

FEE EXCEPTION TO STATE RECREATIONAL USE LAWS ON FEDERAL SITES

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Congress has provided limited authority for federal agencies to charge minimal entrance or admission fees to federal recreation sites, including national parks and forests (16 U.S.C. 460L-6a et seq.). In addition, federal law allows permit fees for special recreation uses, i.e., group activities, recreation events, motorized recreation vehicles, and other specialized recreation uses. In setting permit fees, among other factors, federal agencies are to consider the direct and indirect cost to the Government. One such indirect cost associated with recreational use fees on federal sites may be the loss of limited landowner immunity under state recreational use statutes.

Under the Federal Tort Claims Act (FTCA), the federal government is held liable like a private individual under the law of the jurisdiction where the injury occurred. Consequently, in those jurisdictions where private landowners enjoy recreational use immunity, the federal government is provided similar protection under the terms of the FTCA. As a result, federal courts have uniformly held state recreational use statutes to be available to the United States as a defense to negligence liability. (Federal courts have exclusive jurisdiction over causes of action brought against the United States.)

In general, state recreational use statutes lower the applicable legal standard of care for landowners from ordinary negligence to willful or wanton misconduct. Despite minor jurisdictional variations, almost every jurisdiction has a state recreational use statute. The vast majority of these statutes are based in whole or part on a 1965 model state statute. The stated purpose of the model state and its progeny is to encourage owners of land to make land and water areas available for public recreation purposes by limiting liability to persons entering the premises for recreation purposes. Specifically, these statutes provide that an owner or occupier of land who opens up the land for public recreation use free of charge owes no legal duty to guard, warn, or make the premises reasonably safe for such recreational use.

This statutory immunity, however, does not apply where the owner or occupier of the premises charges a fee to use the premises. Generally, the fee exception applies if money was paid by the recreational user for the use of that portion of the premises where the injury occurred.

Some state recreational use statutes provide an exception to statutory immunity where the landowner receives a "consideration," rather than a fee for the recreational use of the premises. Within this context, "consideration" refers to any economic benefit conferred on the landowner through the recreational use of the premises.

LAW REVIEW, FEBRUARY 1998

In those jurisdictions with a “consideration” exception, statutory immunity does not apply where the landowner receives economic benefit from recreational users of the premises, e.g., concession services. Accordingly, statutes which contain a broader “consideration” exception provide less landowner immunity than those jurisdictions where the term "fee" is used. To address this issue, the Virginia recreational use statute was amended in 1989 to remove the phrase “Consideration or anything of value” and substitute “Fee for the use of the premises.” As illustrated by the federal cases described herein, this seemingly innocuous change in the language of a state recreational use statute significantly broadens the scope and availability of immunity to private, as well as federal landowners in such jurisdictions.

LANDOWNER DERIVES ECONOMIC BENEFIT?

In the case of *Twohig v. United States*, 711 F.Supp. 560 (D.Mont. 1989), a cross country skier was killed in an avalanche in a federal ski area. Plaintiff argued that limited landowner immunity under the state recreational use statute was inapplicable since the federal government had received “compensation” for recreational use of the premises. Specifically, a vehicle permit had been purchased for the vehicle which had transported the decedent to the ski area. The forest service received revenues from the purchase of these permits and maintained the ski area with the proceeds.

According to the court, the specific language of the state recreational use statute did not limit compensation to fees paid directly to the landowner for entrance to the premises. On the contrary, the court found that the “compensation” exception to this particular state recreational use applied in this instance because the defendant landowner derived economic benefit from the vehicle permit program:

Recreational use acts similar to Idaho's have been the focus of much litigation, where often the issue is whether compensation or consideration was paid for the use of the land. Frequently, the result depends upon the precise language of the statute. In states with "*quid pro quo*" language, defining "charge" as "the admission price or fee asked in return for invitation or permission to enter or go upon the land," courts require that the plaintiff actually have paid such a specific admission fee in order to find liability on the part of the defendant.

Like Idaho, many states do not define the consideration aspect so narrowly, and hence the courts have not given these statutes such a narrow construction... The policy underlying the adoption of a consideration exception to the... recreational use statute is to retain tort liability in actions involving recreational use of land where the use of the land for recreational purposes is granted not gratuitously but in return for an economic benefit. Where a landowner derives an economic benefit from allowing others to use his land for recreational purposes, the landowner is in a position to post warnings, supervise

activities, and otherwise seek to prevent injuries...

The result is not changed by the fact that the decedent himself did not purchase the permit. Courts have considered the "consideration" issue in interpreting similar statutes have held that the consideration need not come from the ultimate user but it must be paid by someone so as to create access to the premises.

The court, therefore, denied the federal government's motion to dismiss plaintiff's claim based upon the state recreational use statute.

"CONSIDERATION" EXCEPTION

In reaching its conclusion, the federal district court in *Twohig* adopted the reasoning of the federal circuit court in the case of *Ducey v. United States*, 713 F.2d 504(9th Cir. 1983). In this particular instance, plaintiffs brought wrongful death claims against the United States after their spouses died in a flash flood at a Nevada national recreation area administered by the National Park Service (NPS). Plaintiffs alleged the failure to guard or warn against this hazard had caused the deaths of their spouses. The United States argued that it was immune from liability under the Nevada recreational use statute. This state law provided that a landowner who opens his land for recreational use owes no duty to the user to keep the premises safe or warn of hazards. Such landowner immunity would not apply, however, where "consideration" was provided for permission to use the premises.

In this particular instance, NPS provided a ranger station, boat launching ramp, and comfort station at the site. NPS did not charge entrance fees or user fees for these facilities at the NRA. The NPS concessionaire, however, maintained and operated revenue facilities at the area including: a care-store, boat slips, automobile fueling and boat service facilities, rental cabins and trailer spaces. Under a contract with NPS, the concessionaire was required to pay the United States 1.75% of the gross receipts from these facilities. In addition to purchases at the concessionaire's store, plaintiffs' spouses had paid rental fees to the concessionaire for boat slips and trailer space.

The United States had argued the consideration exception under the Nevada recreational use statute was inapplicable because no fees were received "in return for permission to participate in recreational activities." In the opinion of the United States, the consideration exception was applicable "only where a fee is specifically charged for permission to enter."

The appeals court rejected this argument. In the opinion of the federal circuit court, the fees paid to a National Park Service concessionaire for certain services constituted "consideration" within the meaning of the statute. Consideration within this context referred to any economic benefit conferred upon the landowner.

LAW REVIEW, FEBRUARY 1998

[T]he language of the consideration exception itself suggests a broad reading of [this] section... The exception is worded not in narrow terms of "fee" or "charge," but rather in the far more encompassing terms, "for a consideration."

"Consideration" is a term of art, a word with a well-understood meaning in the law, embracing any "right, interest, profit or benefit." Used in a statute, it should be accorded that meaning...The statutory exception, then is itself literally applicable to situations well beyond those involving a strict charging of a "fee" for "permission" to recreate.

Under the facts of this case, the appeals court, therefore, concluded landowner immunity pursuant to the Nevada recreational use statute was not available to the United States. The appeals court, however, limited the application of the consideration exception to the facilities operated by concessionaire, not the entire national recreation area.

In addressing the fee issue, the *Ducey* court cited *Thompson v. United States*, 592 F.2d 1104 (9th Cir. 1979) as controlling precedent. In this case, plaintiff was injured while participating in a motorcycle race conducted by a racing association on federal land administered by the Bureau of Land Management (BLM). BLM was required by regulation to charge the racing association a \$10 application service fee and a minimum rental charge of \$10. The association, in turn, charged plaintiff Thompson an entry fee of \$6. At the time of the injury, the state recreational use statute in California provided that landowner immunity for recreational injuries would not apply "where permission to enter for the above purposes was granted for a consideration." In the opinion of the court, the minimal rental fee constituted "consideration" paid to the government for permission to use the premises for the motorcycle race.

With a rental charge having been made for the use of the land, it is clear that permission to enter the government land was "granted for a consideration", and therefore California Civil Code § 846 [the state recreational use statute] does not apply so as to limit the liability of the landowner.

“FEE” EXCEPTION OR RENTAL FEE?

In contrast to *Ducey* and *Thompson*, the state recreational use statute in the case of *Jones v. United States*, 693 F.2d 1299 (9th Cir. 1982) provided an exception if the landowner received a "fee" (rather than a "consideration") for recreational use of the premises. In this case, plaintiff, age 15, crashed into a tree while "snow sliding" in a "Snow Play Area" in Olympic National Park.

LAW REVIEW, FEBRUARY 1998

As in *Ducey*, plaintiff argued that the state recreational use statute did not apply because the federal government had received a "fee" for use of the national park. In this particular instance, plaintiff had paid a national park service concessionaire one dollar to rent an inner tube to go snow sliding. Similar to the concessionaire in *Ducey*, this concessionaire paid the government a fixed rental and a percentage of its gross receipts. Under the circumstances of this case, the federal circuit court held that "the fee was charged for the use of the inner tube and was not a fee charged for the use of the land."

[T]he fee was not charged to members of the public for entry on to the land or for use of the land. Lisa paid the dollar fee to rent the tube. She entered the Park without paying a fee. She could have used the Hurricane Ridge or any other area of the Park without making any payment if she had brought her own tube.

As a result, the federal circuit court determined that the United States was immune from negligence liability under the Washington Recreational Land Use Act because "no fee was charged" for recreational use of the land. While the rental fee may have constituted "consideration" under the Nevada recreational use statute in *Ducey*, or the California statute in *Thompson*, the dollar fee in *Jones* did not constitute a "fee for the use of the land" under the expressed language of the Washington recreational use statute.

NO CHARGE FOR RECREATIONAL USE

Similarly, in the case of *Cox v. United States*, 827 F.Supp. 378 (N.D. W.Va. 1992), the federal court found "the injured plaintiff was not charged by the United States to go on the land in question or to swim in the lake." In this particular instance, plaintiff, age 14, fell from a rope swing located in a U.S. Army Corps of Engineers lake project. There was no charge for use of the lake or the land surrounding the lake for swimming, picnicking, or other recreational purposes. The lake project offered boat rentals and snack foods through a small marina and snack shop operated by a concessionaire. The concessionaire paid a flat rental fee to the federal government to operate the business.

In pertinent part, the applicable state recreational use statute (West Virginia) expressly provided that "liability limitations do not pertain to a landowner who charges the person or persons who enter or go on the land." According to the court, the "charge" exception in the state recreational use statute was limited to situations where the injured plaintiff "was being charged for his recreational activities in which he was engaged":

[I]t is the conclusion of this Court that in order for a plaintiff to circumvent the liability limitation of [the state recreational use statute] W.VA.Code § 19-25-2 by way of a W.VA.Code § 19-25-4(b) "charge", the plaintiff himself or herself must actually be charged for the use of the facilities at which the injury occurred.

Applying this principle to the facts of the case, the federal district court found that “Cox and her friends were charged no fee for any of their recreational activities on the day of the injury.” In so doing, the court noted that “the United States had no connection with the operation of the concession, other than to exact a flat rental fee from the concession operator.” In the opinion of the court, this minimal rental fee did not constitute a “charge” for the use of the land.

FINANCIAL GAIN?

In the case of *Miller v. United States*, (9th Cir. 1994), plaintiff was injured while participating in the 1991 MS 150 Bike Tour sponsored by the National Multiple Sclerosis (MS) Society. In order to gain access to the dam, the MS Society obtained a special event permit from the U.S. Army Corps of Engineers. This special event permit was granted without charge on the express condition that the MS Society not solicit contributions or charge entrance and/or admission fees on government property.

Plaintiff was injured when his bicycle allegedly struck a “gap” in a roadway across the spillway of a dam owned by the U.S. Army Corps of Engineers. The federal district court granted summary judgment in favor of the federal government based upon the state recreational use statute.

On appeal, plaintiff argued that “the opportunity to cross the dam was contingent upon the payment of a fee to the MS Society.” Specifically, Miller contended that “the \$25 fee charged by the MS Society exposes the Corps to liability because the Corps was “aware of the fund raising nature of the event” and because it approved the fee charged by the MS Society.” Accordingly, Miller maintained that “the purpose of the \$25 fee is irrelevant as long as payment is a condition precedent to access across the dam.” The federal circuit court rejected this argument.

In the opinion of the court, “the fee charged by the MS Society was administrative in nature rather than a charge to cross Bonneville Dam.” Quoting *Ducey*, the court noted that the relevant inquiry is not whether money passes from the recreational user to the landowner, but “whether economic benefit inures to the landowner.”

The consideration exception to recreational use statutes is intended to serve more broadly as a proxy for differentiating the entrepreneur-landowner whose land is open for business reasons from the landowner whom the statute encourages to open his land on a gratuitous basis on the promise of immunity.

Applying this principles to the facts of the case, the court found that “the Corps did not allow access for financial gain but rather for recreational purposes.”

LAW REVIEW, FEBRUARY 1998

[The fee] could not be a charge to cross the dam because the Corps conditioned its grant of a special permit on the MS Society's agreement to levy no such charges against the participants. Regardless of whether the \$25 dollars paid by the participants to the MS Society constituted a fee, it is undisputed that this alleged economic benefit in no way accrued to the Corps, which issued the special permit free of charge. The purpose for which land is held open is determined by the landowner.

The federal appeals court, therefore, affirmed the judgment in favor of the United States which had found that “the MS Society administrative fee did not preclude operation of Washington's recreational use statute.”