December 27, 2021

POLICY BRIEF

From: Natural Resource Users Law and Policy Center
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Subject: Allocation of liability for third-party injuries on State Trust Lands

Issue:
Who should be liable from a policy and legal perspective for personal injuries to third parties using off-highway vehicles (OHVs)[1] on state trust lands (STL) that are also under a grazing lease? The State, ranchers, or OHV operators?

Background:
Arizona has 9.2 million acres of STL managed by the Arizona State Land Department (ASLD). Nearly 84% of these lands are leased for grazing and agriculture. Additionally, the land is used for hunting and recreational use of off-highway vehicles. These lands are managed to maximize revenue for statutorily-named beneficiaries. In FY 2021, ASLD collected $433.9 million in total revenue, including $344.3 million from land sales and $8.5 million in royalties. Additionally, the Department generated $55.9 million from leases (ranching and agriculture), and $24.7 million in fees (recreational).[2]

With respect to grazing, producers sign ten-year leases with ASLD. One example of this relationship is a ranch in southern Arizona that has ten different state leases covering about 300,000 acres. There is an interstate, state highway, or county road that runs through or next to the state-leased land on the ranch. The public has easy access to the leased land by parking on the side of any of the non-interstate roads and walking onto the land.

Additionally, ranchers make improvements of different kinds to the leased land to support the grazing activity such as roads, water troughs, canals, or fences. State law (A.R.S. 37-321, 37-322.03) and Article 10 of ASLD grazing leases recognize these improvements as the private property of the lessee if the right to the property had been perfected in accordance with the law.

The public can utilize off-highway vehicles to hunt on state lands after first obtaining an Arizona license to do so. A.A.C. R12-5-533. The state hunting license authorizes OHV use of "any maintained or unmaintained way, road, highway, trail or path that has been utilized for motorized vehicular travel and clearly shows or has a history of established vehicle use." R-12-5-533(D)(3). Cross-country travel to pick up legally killed big-game animals is also authorized under this section. The general public may only use roads and highways maintained by a public agency. R-12-5-533(D)(1).

[1] While the issue of liability for injuries implicates other public uses of STL and state and federal environmental laws, this memorandum only considers the issue of allocation of liability for third-party injuries stemming from OHV use.

[2] Fiscal Year 2021 ASLD Annual Report submitted by Commissioned Atkins to Governor Ducey, September 1, 2021.

With respect to general OHV recreational activity on State lands, the public may drive the vehicles on existing roads and trails. But they may not drive "off an existing road, trail or route in a manner that causes damage to natural resources or improvements." A.R.S. 28-1174(A)(2). Driving over "unimproved roads, trails, routes or areas" is also barred unless the driving is allowed by rule or regulation. A.R.S. 28-1174(A)(4).

In short, although hunters get nominally preferential access, OHVs for hunting and general recreational purposes are generally authorized to be used on the same state lands that are subject to grazing leases. The issue presented here is who or which entity should be liable if an OHV driver is injured on STL: the state, the rancher, or the driver?

This is not an abstract question. OHV use is a dangerous activity. There are many injuries and fatalities in Arizona and the country every year. For example, as of November 30, 2021, there were 463 OHV fatalities reported in the country. There were 615 fatalities in 2020.[3]

A Canadian analysis of causes of OHV fatalities in that country highlights the importance of faulty judgment in the accidents: In at least 51% of OHV-related fatalities from 2013 to 2019, the driver had reportedly consumed alcohol or drugs. The driver was riding alone in 40% of cases. In at least 33% of the fatalities, the deceased had been riding on dangerous terrain. At least 33% of riders were not wearing a helmet during a fatal accident.[4]

More particularly, an Arizona resident died in 2020 while driving his OHV over a cattleguard on state-leased land and a suit was filed against the State.

State Allocation of Liability

The State responded to the suit by sending a letter to the lessee/rancher informing him that he was responsible for defending the lawsuit and indemnifying the State in accordance with Article 21 of the lease. Actual liability for OHV injuries on STL for grazing is found at A.R.S. 33-1551, which provides in pertinent part:

> "A public or private owner, easement holder, lessee or occupant of premises is not liable to a[n OHV user] except upon a showing that the owner, easement holder, lessee or occupant was guilty of willful, malicious or grossly negligent conduct which was a direct cause of the injury to the user."

This law facilitates recreation use of private and public lands by significantly immunizing the owner/lessor of the land from liability for injuries caused by negligence which occurred on the premises. Under the statute, both the State and the lessee/rancher potentially benefit from the immunity.

Ranchers also hold general liability insurance policies in the amount of $1 million as required under Article 23 of the lease. However, submitting a claim for defending a personal injury lawsuit could result in the company significantly increasing the cost of maintaining the policy, or cancelling it. These expenses may exceed the capacity to pay for small to medium ranching operations. Most

[3] Consumer Federation of America website, consumerfed.org/off-highway-vehicle-safety/.
[4] www150.statcan.gc.ca/n1/daily-quotidien/210607/dq210607d-eng.htm.

fundamentally, the state's complete waiver of its own liability and imposing litigation costs and indemnification on the lessee/ranchers raises important legal and equitable policy questions for the State.

State assignment of liability applies whether the lessee/rancher acted with "gross negligence" or just negligence, even though A.R.S. 33-1551 only imposes liability on the lessee for "gross negligence". In other words, the rancher will be obligated to invoke the coverage of his insurance policy regardless of whether he is culpable of any degree of wrongdoing in a particular situation, and regardless of the conflict with State law which immunizes "negligent" actions. [5]

The State might try to argue the law authorizes this complete waiver of liability. Under the A.A.C., leases "shall contain such provisions and supplemental conditions as may be prescribed by the Commissioner [of the ASDL] in accordance with the provisions of the law. . . ." R12-5-701. However, in the absence of an affirmative grant of statutory authority for this allocation of liability, such a significant departure from existing statutory language and the policy represented by this language may very well not be in accord with A.R.S. 33-1551. While it may be possible to address the liability issue through administrative rulemaking, the State has had a moratorium on most administrative rulemaking for almost ten years. Lessee/ranchers deserve a more equitable allocation of liability than is currently available.

There are other powerful equitable reasons for reallocating liability. As indicated above, hunters using OHV and OHV recreationists are only able to use state lands because the State has authorized their use. Under Arizona law they are considered licensees in that the State has granted them permission to use STL for a non-commercial purpose. Given the inherently dangerous nature of OHV use in open country, the State can set the terms of that use and consider options for having OHV users assume greater responsibility for the legal consequences of their activity.

The current State policy of imposing a blanket requirement on the lessee/rancher to defend such suits and possibly indemnify the State for injury is highly unfair, particularly when the lessee/rancher may have had no connection to the injury. It is unjust to make the lessee/rancher responsible at a minimum for the State's legal costs. If the State were to named as a party in such a suit, it could join the lessee/rancher in the action if the injury was related to any activity of theirs. OHV users could be required to carry insurance for their own negligence. In any case, State legal authority to impose Article 21 in agriculture and ranching leases needs to be reexamined. Each party should have responsibility for the costs and consequences of litigation in proportion to their connection to an injury at issue.

There are further problems with the state's waiver of liability. As discussed above, improvements on STL are the property of the lessee/rancher under the circumstances specified under the law. The state cannot issue a blanket waiver of liability that encompasses property that it does not own within the boundaries of a state lease. A very pertinent example of this is the lawsuit noted above. The death occurred while the individual was crossing a cattleguard in his OHV. This cattleguard is an improvement that may have very well been the property of the lessee/rancher, not State property.

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[5] In Colorado, lessees of state trust land are immune from liability for injuries to persons resulting from the negligence of the lessee and the State's allowed access to the land for recreational or wildlife purposes. CO Rev Stat § 36-1-118.3 (2016).

It is unknown at this time whether the state maintains records of lessees/ranchers who have perfected their property interests on STL. In the absence of this information, it is fair to ask whether the Article 21 blanket waiver of liability may improperly cover situations beyond the scope of state authority. For all these reasons, the state should bring the allocation in line with the legitimate property and financial interests of the stakeholders using the land as well as the financial interest of the State in realizing income from its management of the lands.

Adjusting the allocation of liability for OHV injuries on STL would have minimal effect on the state's generation of revenue because of the relatively small amount of revenue generated by OHV applications for the STL. It seems unlikely that preventing the state from transferring defense of lawsuits to the ranchers will have much impact on the number of licenses or permits requested for OHVs.

Rancher Options

Short of the State making an equitable allocation of exposure to liability for OHV activity on STL, what can a rancher do to minimize his own exposure to suit for injuries? As indicated above, rancher improvements on STL may be their property assuming the ownership interest was perfected in accordance with the law. Also as noted, the OHV fatality being litigated occurred while crossing a cattle guard on STL, a rancher improvement that may not be a perfected property right. Similar situations could be avoided in the future if the rancher simply closed a gate to a road that crossed the cattle guard. There would then be minimal chance of future injury by driving over the guard if the gate leading to the guard is closed.

The effect of such a closure would be to exclude outsiders from access to the ranchers' private property (the cattle guard) if the right to the improvements had been perfected in accordance with State law. The U.S. Supreme Court recently observed that the right to exclude is "one of the most treasured" rights of property ownership. Cedar Point Nursery v.Hassid, 594 U.S. ___, 141 S.Ct. 2063 (June 23, 2021), quoting, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982).

The government regulation at issue in Cedar Point Nursery granted labor organizations a right to take access to an agricultural employer's property in order to solicit support for unionization. The Court found this regulation to constitute a *per se* physical taking of the property. 141 S.Ct. at 2072. Unlike a mere trespass, the regulation in Cedar Point granted a formal entitlement to physically invade the growers' land.

Arizona may wish to claim that hunters and recreational drivers have a similar entitlement to "invade" STL improvements as a matter of state property law. As indicated above, OHVs are generally authorized to use roads on STL. Additionally, under A.C.C. R12-4-110(B), individuals are barred from denying legally available access to or use of any existing road upon state lands by persons lawfully taking or retrieving wildlife or conducing any activities that are within the scope and take place while lawfully hunting or fishing. Whether or not a lessee/rancher would be able to effectively assert a "taking" claim would depend on the facts of a particular case.

Putting aside issues of property rights, facts can mitigate this seemingly harsh effect of the law. Blocking access to a particular road does not mean that access is blocked to the STL. As indicated in the example cited above, a particular rancher has 300,000 of STL under lease. These lands are criss-crossed by more minor county and state roads. The public has multiple points of access to the STL, even if it would prefer that access to run through the rancher's gate.

In 2019, the state had drafted a protocol for management of motor vehicle access on state trust land which contemplated looking for viable alternative access to a proposed closure. To our knowledge, the policy reflected in this protocol was never finalized. Alternative access to a single road is only possible if there are multiple points of access to the STL.

Conclusion

For the many reasons discussed above, ranchers/lessees understandably want to minimize public use of their improvements given the State's position on liability. The State needs to update its position on access to STL and liability for third-party injuries. An equitable allocation of liability would make each stakeholder liable for injuries they cause themselves or are caused by their improvements under the standard of A.R.S. 33-1551. The State would be responsible for all other injuries occurring on STL under the same standard. Not only is there no equitable or practical reason for Arizona to impose costs and awards on lessee/on ranchers for OHV injuries with which they have no connection but doing so may very well violate state and civil rights law.