted to prove the waiver. Courts will not go beyond the plain language of the release in determining its validity. If the plain language of the release is unclear or ambiguous, it will be void as a matter of law.[33] Absent fraud or concealment, failure of the user to read an otherwise valid release will not render the release ineffective.[34]

To be effective, the release should state expressly that its purpose is to release landowners or recreational providers from their own negligence. In preparing a release, the key is to state expressly, clearly, unambiguously, and in as plain language as possible, the intention of the parties to extinguish that liability.

Having said this, it should be noted that the equine activities liability statute described in detail above was enacted, at least in part, in response to *Heil Valley Ranch, Inc. v. Simkin*.[35] In that case, the Colorado Supreme Court held that a broad language release executed in favor of a ranch precluded claims of negligence and breach of warranty and barred recovery, even without the use of those specific terms.[36] However, this result was obtained only after extensive (and undoubtedly expensive) litigation in which the ruling in the trial court favorable to the ranch was overturned in the Court of Appeals and then reinstated by the Colorado Supreme Court over a vigorous dissent. This type of risk is certainly not recommended.

There are also general limitations on releases. For example, a release will not provide a shield against a claim for intentional or malicious conduct.[37] The effectiveness of a release also is unclear in Colorado where the injured party is a minor. A minor generally may disaffirm a contract (such as a release) made during his or her minority within a reasonable time after attaining majority.[38] Most courts have held that a parent signing a release on behalf of a minor does not validate the release as against a subsequent claim by the minor on the theory that such releases are void as against public policy when children are involved. The only mention of this issue by the Colorado Supreme Court has been as a footnote in the *Jones* case in which the court noted that parental ratification of the release did not necessarily validate the minor's contractual release.[39]

Operating on public property also may affect the validity of a release. A federal public policy limiting the effectiveness of waivers may exist or the permits under which such activities are undertaken may adversely affect the effectiveness of any release.[40] Particular care must be taken under these circumstances to review the applicable governmental regulations and operational permit documents.

Other Considerations

Obtaining and maintaining in force proper and adequate liability (and, if applicable, casualty) insurance may be one of the most crucial factors to be considered in planning and undertaking any recreational use of agricultural property. Counsel should become familiar with the types, coverage, cost and availability of insurance. Inquiry should be made to assure coverage for personal injury, property damage and bodily injury. All policies should name the landowner-client as an additional insured, be written by carriers properly authorized to do such business in Colorado and should specify that the policy cannot be changed or cancelled without a stated period (from ten to thirty days is not uncommon) of prior written notice to the landowner.

Utilizing an entity such as a corporation, limited liability company or limited partnership may provide an additional layer of insulation from liability in the activities undertaken. However, each will have its own advantages and disadvantages from tax, operational, recordkeeping and other viewpoints. Any required licensing also may become more complicated and problematical if certain types of entities are utilized.[41] Perhaps the most that can be said is that insurance and choice of entity are elements that must be thoroughly considered by the practitioner in the context of the particular recreational activity to be undertaken.

REGULATION

Particular recreational uses of agricultural property may be controlled by some or all of federal, state or local laws and regulations. The source and extent of regulation and control varies considerably depending on the nature of the activity undertaken. However, some requirements are applicable to most businesses of this type.

General Considerations

Any business which has employees is required to pay federal withholding and FICA (Social Security tax) for their employees. Each business must pay income taxes on its income. There are numerous filing and reporting requirements, such as the issuance of W-2 forms for payment of employee wages or Form 1099 for payments to independent contractors. Any business with employees is required to obtain a federal employer's identification number, regardless of the form of entity.[42]

Colorado requires payment of workers' compensation and unemployment insurance for employees.[43] It also requires withholding from wages for state income taxes. In addition, many businesses are required to collect and pay sales taxes to the Colorado Department of Revenue for the goods or services they provide. Real property, personal property and use taxes also may be involved.

Failure to pay any required federal taxes outlined above can result in a lien being asserted against the property of the taxpayer.[44] Under Colorado law, failure to pay sales or withholding taxes may result not only in a lien against the property of the taxpayer, but also against the property of the landowner in the situation where the taxpayer is a lessee. However, Colorado law has recently been changed to make it easier for a landowner in these circumstances to avoid such a lien.[45]

Labor law issues also are likely to impact this type of business. The most common is whether workers providing services are independent contractors or employees. Employers generally find it less expensive, more convenient and less burdensome from a recordkeeping standpoint to hire workers as independent contractors rather than employees. Social Security payments, unemployment tax payments, tax withholdings, pension and health benefits, vacation and sick leave benefits and minimum wage and overtime guarantees do not apply to independent contractors. However, with independent contractors, the employer loses control over the details of performance of the job for which the independent contractor is hired and is dependent on the contractor's business management skills for the success of the employer's business.

Even if this appears to be a desirable trade-off, it is not a selection which can be made unilaterally by the employer. The classification depends on the particular facts and circumstances of the relationship between the employer and worker.[46] If the federal and state agencies responsible for enforcing wage and hour laws, income tax laws, or unemployment or workers' compensation laws determine such workers are employees when the employer has treated them as independent contractors, the consequences to the employer may be dire.[47]

Counsel also must keep in mind that employees involved in recreational activities, even though on agricultural land, probably are not "agricultural employees" subject to minimum wage and/or overtime exemptions applicable to those employees under the Fair Labor Standards Act.[48] Certain recreational employees may still be exempt from overtime, but this will depend on the facts and circumstances of the particular case.

Many other federal and state laws are likely to apply, depending on the nature of the business. For example, federal and state anti-discrimination provisions generally are applicable to recreational businesses or agricultural lands. It also is possible that the nature of the recreational activities may cause a property to be a "place of public accommodation" under the Americans with Disabilities Act of 1990, triggering the obligation to take reasonable steps to accommodate access to the services provided by handicapped individuals within the parameters specified by that law.[49]

Outfitters and Guides

Hunting is one of the most common recreational uses of agricultural lands.[50] This may range from owners simply accepting payments from hunters for the right to hunt on their property to owners or outfitters providing lavish and comprehensive guided hunting excursions. It is not at all uncommon for landowners of prime big game hunting property to earn more income from hunting activities than from ranching. The potential for tremendous gain is offset by significant risk of liability arising from the inherent nature of the activity, making liability issues (discussed above) crucial considerations in any outfitting activities.

Colorado requires registration of guide and outfitting providers.[51] Registration is not required for individuals providing such services, even though for compensation, solely on land they own. Individuals providing only rental of motor vehicles, horses or other equipment are also excluded from regulation.[52] Registration requirements include being twenty-one years of age, proof of specified first-aid

training, carrying $50,000 per person/ $100,000 per occurrence in general business liability insurance, and obtaining a $10,000 corporate surety bond.[53]

The Colorado legislature has substantially revised the regulation of outfitters by enactment of Senate Bill 93-1. The bill defines outfitting services requiring registration to include providing transportation of individuals, equipment, supplies or wildlife by means of vehicle, vessel or pack animal; providing facilities including but not limited to tents, cabins, camp gear, food or similar supplies, equipment or accommodations; and guiding, leading, packing, protecting, supervising, instructing or training persons or groups of persons in the taking or attempted taking of wildlife.[54]

Outfitters are required to have a written contract signed by both the outfitter and the client, specifying at least the types and dates of service to be provided, transportation arrangements, costs of services, ratio of clients to guides, and the outfitter's policy regarding contract cancellation and refund of any deposit.[55] Each contract also must contain a statement that the outfitters are bonded, required to have a minimum level of liability insurance, and regulated by the Division of Registrations of the Colorado Department of Regulatory Agencies. Outfitters may not recover compensation for their services or breach of contract if they have failed to comply with these requirements.

Outfitters' contracts for services also are unenforceable unless the outfitters are properly registered.[56] Personal property utilized by the outfitting service in violation of the statutory regulations is declared a public nuisance, subject to confiscation and forfeiture. Failure to register is a crime, and other administrative fines are provided.[57]

Regulations promulgated pursuant to the authority contained in the statute add substantial additional requirements and responsibilities. For example, assistant guides and wranglers must have specified first-aid training, and appropriate first-aid kits must be immediately available during all outfitted services. Equipment, tack and stock must be safe and properly maintained; facilities must be neat, orderly and sanitary; and the outfitter is prohibited from making any assurances of the success of the hunting or fishing activities.[58]

The properly registered guide or outfitter must have the legal right to provide the services on the land to be utilized.[59] This authorization generally takes the form of a lease between the landowner and outfitter. Any hunting lease made by a landowner should include among its provisions the requirement that those providing the services be properly registered and in full compliance with the applicable statutory and regulatory provisions. Local business licenses or other permits also may be required. If the hunt is to occur on public lands, permits are required to be obtained by the paid guide or outfitter from whichever governmental agency has authority over the land on which hunting is to occur.

Of course, all hunters are required to have the appropriate Colorado hunting licenses for the animal which is being taken. There will also be regulatory restrictions on other aspects of the hunt, such as the sex or quality of the animal which may be taken and particular types of weaponry being required or that the hunt be restricted to certain specific time periods during the year.

Regulatory requirements may affect ancillary aspects of the hunt. There are numerous traps for the unwary. An outfitter whose customer decides to unload his pack rod and fish in a convenient stream during a lull in the hunt also should be certain that the client has a valid fishing license.

Food service is another problem area. A memorandum issued by the Colorado State Health Department takes the position that meals cooked in the field by outfitters are exempt from regulation. On the other hand, where the outfitter is operating out of a fixed base of operations

and returning to it on a daily basis, meals prepared at that location constitute the operation of a food service establishment, requiring licensing by the local health department.[60] The Health Department has taken the position that one or more meals prepared at a base lodge on the date of arrival or departure for the hunters constitutes a marginal situation which would be subject to the discretion of each local health department as to whether food service establishment licensing would be required for those premises. However, one state official contacted by this author was of the opinion that such licensing would be required.

Although there is apparently no state licensing requirement for the accommodations provided in connection with outfitting services, local requirements may vary. Indeed, counsel should consult local government authorities relative to other aspects of the services provided in addition to food service; for example, business licenses and payment of sales taxes.

Other Regulated Activities

A number of other recreational activities are regulated through operational regulations or limitations or through the imposition of registration requirements. River outfitters providing river-running transportation or guide services are licensed and regulated.[61] Evidence of a minimum of $300,000 liability insurance must be submitted and the safety standards met. Age requirements and first-aid training qualifications are imposed. Equipment requirements are specified by regulation. Criminal penalties are provided for violations.

Safety and sanitation standards are specified for natural and artificial swimming areas.[62] Plans for construction or modification are subject to review by the state health department. Local government approval may also be required. Inspection is permitted and injunctive relief for operational violations is available to state and local health officers.[63]

The operation of certain recreational equipment also is regulated. Snowmobiles must be registered, and restrictions are placed on the age of operators and the manner of snowmobile operations.[64] Careless, reckless and alcohol-influenced operation is prohibited, as is hunting from a snowmobile or carrying loaded or uncased firearms.[65] Operation of boats is regulated in a similar manner.[66] Careless use of water skis, surfboards, innertubes and similar devices, or their use while under the influence of alcohol, is also prohibited.[67]

Lender Concerns

While the lender in a recreational business loan is faced with the many normal issues present in any business loan situation, recreational activities may present unique problems. *Morgan County Feeders, Inc. v. McCormick*[68] concerned a contest over the right to proceeds of the sale of certain cattle owned by a debtor between a lender holding a perfected security interest in inventory and the purchaser under an oral contract with the debtor to buy the cattle. The crux of the matter concerned classification of the cattle under the Colorado Uniform Commercial Code.[69] The parties agreed that the cattle constituted goods. Goods are classified into four major mutually exclusive types, including consumer goods, equipment, farm products and inventory.[70] In affirming the ruling of the trial court, the Court of Appeals agreed that the cattle were equipment subject to the lender's perfected security interest, rather than inventory, which would have been free from the lender's lien.

The basis for this holding was that the debtor had acquired the livestock not principally for immediate or ultimate sale or lease, but primarily for use in recreational cattle drives in the debtor's recreational business.[71] While the Court of Appeals refers to the circumstances of this case as unusual and unique, it appears that this area of the law will demand heightened vigilance and creative solutions from all involved practitioners.

CONCLUSION

The economic, political and environmental stakes associated with the recreational use of agricultural lands clearly will continue to grow in the future, intensifying the conflicts among the many involved interest groups and magnifying both the risks and rewards associated with this type of land use. Practitioners must assess and address a variety of issues in numerous areas of the law to adequately serve their landowner and recreational services provider clients.

NOTES

1. CRS §§ 18-9-502 through 504.5; *Burt v. Beautiful Savior Lutheran Church of Broomfield*, 809 P.2d 1064 (Colo.App. 1990).

2. 597 P.2d 1025 (Colo. 1979).

3. *See* CRS § 41-1-107.

4. The court cites the language of the public recreational access statute discussed below as legislative recognition of the right of the landowner to close public access to nonnavigable streams overlying his lands.

5. *Bijou Irr. Dist. v. Empire Club*, 804 P.2d 175 (Colo. 1984)(neither irrigation district with statutory easement for water storage in reservoir nor owner of underlying and adjoining lands had right to use reservoir surface for recreational purposes); *Bergen Ditch & Res. Co. v. Barnes*, 683 P.2d 365 (Colo.App. 1984)(owner of land underlying portion of reservoir over which was granted easement for reservoir not stated to be exclusive had right to use that portion of surface for recreation in common with easement holder).

6. Other governmental incentives may include direct or indirect monetary inducements such as favorable extensions of credit or tax credits for conservation easements.

7. CRS § 33-41-101 *et seq.*

8. *Goulding v. Ashley Cent. Irr. Co.*, 793 P.2d 897 (Utah 1990); *see generally, Lewis*, "Recreational Use Statutes: Ambiguous Laws Yield Conflicting Results," 27 *Trials* 68 (Dec. 1991).

9. CRS § 33-41-104(1)(d); *Smith v. Cutty's, Inc.*, 742 P.2d 347 (Colo.App. 1987).

10. This doctrine is discussed in a number of Colorado cases. *E.g., Garel v. Jewish Community Center of Denver*, 428 P.2d 714 (Colo. 1967).

11. CRS § 13-21-115.

12. *Gallegos v. Phipps*, 779 P.2d 856 (Colo. 1989); *Klauz v. Dillon Companies, Inc.*, 779 P.2d 863 (Colo. 1989).

13. CRS § 13-21-115(3).

14. CRS § 13-21-115(3)(c)(II).

15. Salmon, "1990 Update on Colorado Tort Reform Legislation," 19 *The Colorado Lawyer* 1529 (Aug. 1990).

16. CRS § 13-21-115(2) (not modified by 1990 amendments).

17. 706 F.Supp. 1442 (D.Colo. 1988).

18. *Id.* at 1446.

19. CRS § 13-21-119.

20. CRS § 13-21-119(2)(f).

21. Compare this duty to warn standard to the reasonable care standard described in CRS § 13-21-119 and consider the effect of the apparent differences where the landowner provides equine services.

22. CRS § 13-21-119(4)(b).

23. CRS § 13-21-119(5) and (6).

24. CRS § 33-44-101 *et seq.*

25. CRS §§ 13-44-107 and 108.

26. CRS § 13-44-104. *See generally,* Chalat and Kroll, "The Development of the Standard of Care in Colorado Ski Cases," 15 *The Colorado Lawyer* 373 (March 1986).

27. CRS §§ 33-44-103(10) and 112. Note that skier/skier collisions are specifically excluded as inherent risks to which assumption of risk applies.

28. *See Geringer, supra*, note 17.

29. 623 P.2d 370 (Colo. 1981).

30. *Id.* at 376.
31. *See generally, Jones, supra*, note 29. *See also Rosen v. LTV Recreational Development, Inc.*, 569 P.2d 1117 (10th Cir. 1978)(an adhesion contract is one drafted unilaterally by a business enterprise and forced on an unwilling and often unknowing public for a necessary service that cannot be obtained elsewhere on a take-it-or-leave-it basis).
32. *See Rosen, supra*, note 31 at 1122.
33. *Anderson v. Eby*, 998 F.2d 858 (10th Cir. 1993).
34. *Day v. Snowmass Stables, Inc.*, 810 F.Supp. 289 (D.Colo. 1993).
35. 784 P.2d 781 (Colo. 1989).
36. The court interpreted the broad language used as intending to cover risks obvious to experienced participants. *Heil Valley Ranch, supra*, note 35 at 785.
37. *See Jones, supra*, note 29.
38. CRS § 13-22-101.
39. *See Jones, supra*, note 29.
40. *See Ebey, supra*, note 33 (summary judgment denied snowmobile trip organizer despite signed release where language of special use permit was unclear concerning organizer liability).
41. *See* Keatinge, DeBruyn *et al.*, "Choice of Entity in Colorado," 23 *The Colorado Lawyer* 293 (Feb. 1994).
42. 26 U.S.C. §§ 6109 and 3403.
43. CRS § 8-40-101 *et seq.*; CRS § 8-70-101 *et seq.*
44. 26 U.S.C. § 6321.
45. CRS § 29-22-604(7); CRS § 39-26-117.
46. *See* Brenner, "The Employer's Fruitless Search for Independent Contractor Status," 21 *The Colorado Lawyer* 459 (March 1992).
47. *See, e.g., Allen Co., Inc. v. Industrial Commission*, 762 P.2d 677 (Colo. 1988).
48. 29 U.S.C. 201 *et seq.*
49. 42 U.S.C. 12101 *et seq.*
50. Creative governmental regulation can encourage recreational activities to the benefit of both agricultural landowners and members of the public. *See, e.g.*, "Guidelines for Ranching for Wildlife—State of Colorado," adopted by the Colorado Wildlife Commission, Jan. 14, 1993.
51. CRS § 12-55.5-101 *et seq.* Note that registration and regulation are not accompanied by limitation of liability.
52. CRS § 12-55.5-102(5).
53. CRS § 12-55.5-105.
54. CRS § 12-55.5-102(5.5).
55. CRS § 12-55.5-109.
56. CRS § 12-55.5-110.
57. CRS §§ 12-55.5-105 and 107.
58. CRS § 12-55.5-104; *see also* "Rules and Regulations of the Office of Outfitters Registrations" issued by Outfitters & Guides Registration, Colo. Dept. of Regulatory Agencies.
59. CRS § 33-6-116.
60. Colorado Department of Health Food Service Letter 90-2, April 18, 1990.
61. CRS § 33-32-101 *et seq.*
62. CRS § 25-5-801 *et seq.*
63. CRS § 25-5-807.
64. CRS § 33-14-101 *et seq.*
65. CRS §§ 13-14-116 and 117.
66. CRS § 33-13-101 *et seq.*
67. CRS § 33-13-110.
68. 836 P.2d 1051 (Colo. App. 1992).
69. *See* CRS § 4-9-101 *et seq.*
70. CRS § 4-9-109.
71. *Morgan County Feeders, Inc., supra*, note 68 at 1054.