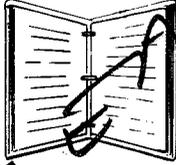


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N Legal Responsibilities of the Forest Service
(From an Engineering Standpoint) Associated
With Special Uses Involving Winter Sports
Charles F. Dwyer

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FOREST SERVICE • U.S. DEPARTMENT OF AGRICULTURE

ENGINEERING FIELD NOTES

This publication is a monthly newsletter published to exchange Engineering information and ideas among Forest Service personnel.

The publication is not intended to be exclusive for engineers. However, because of the type of material in the publication, all engineers and engineering technicians should read each monthly issue.

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It is intended that the material in the Field Notes be primarily written and used by Forest Service Field Engineers; however, material from other publications may be used.

Field Note material should always be informative and cannot contain mandatory instructions or policy. The length of an article may vary from several sentences to several typewritten pages. Material need not be typed (neatly written or printed is acceptable) nor edited before being submitted to the Washington Office. The Washington Office will edit and prepare the camera copy to accommodate our format and allowable space.

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FIELD NOTES

LEGAL RESPONSIBILITIES OF THE FOREST SERVICE (FROM AN ENGINEERING STANDPOINT) ASSOCIATED WITH SPECIAL USES INVOLVING WINTER SPORTS

By Charles F. Dwyer
Cableways Staff Engineer, Washington Office
(Located in Denver, Colo.)

The legal considerations and principles of law presented here are the work of others, particularly Mr. Dean A. Gardner, Attorney in Charge, Office of the General Counsel, Ogden, Utah. This paper directs applicable portions of prior presentations to the more limited subject under discussion.

SUBJECT DEFINITION

Legal Responsibilities. We are discussing here the procedures and rules of law that apply to the duties or responsibilities of the Forest Service and its employees, both individually and collectively, in their administration and other involvement with special uses, particularly winter sports.

In law a legal responsibility or duty is created by agreeing to do something for the benefit of someone else. This responsibility or duty is incurred by a written agreement, as were our permits, standards, and safety requirements, or it may be incurred by a particular course of conduct, even though never written, if the user is aware of the responsibility or duty and relies on it. It also may be imposed by law to cover certain relationships, such as the duty and degree of care expected of the operator of a common carrier.

Liability is that condition of being responsible for a loss, an expense, an injury, an evil or a burden. Liability is incurred when there is a neglect of a legal duty or responsibility.

From an Engineering Standpoint. The term "from an engineering standpoint" connotes that the subject under discussion involves rights and responsibilities of the Forest Service employees relating to activities with structures, plants, equipment, conveyances and related items involving activities of engineering personnel or the application of engineering principles in their design, construction, application, inspection, operation and maintenance.

Special Uses Involving Winter Sports. The term “special uses involving winter sports” is defined here to be those engineered items used in our ski areas and winter recreation sites. The principal items are:

1. **Mechanical transport facilities** — aerial passenger tramways, aerial and surface ski lifts, tows, personal rapid transit (PRT) systems, and similar conveyances.
2. **Engineered Services** — water supply and sewage treatment plants, snow making and snow removal equipment, power supply and distribution, and heating and cooling systems.
3. **Others** — roads, bridges, dams and parking facilities associated with the development of winter sports areas; avalanche retainage and control structures.

To clarify this paper it seems expedient to use one aspect of the engineering effort associated with special uses involving winter sports and assume the others are closely related. Since mechanical transport facilities typify winter sport special uses, that subject will be used when a specific activity is described.

RESPONSIBILITIES AND THE ESTABLISHING FACTORS

As an owner of land, the Government is entitled to most of the rights and privileges of a private landowner. And, since 1946 when the Federal Torts Claims Act was enacted, the Government has assumed the legal obligations and responsibilities of a private landowner except in cases of sovereign immunity in discretionary functions, and in the exceptions listed in 28 USC 2680, such as libel and slander. The following explains some of the situations where the Forest Service has legal responsibilities to be met or for which it may be held accountable.

Standard of Care. We have established by direction and past action a standard of care or behavior for the various activities of the Forest Service. Among these are our activities associated with special uses involving winter sports. Failure to meet these standards may be considered negligence. Negligent conduct is conduct which falls below the standard of behavior established by law for the protection of others against unreasonable harm and risk. We incur a liability when an injury has been caused by an act of negligence and the injured party has not contributed thereto (e.g. through contributory negligence or by assumption of the risk).

There may be reasons not based on any principle of negligence that would prevent a negligent person from becoming liable. The statute of limitations may prevent an action. The Federal Tort Claims Act requires that a person file a damage claim with the agency responsible for the alleged negligence prior to commencing a lawsuit in court.

There are various degrees of misconduct involved in negligence actions, such as reckless, wanton and willful negligence. There is also a type of conduct that produces liability without negligence; this is called absolute liability or liability without fault. Recently the U. S. Supreme Court decided, in the case of *Laird vs. Nelms*, that claims based on the principle of absolute liability may not be prosecuted successfully against the United States because the Federal Tort Claims Act only waived sovereign immunity for injury to persons or property caused by negligent or wrongful acts or omissions.

The directive system of the Forest Service, including manuals, handbooks, and regional supplements is a reference to determine the standard of care for an engineer. There is no clear-cut law setting forth the Forest Service responsibility in special uses involving winter sports; it is derived from the various interpretations of the Organic and Multiple Use Acts. To the extent that these interpretations vary, the nature and level of performance should vary. Each engineer should know the rules of his Region.

Type of Use. Outdoor recreation is recognized as a land use which is to be fostered and promoted. It involves both native and improved lands. Special uses involving winter sports are of increasing importance among developed and natural outlets for outdoor recreation. Since large numbers of people are directly concerned, public safety is paramount in recreational areas developed by the Forest Service or constructed under special use permit.

Supervision and Control. The Forest Service by direction and past action has established a policy of maintaining supervision and control over the entire operations of its permittees.

Engineering Responsibilities. The Forest Service has placed a heavy burden upon engineers — both those employed by the Service and those in private practice retained by our permittees. It has directed that the design of structures and mechanical equipment be certified for adequacy by a qualified engineer and has placed similar requirements for construction and operation. The Forest Service expects the same standard of care from its engineers that is demanded of a professional person in any other field. The forest engineer is assigned work in a wide variety of activities and he is accountable for his actions in any particular field or specialty.

The Federal Tort Claims Act has imposed the negative and defensive duty of an ordinary landowner on the employees of the Government to conduct their operations free from negligence or suffer the potential of suit for damages resulting therefrom. A negligent Government employee who injures or damages someone is vulnerable to personal liability for his acts unless he is acting as a public officer performing a discretionary function.

Federal-State Jurisdiction. Virtually all instances of special use involving winter sports fall in some measure under the joint jurisdiction of the Federal and a State Government.

It is well established that Federal agencies are not subject to regulation by the States. When both Federal and State laws are dealing with the same subject, the Federal law is supreme. However, the Federal Tort Claims Act sets the standard of care at that required by State law regarding liability. Where a State has relevant laws and regulations pertaining to those activities associated with our special uses, the level of Federal care must be at least equal to those laws. Primarily, the protection of life and property and the maintenance of law and order within the territorial jurisdiction of any State are responsibilities of State and local authorities. Local laws and ordinances often establish duties which the Federal Government, as a landowner, owes to the public.

The Nature of Use. In analyzing the legal rights of persons and the legal responsibilities of landowners, the purpose for the presence of an individual on the land is most important. Traditionally, the purpose of a visit is classified as that of a: (1) trespasser (2) licensee, and (3) invitee. Persons using Forest Service land under special use for winter sports are, almost without exception, invitees on the land and the Forest Service as landowner is legally responsible to provide reasonable care for their safety. When their presence further involves the use of aerial passenger tramways or related facilities sometimes classified as common carriers, we are responsible for providing the highest degree of care.

Usually, a landowner has no duty or responsibility for persons on leased premises. But the Forest Service as landowner in the instance of a special use involving winter sports, has the responsibility for the public or invitee on the land. The following condition arises from these circumstances:

- Our special use permits create a unique legal relationship between the Government and its permittees.
- In the instance of a concession involving an extra-hazardous operation for public use, the landowner retains a non-delegable duty and responsibility to those invited on the land.

Warning of Danger. The Forest Service has the responsibility, as a possessor of land, to warn its licensee of danger and hidden dangers or to remove the dangerous obstacles. This responsibility is of particular importance in the instance of winter sport special use which involves avalanche hazards, lift installation and operation, and like considerations.

Recent Legislation. Recent environmental legislation has introduced new legal responsibilities for the Forest Service in its administration of public lands. This legislation directly involves our engineering efforts associated with special uses involving winter sports. The Clean Air Act of 1963, as amended, requires that the Forest Service comply with State requirements respecting control and abatement of air pollution (Section 118, Clean Air Amendments of 1970). We are required to comply with the applicable Federal, State, Interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. Similar responsibilities are

incurred under provisions of the Water Pollution Control Act of 1970 intended to enhance the quality and value of our water resources and to exercise the prevention, control and abatement of water pollution. Related responsibilities were developed under provisions of the National Environmental Policy Act of 1969. The Act encourages a productive and enjoyable harmony between man and his environment; promotes efforts to prevent or eliminate damage to the environment, and to stimulate the health and welfare of man. These recently enacted laws must be studied along with provisions of the Organic Act and the Multiple Use Act to establish Forest Service responsibilities peculiar to a specific special use and, most particularly, those involving winter sports. Our employees incurred additional legal responsibilities for cooperation with others in implementing the provisions of the Occupational Safety and Health Act of 1970. These responsibilities could not be more specifically directed to any Forest Service activity than that of engineers and others involved in special use activities associated with winter sports.

***MINIMIZING LIABILITY IN THE PERFORMANCE OF ENGINEERING DUTIES
AND IN MEETING LEGAL RESPONSIBILITIES
ASSOCIATED WITH SPECIAL USES
INVOLVING WINTER SPORTS***

The preceding material attempts to interpret the legal responsibilities, from an engineering standpoint, associated with special uses involving winter sports. The purpose for the interpretation is to facilitate a standard compliance with the many Acts establishing these responsibilities. An awareness of the consequences of failing to correctly perform the duties assigned and a suggestion for procedures which might tend to decrease the liability inherent in the activities associated with meeting responsibilities in the field is necessary.

Performance of Engineering Assignments. Each engineering assignment should be performed as that of a professional person accepting such assignment. It should be performed by following, to the fullest extent possible, the instructions and procedures established by the Forest Service for the performance of the assignment. It should be performed in a manner to best accomplish or fulfill the duties and responsibilities which the Forest Service has to the public.

Many of our engineering related legal responsibilities arise from our established work rules. Most of these rules are clearly established and readily available in our manuals, handbooks, codes and standards. Others exist, but are less available, in State and Federal laws. Still others exist in the intangible form of parallels established by pleading procedures and court actions. We are obligated in the performance of our work to be knowledgeable of, and to adhere strictly to, the established rules available to us. We are equally compelled to recognize a potential responsibility arising from a less definitive rule or precedent and we should seek legal assistance in clarifying this responsibility.

We must be cognizant of those aspects of our work which demand the highest degree of care and carry prime responsibilities. Design approval and inspection of passenger transport facilities or the handling and storage of explosives are examples of activities in our winter sport sites which demand the highest standard of reasonable care.

Elimination of Negligence. An engineering service must be performed without negligence. Negligence can be based on either active or passive conduct — a failure to act or an action. Under the Federal Tort Claims Act negligence is a negligent performance of a Federal Government employee engaged in an activity on the operational level that subjects the Government to liability. (The exception is the Government's being exempt from liability for the negligence of its employees when they are performing a discretionary function. A discretionary function in turn being one in which an engineer exercises a power or right to act officially in the policy making field.)

Avoiding Grievances. Assignments to our administrative and engineering personnel in exercising control over special uses involving winter sports are many and varied. These assignments involve contact with individuals, firms, and others exercising their rights while we perform our tasks and fulfill our responsibilities. Often this interplay does not have the benefit of implementation by definition or other inclusion in either the standard or special clauses of the special use permit. However, the assignments are generally accomplished amiably, and problems or differences that arise are resolved without incident. Occasionally an individual is injured, damaged or aggrieved. Most often his claim is based upon:

- Torts committed by our employees (negligence).
- Agreements and contracts which we have failed to perform or fulfill.
- Violations against the public interest.

In performing their duties, Forest Service personnel are expected to cooperate and to maintain the highest level of amicable relations with permittees. They must be mindful, however, of the possible consequences of their actions in activities beyond those assigned. They cannot function, for example, in the capacity of a consultant as this would infringe on the rights of private consultants in competition and violate the principles of private enterprise.

Program Enforcement. The principal means of controlling safety practices and thus assuring fulfillment of Forest Service legal responsibilities for areas under a winter sports special use permit are for the Forest Service to (1) enforce controls which are written into the permit and (2) inspect the permittee's actions. Permit revocation is the main method of enforcing compliance. When police action is required, it will be taken largely by and in accord with local and State law.

The Forest Service Manual is explicit in requiring certain inspections of facilities in a winter sports area. The rule of law is that when inspections are required they must be performed. Failure to make required inspections is evidence of negligence.

When an engineer has negligently failed to perform an inspection, or performed an inspection negligently, his personal liability judgment will be based on his performing a discretionary function or duty unless his act was outside of his authority or was performed wilfully, corruptly or with malice.

CONCLUSION

The legal responsibilities of the Forest Service associated with special uses are vast and are not easily established or clearly defined. While the field is narrowed when approached from an engineering standpoint and limited to special uses involving winter sports, it remains broad and subject to variation from many factors. Location, State or local laws and ordinances, nature of the particular use and other factors affect our responsibilities.

Without an exhaustive study of the legal ramifications of laws governing our activities, it seems reasonable to accept those responsibilities in our subject fields which are established by current Forest Service Manual or related direction and by the precedence of our activities in the past.

The Forest Service engineer is also expected to comply with the standard of reasonable prudence determined by legislative enactment, administrative regulations, prior court decisions, or a court jury decision by:

1. Exercising his skill and knowledge in a manner normally possessed by a professional engineer in good standing.
2. Conducting himself as a reasonable, prudent engineer.

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