

SECTION IV:

Legislation, Liability, and Insurance

Liability is an extremely important area of concern in virtually all RWT projects. In the context of RWT, liability refers to the obligation of a trail manager or railroad to pay or otherwise compensate a person who is harmed through some fault of the trail manager or railroad. The filing of a personal injury or tort claim against the presumed responsible party typically begins the formal process of enforcing that responsibility. However, because there are relatively few RWTs, the courts rarely have analyzed the relative responsibilities of railroads and trail managers toward an injured trail user. Additionally, cases often are settled before they reach a court trial, leaving no legal precedents from which to draw. Thus, there are no clear legal guidelines as to how the courts will view RWT liability issues. Also, some liability questions relating to RWTs are resolved by State law, which varies from State to State, and the applicability of which depends on the specific facts of each case. Nevertheless, some conclusions, with certain references to minority positions, can be made as to how liability issues arising in the context of RWTs are likely to be resolved. This section¹ discusses the principles governing liability in the context of RWTs, including both statutory protections and common law standards.² This section does not address the fairly extensive body of law dealing with disputes related to ownership and acquisition of land near railroad tracks, nor does it address individual liability for violation of the Federal railroad safety laws (e.g., by interfering with the normal functioning of a grade crossing warning device) (see 49 CFR 234.209).

Overview of Recommendations

1. Trail development agencies interested in pursuing an RWT should conduct initial legal research as early into the process as possible. Important information includes the following: ownership, easement, and license agreements in the railroad corridor; legal protections available at the State level (e.g., indemnification, applicable State statutes, and strength of local trespassing ordinances); local or State property rights ordinances and information; and trail management organization insurance protection.

¹ Karl Morell, Ball Janik, LLP, who has experience representing railroads, and Andrea Ferster, Esq., who represents trail and land conservation proponents and serves as counsel to the Rails-to-Trails Conservancy, analyzed rails-with-trails issues for this section.

² “Common law” standards are those developed by judges through case-by-case litigation and set forth in published judicial decisions that are considered precedent in factually similar contexts.



2. Trail development agencies interested in pursuing an RWT should acquire the affected railroad property for public ownership whenever feasible.
3. Trail managers should adhere to design recommendations identified in this report and in design standards and guidelines (e.g., the *AASHTO Guide for the Development of Bicycle Facilities* and *Manual on Uniform Traffic Control Devices*) (see *Appendix A* for explanation of these documents). In particular, signs should be provided at entrances to warn users to stay off the railroad tracks and that trespassing is a crime.
4. Both trail managers and railroad companies should review State statutes to ensure the validity of indemnification agreements, and the scope or applicability of fencing laws (see *Appendix B, Matrix of Statutes and Laws*). To the extent there is any ambiguity as to the applicability of the statute, trail proponents should lead an effort to strengthen their State's laws to increase railroad liability protection, as States such as Arizona have done.
5. Trail management organizations should absolve railroad companies of liability responsibility for injuries related to trail activities on related property, to the extent practicable and reasonable.
6. Trail management organizations should purchase or provide comprehensive liability insurance in an amount sufficient to cover foreseeable liability costs and pay the costs for railroad company insurance for defense of claims.

Overview of Concerns

Railroads have a number of liability concerns about the intentional location of a trail near or on an active railroad corridor:

- Trail users may not be considered trespassers if a railroad intentionally invites and permits trail use within a portion of their right-of-way, and that the railroad would therefore owe a higher duty of care to trail users than they would otherwise owe to persons trespassing on their corridor.
- Incidents of trespassing and injuries to trespassers will occur with greater frequency due to the proximity of a trail.
- Trail users may be injured by railroad activities, such as an object falling or protruding from a train, hazardous materials, or by a derailment.
- Injured trail users might sue railroad companies even if the injury is unrelated to railroad operations, causing railroads to incur legal fees, court costs, and potential judgments for damages. Railroads have in the past borne the burden of litigation for many incidents on their property, even for crashes with at-fault automobile drivers who have blatantly ignored obvious warning systems.

The level of railroad company concern is dependent in part on the class of railroad and the type of operations they perform. Privately-owned Class I railroads (see *Appendix A: Definitions*) tend to be reluctant to grant non-rail usage of their rights-of-way because loss of right-of-way width at any given location could reduce the ability of the railroad to add main track and sidings necessary to provide increased capacity and serve customers. In addition, their perceived deep financial pockets make them a frequent target of lawsuits. Transit and tourist train operators may support RWT projects because they often are



quasi-governmental entities, with a mission of attracting people to their service. Finally, locally-based short-line operators have less reason to be concerned about future track expansion, and may be inclined toward the potential financial rewards of permitting an RWT project along their rights-of-way. For all RWTs proposed for railroad property, the railroad must weigh the safety and liability risks against potential financial and other gains. Thus, minimization of these risks is a key ingredient to a feasible RWT.

Definitions and Laws

As the owners and occupiers of their rights-of-way, railroads have legal duties and responsibilities to persons both on and off their premises. Railroads have a duty to exercise reasonable care on their premises to avoid an unreasonable risk of harm to others who may be off the railroad premises. For example, railroads may be found liable if the use of their right-of-way creates an unreasonable risk to persons on an adjacent “public highway” such as through derailments or objects falling off the trains.

In most States, the duty of care owed to persons who enter another’s property depends on whether the injured person is considered a trespasser, a licensee, or an invitee. Trespassers are due the least duty of care, while invitees are due the most³ (see **Figure 4.1**).

As a general rule, railroads owe no special duty of care to persons trespassing on railway premises, other than to refrain from intentional, harmful, or reckless acts. There are, however, four exceptions to this general rule:

- **FORESEEABLE TRESPASS:** Whenever the railroad is aware, or should be aware, that trespassers are frequently entering on a small area of the right-of-way, most courts will find that the railroad has a duty to exercise reasonable care to look out for the trespassers. Where a known and apparent pathway is located along a railroad track, most courts will hold a railroad liable for not anticipating the presence of persons near the tracks and exercising ordinary care to prevent injury to them, such as by keeping a reasonable look-out.⁴
- **DANGEROUS CONDUCT:** A few States have placed an obligation on railroads to use reasonable care whenever a trespasser can be anticipated and the railroad’s activity in that area involves a high degree of danger.
- **DISCOVERED TRESPASS:** Under the “last clear chance” doctrine, a majority of States impose a duty on railroads to use reasonable care whenever the engineer of a train becomes aware of a trespasser on the right-of-way. In these jurisdictions, the railroad has a duty to use ordinary care to avoid injury to a discovered trespasser.⁵ Most jurisdictions have abandoned this doctrine.

³ A number of States have adopted a rule that a landowner’s liability depends on the foreseeability of the injury rather than the status of the injured person as invitee, licensee or trespasser. See Gulbis, Vitatus, “Modern Status of Rules Conditioning Landowners’ Liability Upon Status of Injured Party as Invitee, Licensee, or Trespasser,” 22 ALR 4th 294, § 3a.

⁴ In some States, a railroad’s tolerance of frequent trespassers has led courts to elevate the status of an injured intruder to licensee.

⁵ A railroad has a duty to take affirmative action to aid or protect a trespasser where the trespasser’s peril is caused by active force under control of the railroad, such as where a member of a train crew observes a trespasser in danger on a trestle.

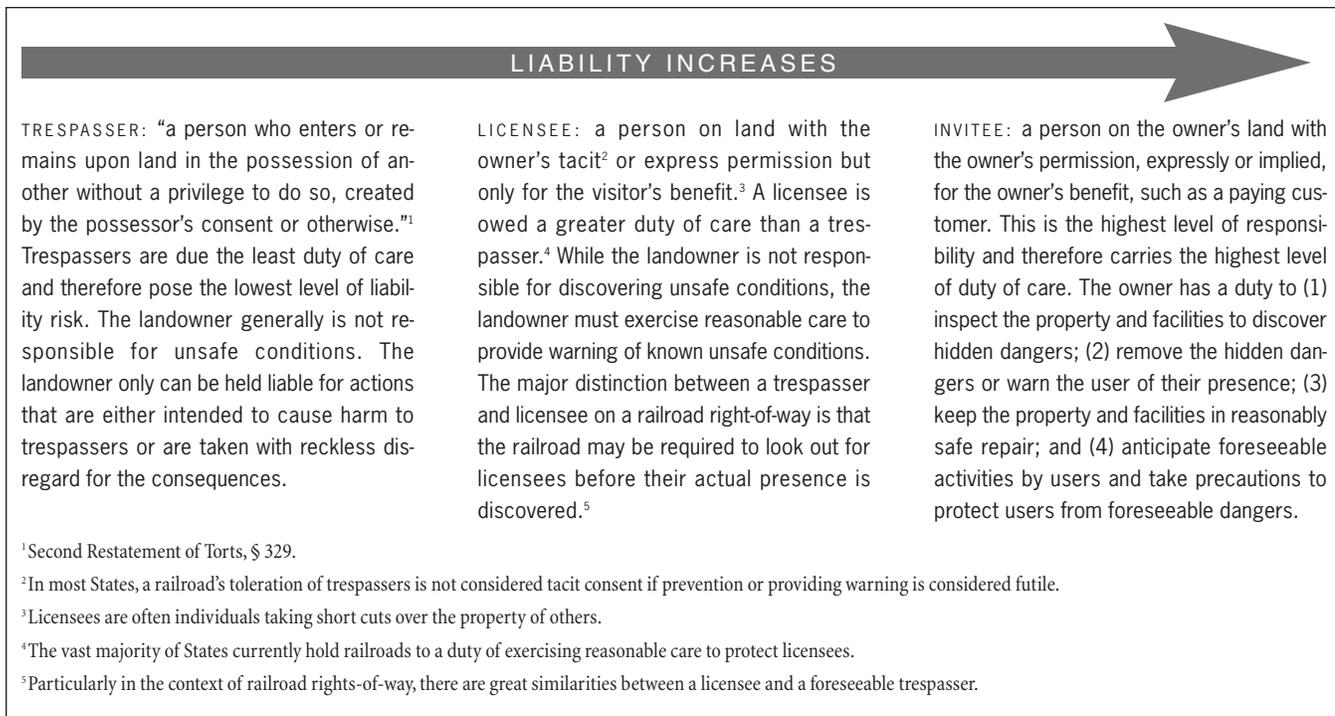


FIGURE 4.1 Liability definitions

- **YOUNG CHILDREN:** Under the “attractive nuisance” doctrine, a vast majority of States hold railroads to a duty of exercising reasonable care for young children of whose presence the railroad has actual or constructive knowledge.

In deciding whether to allow an RWT on its right-of-way or determining the indemnity and insurance coverage appropriate for a given RWT, a railroad needs to weigh and balance three factors: (1) the extent, if any, to which the RWT will elevate the railroad’s duty of care to any particular individual; (2) the potential increased scope of the railroad’s liability; and (3) the increased or decreased likelihood of an injury occurring as a result of the RWT.⁶ Each RWT project will necessarily have unique characteristics affecting the extent, if any, to which a railroad’s liability is potentially enlarged. Some general observations, however, can be made.

By selling or leasing a longitudinal strip of its right-of-way for an RWT, the railroad will be permitting the creation of a public way immediately adjacent to its tracks. For rights-of-way not already adjacent to public highways and for those having low incidents of trespass, an RWT would likely enhance the railroad’s duty of care under common law principles and increase the scope of its potential liability for those on the trail. In such situations, an individual traversing the longitudinal strip would generally be deemed a trespasser pre-RWT, to whom no duty of care is owed, but would be considered either a licensee or invitee on the trail post-RWT. As a licensee or invitee on the adjacent trail, the railroad would owe the trail user a duty to exercise reasonable care. The scope of liability is likely to

⁶ The elevation of the duty of care owed to an individual can occur, for example, by having a current trespasser, to whom the railroad generally owes no duty of care, elevated to a licensee, to whom the railroad owes a duty of reasonable care. “Scope of liability” means the potential number of individuals that may be injured.



increase by virtue of the RWT increasing the public usage of the longitudinal strip. A well-designed RWT, however, may mitigate these potential increases in off-property liability by decreasing the likelihood of injury.⁷

In the above situation, a trail user, who departs from the trail and unlawfully enters the railroad's remaining right-of-way, would most likely be deemed a trespasser in most States as long as the incidents of trespass remain infrequent. Thus, the railroad's duty of care likely would not be enhanced for individuals leaving the trail and intruding on the right-of-way. In several cases involving track-side paths, such as a surfaced walkway, courts have found the person injured while walking near the tracks but off the pathway to be contributorily negligent thereby absolving the railroad from responsibility for the injury. Some States use comparative negligence instead of contributory negligence, thereby allowing juries to assess some portion of responsibility to the railroad. By inhibiting trail users from accessing the right-of-way, a well-designed and maintained RWT also could prevent an increase in the scope of the railroad's on-property liability and the likelihood of injury.

For rights-of-way already adjacent to public highways and those with a high incidence of trespass, an RWT likely would not enhance a railroad's duty of care to individuals on the trail. Railroads already have a duty to exercise reasonable care to those lawfully occupying adjacent property. Most States impose that same duty on railroads whenever trespassers frequently enter discrete areas of their rights-of-way. Most likely, the scope of the off-property liability will increase, since in only rare, if any, instances should the frequency of current trespass exceed the projected use of the trail. A well-designed and maintained RWT, however, could offset the increased scope of the off-property liability by channeling current trespassers away from the right-of-way, decreasing the likelihood of injury.

In this latter situation, a well-designed and maintained trail could reduce a railroad's current liability exposure by reducing the number of individuals to whom the railroad owes a duty of care, thereby limiting the scope of the potential liability and decreasing the likelihood of injury. If appropriate barriers are erected on the right-of-way between the trail and the tracks so as to reduce the incidents of trespass onto the tracks, the courts may view the remaining isolated trespassers as no longer foreseeable. Thus, at least in those States that recognize the "foreseeable trespass" exception, the railroad may no longer owe a duty of care to adult trespassers as a result of the RWT. By reducing the number of trespassers, the barriers also should serve to limit the scope of the potential on-property liability and the likelihood of injury on the right-of-way.

The railroad's concern is that an RWT will bring a large and increasing number of individuals near the tracks. This, it claims, will inevitably increase the number of people exposed to injury arising from railroad operations, the incidents of trespass, and the number of locations where a railroad will have to anticipate trespassers. For an RWT without barriers, or with improperly constructed or maintained barriers, these concerns are valid. Without appropriate separation between track and trail, the incidence of trespass is likely to increase and most States likely would hold the railroad to a standard of reasonable care in anticipating a trail user crossing or longitudinally traversing the tracks along the entire

⁷ In assessing a railroad's potential off-property liability, a number of factors need to be considered, including the width of the right-of-way, trail setback distance, condition of track, speed of the trains, and nature of the barrier between the track and trail.



RWT corridor. In these circumstances, both the railroad’s duty of care and scope of liability are likely to increase. A trail with well-constructed and properly maintained barriers, however, could serve to reduce, rather than increase, the frequency of trespass onto the tracks. As indicated in *Section II*, a well-designed and maintained RWT can reduce trespassing by “channelizing” pedestrian crossings to safe locations or by providing separation or security. In these circumstances, the incidents of trespass and the railroad’s corresponding duty of care may decrease or stay the same.

Available Legal Protections

Potentially offsetting some or all of a railroad’s increased liability attributable to an RWT are the State-enacted recreational use statutes (RUS) and rails-to-trails statutes. Landowners receive special protection from liability by the RUS. All 50 States have an RUS, which provides protection to landowners who allow the public to use their land for recreational purposes. Under an RUS, an injured person must prove the landowner deliberately intended to harm him or her. States created these statutes to encourage landowners to make their land available for public recreation by limiting their liability provided they do not charge a fee.

Table 4.1 shows the available legal protections that reduce risk for adjacent property owners on RWT projects, with sample language from relevant legal documents. A compilation of the laws of the 50 States and the District of Columbia relating to the liability issues associated with RWTs is shown in *Appendix B*, providing a listing of the RUSs and governmental tort claims acts for each State. In addition, *Appendix B* also lists recreational trail and rails-to-trails statutes for the States that have enacted them. These are laws specifically enacted to clarify, and in some cases, limit, adjacent landowner liability. More than half of the States have enacted a recreational trail statute that directly addresses the issue of liability. This can range from protecting adjacent landowners from liability to making the RUS for the State specifically applicable to a rails-to-trails program.

Trail managers face similar common law duties of care for on- and off-property injuries and damages. Recreational use statutes and governmental tort claims acts, however, can significantly limit a manager’s liability. These statutes and acts vary greatly from State to State.

Recreational use statutes typically protect managing agencies from being held liable for injury to trail users, unless trail managers intentionally or recklessly injure or create danger to users. Virtually all RUSs essentially treat trail users as trespassers on the trail property for purposes of determining the duty owed by the manager of the property to the trail users. Most RUSs, however, are not applicable where a fee is charged for entry or use of the trail.⁸ In most States, the RUS grants immunity for the recreational use of any land, whether developed or undeveloped, rural or urban, so long as the plaintiff used it for recreation.⁹

⁸ Many RUSs, however, specifically provide that any consideration received by the private owner for leasing land to a State or State agency shall not be deemed a charge for purposes of rendering inapplicable the RUS. See Del. Code Ann. tit. 7, § 5906 (2000); Ga. Code Ann. § 51-3-25 (2000).

⁹ The possible exceptions are Alaska and Oklahoma. Alaska’s RUS is only applicable to certain specified undeveloped lands. While the definition of “unimproved land” includes a “trail,” it is unclear whether developed trails would fall under that Statute. See Alaska Stat. § 09.65.200 (Michie, 2000). Oklahoma’s RUS appears to be limited to land “primarily used for farming and ranching activities.” See OK Stat. tit. 7 § 10(2000).



TABLE 4.1 Liability exposure reduction options

Measure	Sample Language
Recreational Use Statute	<p>“An owner of land who either directly or indirectly invites or permits, without charge, any person to use such property for recreational purposes does not thereby:</p> <p>(a) Extend any assurance that the premises are safe for any purpose;</p> <p>(b) Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed;</p> <p>(c) Assume responsibility or incur liability for any injury to person or property or for the death of any person caused by an act or omission of such person.”¹</p>
Trespassing legislation	<p>Whoever, without lawful authority or the railroad carrier’s consent, knowingly enters or remains upon railroad property, by an act including, but not limited to—</p> <p>“(1) standing, sitting, resting, walking, jogging, running, driving, or operating a recreational or non-recreational vehicle including, but not limited to, a bicycle, motorcycle, snowmobile, car, or truck; or</p> <p>“(2) engaging in recreational activity, including, but not limited to, bicycling, hiking, fishing, camping, cross-country skiing, or hunting—except for the purpose of crossing such property at a public highway or other authorized crossing, shall be guilty of a misdemeanor. Upon conviction of such act, the person shall be fined not more than \$100, imprisoned for not more than 30 days, or both.”²</p>
Trail or rail-with-trail State statute	<p>“No adjoining property owner is liable to any actions of any type resulting from, or caused by, trail users trespassing on adjoining property, and no adjoining property owner is liable for any actions of any type started on, or taking place within, the boundaries of the trail arising out of the activities of other parties.”³</p>
Easement/lease agreements that limit liability	<p>“The County hereby releases and will protect, defend, indemnify and save harmless Conrail from and against all claims, liabilities, demands, actions at law and equity (including without limitation claims and actions under the Federal Employer’s Liability Act), judgments, settlements, losses, damages, and expenses of every character whatsoever (hereinafter collectively referred to as “claims”) for injury to or death of any person or persons whomsoever which result from the unauthorized use of motorized vehicles, such as but not limited to, motorcycles, minibikes, and snowmobiles within the easement area, and for damage to or loss or destruction of property of any kind by whomsoever owned, caused by, resulting from or arising out of the exercise of this Easement granted hereby, except to the extent that such claims arise from Conrail’s negligence.”⁴</p> <p>“Permittee shall assume complete liability for any and all claims resulting from the construction, reconstruction, maintenance, operation, use, and existence of the Facility located on, under, or over the Site. . . . however, (the) Permittee shall not be required by this permit to indemnify any person against liability for damages arising out of bodily injury or property damage caused by or resulting from the sole negligence of such person or such person’s agents or employees.”⁵</p>
Easement/lease agreements with full indemnification	<p>“... the City assumes all risk of loss or destruction or damage to the Walkway, to property brought thereon by the City or by any other person with the knowledge or consent of the City, and to all other property, including property of the Railroad, and all risk of injury or death of all persons whomsoever, including employees of the Railroad, where such loss, damage destruction, injury or death would not have occurred but for the presence of the walkway on the Bridge.”⁶</p>
Insurance	<p>See Appendix C, p. 149</p>
Transfer of ownership	<p>The language limiting liability or granting indemnification on behalf of the railroad should be the same or similar to easement agreements.</p>

¹ Colorado Recreational Use Statute: Colo.Rev.Stat. Ann. § 33-41-101 et seq. (West 2000). Other examples available on-line at http://www.imba.com/resources/trail_issues/liability_chart.html.

² Federal Railroad Administration, Office of Safety, Model State Legislation for Railroad Trespass and Railroad Vandalism, available at <http://www.fra.dot.gov/content3.asp?P=297>.

³ California Recreational Trails Act, Cal. Pub. Res. Code § 5075.4 (Deering 2000), available at <http://www.leginfo.ca.gov/calaw.html>.

⁴ Schuylkill River Trail Indemnification agreement.

⁵ Coastal Bike Trail Permit between Municipality of Anchorage and the Alaska Railroad Corporation, August 1987: p.5.

⁶ Lease and Operating Agreement between City of Portland and the Union Pacific Railroad, January, 2000: p.9. Agreement provided in full in Appendix C.



Not all States' RUSs cover trail managers. The courts in California, Pennsylvania, and New York have held that the State RUSs do not cover public agencies, but instead are only applicable to private landowners.¹⁰ Under those circumstances, the public agencies would be liable to the extent specified by the State's tort claim statutes.

On the other hand, the Wisconsin RUS expressly covers the owner of the land, any governmental entity that leases the land, and any nonprofit organization that have a recreational agreement with the owner (Wis. Stat. Ann. § 895.52(1)(West 2000)).

Even if a public agency is not covered by a State RUS, its tort claims law may grant immunity. For example, California absolves governmental entities of liability for injuries caused by a condition of certain paved and unpaved trails ((Cal. Civ. Code § 831.4 (West 2000); Minn. Stat. Ann. § 3.736.3(h)(West 2000); S.D. Codified Laws § 20-9-12 et seq. (Michie 2000)). Pennsylvania has enacted a comprehensive rails-to-trails law that expressly extends the State RUS to "any person, public agency or corporation owning an interest in land utilized for recreational trail purposes" (32 Pa. Cons. Stat. tit. § 5621 (2000)). By contrast, Wyoming law specifically provides that the government is liable for damages resulting from negligent operation of maintenance of any "recreation area or public park" (Wyo. Stat. Ann. § 1-39-106 (Michie 2000)).

A trail along a right-of-way may be considered a linear park, the operation of which in some States is considered a "discretionary" or "proprietary" function and immune from liability.¹¹ For example, most States accord highway agencies with immunity from charges of defective highway design (called "design immunity") if the highway was designed in accordance with accepted engineering practices and standards (NCHRP, 1981).

The railroad's increased on- and off-property liability for RWT also may be limited, in whole or in part, pursuant to the various State RUSs.¹² Although there is little case law specifically interpreting the impact of the RUS on RWT, two Federal courts have given a very expansive interpretation to the scope of the recreational use and the reach of the immunity granted by the various RUSs. In both cases, the courts held that railroad rights-of-way are suitable for recreational use and that the railroads are immune from liability for negligence under the respective State RUS where the plaintiffs used the rights-of-way for recreational purposes even though no developed trail had been established on the rights-of-way.¹³ Virtually all RUSs provide that the owner of the property owes no duty of care to a recreational user as long as the use of the property and the property itself qualify under

¹⁰ See, e.g., *Delta Farms Reclamation Dist. No. 2028 v. Super. Ct. of San Joaquin County*, 190 Cal. Rptr.494 (1983); *Leonakis v. State*, 511 N.Y.S.2d 119 (1987); *Watterson v. Commonwealth* 18 Pa. D. & C.3d 276 (1980).

¹¹ See *Mayor and City Council of Baltimore v. Ahrens*, 179 A. 169, 171-73 (Md. 1935) (to hold governments liable for injuries in parks "would be against public policy, because it would retard the expansion and development of parking systems, in and around growing cities, and stifle a gratuitous governmental activity vitally necessary to the health, contentment, and happiness of their inhabitants").

¹² For example, Arizona's RUS is expressly extended to "railroad lands . . . which are available to a recreational or educational user, including, but not limited to, paved or unpaved multi-use trails . . ." Ariz. Rev. Stat. Ann. § 33-1551 (West 2000).

¹³ In *Lovell v. Chesapeake & Ohio R.R.*, 457 F.2d 1009 (6th Cir. 1972), a Boy Scout leader was killed when he tried to rescue a Scout from an oncoming train. The court found that the Boy Scouts had gone onto the railroad tracks for hiking, which was a recreational purpose. Consequently, the court held that the Michigan RUS "deprives his widow of a cause of action absent proof of gross negligence or wanton or willful misconduct on the part of the railroad." *Id.* at 1011. See also *Powell v. Union Pac. R.R. Co.*, 655 F.2d 1380 (9th Cir. 1981). The Washington State RUS was interpreted as potentially immunizing the railroad from liability where a teenager was killed when she used the right-of-way to access the beach, if, on retrial, the railroad was found to have allowed the use of the right-of-way for recreational purposes.



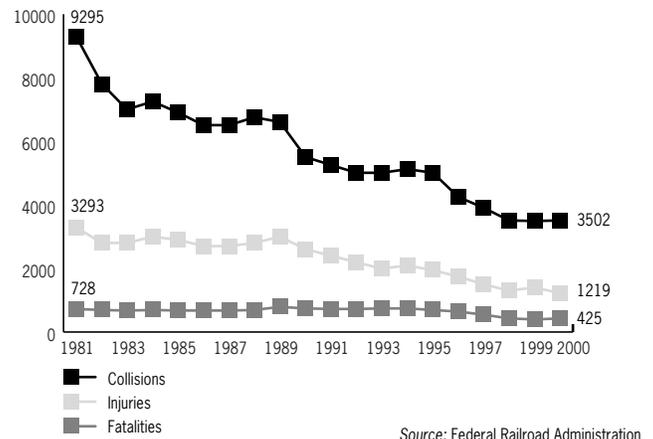
the RUS. The theory behind these statutes is that if landowners are protected from liability they would be more likely to open up their land for public recreational use and that, in turn, would reduce State expenditures to provide such areas. Consequently, the RUSs can be reasonably interpreted as overriding the common law duty railroads would otherwise owe to recreational users on their rights-of-way.¹⁴

Presumably as an added incentive to encourage private landowners to allow use of their property for recreational purposes, the California RUS allows the landowner to recover reasonable attorney's fees in defending against any unmeritorious claim for injury or damages on the property (Cal. Civ. Code § 846.1(a)(West 2000)). The Colorado RUS, in addition to limiting liability to willful and malicious conduct, limits the amount of damages owed by a private landowner for injury to a recreational user on his or her property as long as the owner does not share in any fees paid by the injured person (Colo. Rev. Stat. Ann. § 33-41-103(2)(West 2000)). Similarly, the Maine RUS permits courts to award legal costs, including reasonable attorneys' fees, to an owner or manager of a trail who is unsuccessfully sued for injury or damages (Me. Rev. Stat. Ann. tit. 14, §159-A(6)(West 2000)).

Apparently the most sweeping protection for landowners who enter into an agreement with a governmental entity for recreational use of their property is offered by Virginia. The Virginia RUS expressly mandates that any governmental entity entering into such an agreement must "hold [the owner] harmless from all liability and be responsible for providing, or paying the cost of, all reasonable legal services required by [the owner] as a result of a claim or suit attempting to impose liability" (see Va. Code Ann. § 29.1-509(E)(Michie 2000)). The Statute further provides that any attempt to waive this governmental indemnification is invalid. The Virginia Statute, thus, appears to provide total indemnification for a railroad entering into an agreement with a Virginia governmental entity for trail use along the railroad's right-of-way.

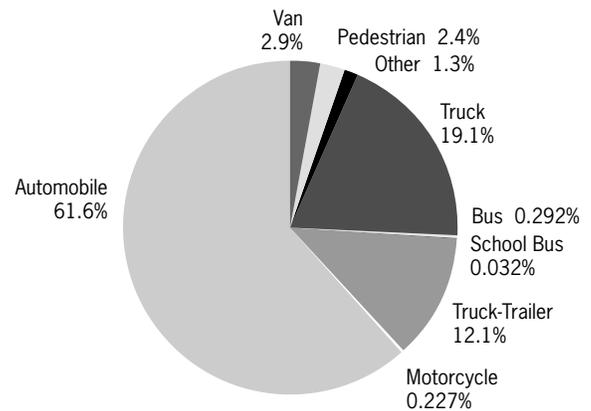
Crash Trends

Almost 3,500 highway-rail incidents occurred in 2000, a dramatic decrease from the 5,715 reported in 1990 (see **Figure 4.2**). In almost three-quarters of the cases, a train strikes a motorist. However, the motorist is almost always at fault, having ignored warning signs, bells, lights, even gates. Automobile, van, and truck crashes make up 83 percent of railroad



Source: Federal Railroad Administration

FIGURE 4.2 Highway-rail grade crossing collisions and casualties at public crossings, 1981-2000



Source: Federal Railroad Administration

FIGURE 4.3 Highway-rail incident breakdown, 2000

¹⁴ As previously discussed, under common law, railroads have a duty to exercise reasonable care to prevent harm to anyone lawfully occupying adjacent property and those tacitly or expressly permitted to enter the railroad's property. Under virtually all of the RUSs, however, railroads would only be liable to recreational users on the right-of-way for intentional or reckless conduct. Also, most RUSs define the recreational users in a manner that would include minors. See e.g., Mass. Gen. Laws Ann.Ch.21, § 17C(a)(West 2000). The Texas RUS, however, does not limit liability for "attractive nuisances" except for injured trespassers over the age of 16 on agricultural land. See Tex.Civ.Prac.+Rem.Code Ann. § 75.003(b)(West 2000).



collisions. Pedestrian crashes only account for about 2 percent (see **Figure 4.3**). These incidents reveal the dangers of trains interacting with people, whether in a car or on foot. Since 1975, the number of trespass fatalities has risen and fallen. Over the past seven years, the number of trespass fatalities has remained approximately 500 per year, a number that now exceeds deaths at highway-rail crossings. As a result, trespasser fatalities represent the greatest loss of life associated with railroad operations.

Researchers queried trail managers, railroad officials, and official railroad industry records for historical trends and information about at-grade RWT-track crossings. The available official documentation yielded no crash information. None of the trail managers or railroad officials reported any crashes along the RWTs studied for this report. The Reading and Northern Railroad official for the Lehigh River Gorge Trail, however, did report frequent close calls.

The Rails-to-Trails Conservancy's (RTC) 2000 report, *Design, Management, and Characteristics of 61 Trails along Active Rail Lines*, identified one crash that occurred at an at-grade road crossing on the Illinois Prairie Path. The bicyclist ignored the warning bells and flashing lights, rode around a lowered crossing gate, and collided with the train. Technically, this incident did not occur on the trail corridor but at an adjacent, pre-existing highway-rail crossing.

RTC found another incident involving a boy in Alaska, who used the Tony Knowles Coastal Trail to approach the tracks. The boy climbed under a damaged fence then attempted to hop onto a passing freight train, with tragic results. The City of Anchorage, which manages the trail and assumed liability, settled the case with the plaintiff for \$500,000. The railroad was held harmless from any liability for this accident by the terms of its indemnification agreement with the City. Subsequently, the Alaska Railroad Corporation took out a \$10 million per incident insurance policy with a \$100,000 deductible at a cost of \$15,000 per year.

Although these are the only known RWT incidents, and although no reported crashes appear to have occurred where RWTs cross active rail tracks at grade, it is important to recognize the potential dangers of human interaction with moving trains.

Many RWT agreements specify design features that are intended to reduce liability potential, such as fencing, landscaping, crossing design, and maintenance. None of the railroad officials interviewed reported an increase in liability costs since the adjacent trail was developed, nor had they had their indemnification agreements challenged in court.

Property Control

The type of property control dictates both the ease of the project and the liability burden. There are three types of property arrangements: purchase, easement, and license. Sample agreements are contained in *Appendix C*.



Acquisition

To accommodate the concerns of rail operators with respect to the location of a trail in an active right-of-way, a public agency might look to own the active rail corridor itself. This internalizes the liability and coordination efforts. Governments under civil law are treated differently from private landowners due to their unique status as sovereign entities. In some jurisdictions, immunity available to governmental agencies depends on the particular function performed, ranging from highway design and maintenance to employment. Many States have recently enacted statutes that limit the amounts or kinds of damages recoverable against governments (Isham, 1995).

Two examples of public ownership include the City of Seattle, Washington, which acquired a right-of-way for use by its Waterfront Streetcar and an RWT located next to the track. Portland, Oregon's regional government, Metro, purchased property under the Oregon Pacific Railroad tracks from a local utility so it could have control of the proposed Springwater Corridor Extension RWT. See *Section II: Case Studies*, for more information regarding these projects.

However, most examples of public acquisition of rail lines involve development of transit facilities or of new facilities providing access to intermodal hubs, such as the 16 km (10 mi) Alameda freight corridor in Los Angeles. The Dallas Area Rapid Transit agency has acquired title to short lines for eventual development as extensions of the existing Dallas light rail system. In California, acquisition of former Class I lines by Caltrain in the Bay Area, the purchase by North County Transit District (NCTD) and the Orange County Transportation Authority (OCTA) of the old Santa Fe mainline into San Diego, and the acquisition of surplus Southern Pacific and Santa Fe lines in the Los Angeles area by the Los Angeles County Metropolitan Transportation Authority (LAMTA) are other examples. These acquisitions have translated into hundreds of millions of dollars for railroads, while retaining use of the lines for their continued private enterprise.

On lightly-used branch lines, a railroad may prefer simply to sell the entire right-of-way rather than encumber it with easements or sub-parcels. Where a railroad corridor traverses suburban or urban areas with high property values, a prime consideration from the railroad's perspective is whether a trail constitutes the highest and best use for an interim or permanent use.

Class I railroads, however, consider their property to be a very important tangible resource. They commonly reserve corridor property for future potential capacity expansion and, for the most part, remain firm in their intent to retain full ownership and control of their infrastructure. Any public agency considering studying the feasibility of an RWT first must start with the assumption that railroads are profit-making enterprises with a strong fiduciary responsibility to their shareholders. Since large railroads are publicly-held corporations, their shareholder base includes millions of Americans with investments in mutual funds and retirement programs. While on occasion they may "donate" items to the public, for the most part they do not expect to part with their assets for free.

Railroad corridors are being sold to public transit agencies around the world for tens of millions of dollars, with the railroad still maintaining the ability to provide freight service. While a public agency may believe that their trail does not impact existing rail service,



The Steel Bridge Riverwalk in Portland, OR, is on property owned by the Union Pacific Railroad (UPRR) via a license agreement. Opened in May 2001, the shared use path is cantilevered off the south side of the bridge. Previously, the bridge was kept in the raised position until a train came across (about 60 per day at less than 32 km/h (20 mi/h)). This was to prevent trespassing and to reduce the maintenance cost of raising the structure for each watercraft.

The license agreement specifies that the UPRR is to incur no additional liability risk as a result of the trail. Thus, the City of Portland indemnifies the railroad against any and all incidents, including derailments. The City also is required to carry \$10 million private insurance at a cost of approximately \$40,000 annually, pay the railroad for the additional maintenance costs it has as a result of the trail, pay for safety improvements as needed, and provide a detailed management plan. The Riverwalk sees more than a thousand daily users.

Class I railroads see no incentive to giving an agency a free easement but do see the potential problems. While RWTs may provide benefits to a railroad, such benefits are unlikely to convince a railroad that it is beneficial to lose control of part of their right-of-way for public recreation. This is particularly true for heavily-used freight railroad routes, on which there are few existing RWTs today.

Public agencies considering RWTs should be prepared to identify financial incentives for a railroad to consider. This may be in the form of land transfers, tax breaks from donated land, cash payments, zoning bonuses on other railroad non-operating property, taking over maintenance of the right-of-way and structures, and measurably reducing the liability a railroad experiences. The agency should employ an experienced land appraiser and attorney. A public agency may submit an offer to a railroad and then negotiate a purchase price for an easement. Once settled, the easement becomes a permanent feature on the land title regardless if it is sold in the future.

Other key considerations for a railroad include future needs for additional tracks and sidings, which an RWT may preclude. On a lightly-used corridor that may be abandoned in the future, the benefits of a short-term sale may outweigh the costs of waiting for a long-term sale. Other questions may include: What is the likelihood of the entire corridor being railbanked and purchased for transit or a linear park? What is the likelihood of the corridor being developed, and could a local agency exert control on type of development? What is the likelihood of the corridor being sold to adjacent property owners? The real estate department will want to analyze these options to determine which is best from an economic standpoint for the railroad.

Easements and License Agreements

In most instances, fee-simple (i.e., full ownership) acquisition is not necessary for trail development, and, in many cases, is not really an option. Easements, which come in many forms, typically are acquired when the landowner is willing to forego use of the property and development rights for an extended period. The landowner retains title to the land while relinquishing most of the liability and the day-to-day management of the property. The trail manager gets a lower price than a fee-interest acquisition and sufficient control for trail purposes. The easement is attached to the property title, so the easement survives property transfer. **Figure 4.4** provides a listing of the preferred contents of an easement agreement from both the railroad and trail manager perspective.

A license is usually a fixed-term agreement that provides limited rights to the licensee for use of the property. Typically, these are employed in situations when the property cannot be sold (e.g., a publicly owned, active electrical utility corridor) or the owner wants to retain use of and everyday control over the property. The trail management authority avoids a large outlay of cash, yet obtains permission to build and operate a trail. But it will have little control over the property, and may be subject to some stringent requirements that complicate trail development and operation. **Figure 4.5** provides a listing of the preferred contents of a license agreement from both the railroad and trail manager perspective.



<p>From the trail manager's perspective, a model easement agreement should:</p> <hr/> <ol style="list-style-type: none"> 1. Guarantee exclusive use. 2. Be granted in perpetuity. 3. Include air rights if there is any possible need for a structure. 4. Broadly define purpose of the easement and identify all conceivable activities, uses, invitees, and vehicular types allowed to avoid any need to renegotiate with fee interest owner in future. 5. State that all structures and fixtures installed as part of trail are property of grantee. 6. Limit grantor indemnification to trail-related activities only. 	<p>From a railroad's perspective, a model easement agreement should:</p> <hr/> <ol style="list-style-type: none"> 1. Include a revocable clause, including removal, if the trail becomes a safety or liability problem. 2. Indemnify the railroads against trail-related trespasser activities. 3. Provide a specific definition of "negligence" in the indemnification exception section as it relates to the railroad's liability exposure, or potentially indemnify the railroad against all incidents including such events as derailments. 4. Place responsibility for ensuring adequate railroad access to the tracks, at any time, for any reason, and place responsibility for needed trail repairs or improvements in the hands of the public agency. 5. Reference a detailed trail management plan and feasibility study which includes design review, feasibility analysis, and maintenance and management procedures and responsibilities. 6. Retain approval rights for any improvement or use on the easement.
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FIGURE 4.4 Preferred easement agreement contents

<p>From the trail manager's perspective, a model license agreement should:</p> <hr/> <ol style="list-style-type: none"> 1. Provide an acceptable term length with an option to renew. 2. Identify all conceivable activities, uses, invitees, and vehicular types. 3. Allow for railroads to review and approve the plan within a time limit. 4. Provide clarity on maintenance responsibilities. 5. Narrow potential environmental liability for pre-existing conditions. 6. Limit grantor indemnification to trail-related activities only. 7. Specify limits on other uses of license property. 	<p>From a railroad's perspective, a model license agreement should:</p> <hr/> <ol style="list-style-type: none"> 1. Allow for temporary trail closures for railroad maintenance activities. 2. Include a revocable clause, including removal, if the trail becomes a safety or liability problem. 3. Indemnify the railroads against trail-related trespasser activities. 4. Provide a specific definition of "negligence" in the indemnification exception section as it relates to the railroad's liability exposure, or potentially indemnify the railroad against all incidents including such events as derailments. 5. Place responsibility for ensuring adequate railroad access to the tracks, at any time, for any reason, and place responsibility for needed trail repairs or improvements in the hands of the public agency. 6. Reference a detailed trail management plan and feasibility study which includes a design review, feasibility analysis, and maintenance and management procedures and responsibilities.
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FIGURE 4.5 Preferred license agreement contents

Design

Visible signage and good design are prudent liability protection strategies, as will be explained in *Section V: Design*. Trail users should be warned at the trailhead and at any other entrances to stay off the railroad tracks, particularly where there is no fencing or physical separation between the trail and the rail corridor. If the RWT is clearly designed to indicate that the railroad corridor is separate from the trail, trail users should be considered trespassers to which no special duty of care is owed.

¹⁵ See *Missouri, K. & T. RR Co. v. Wall*, 116 S.W. 1140 (Tex. 1909); *Chicago, & Q RR Co. v. Flint*, 22 Ill. App. 502 (1887).



Trespassing can lead to potentially deadly consequences. Lake State Railroad tracks. Gaylord, MI

The Canadian government sees the development of RWTs as a trespassing reduction strategy. “The proper design and effective use of space can lead to a reduction in the incidence of pedestrian conflicts with railway operations and improve overall safety and quality of life in the neighboring community.”

CONSTABLE WILLIAM LAW,
CANADIAN PACIFIC RAILWAY

Several court cases have held that the availability of a safer path or route, such as a surfaced walkway between two lines or railroad tracks was a factor in determining that a person injured walking near a railroad track was contributorily negligent, and absolved the railroad from responsibility.¹⁵ As the case studies in *Section II* summarize, a well-designed and maintained RWT can actually reduce trespassing by channelizing pedestrian crossings to safe locations or by providing separation or security. A well-designed and maintained RWT should have the effect of reducing both trespassing and the railroad’s risk of being held responsible for injuries sustained by trespassers.

Risk Reduction: Trespassing

For this study, researchers counted trespassers on the tracks adjacent to the case study trails for two hour periods during the time of day/week the trail manager, railroad official, or law enforcement agent suggested they would be most likely to observe trespassing activity. During these specified times, researchers observed few trespassers on tracks near existing trails, and typically only on tracks not separated by fencing. This is, of course, an initial study. Extensive observations for longer periods of time and over various seasons of the year could yield more comprehensive results.

In corridors with planned RWTs but no formal trail facility, researchers observed more trespassing, with the most serious conditions along the proposed Coastal Rail-Trail in California near Del Mar and Encinitas. There, researchers observed 155 trespassers over the course of two hours. Most trespassers were crossing the track to access water (ocean or river) for surfing, fishing, and other recreational activity (see **Figure 2.2** on page 10). The rest were walking alongside the tracks with very few actually on the tracks. Researchers observed that at least one-third of the activity occurred in areas planned to become the trail, while 44 percent seemed to be in areas that would not be accommodated by the planned trail (see **Figure 2.3** on page 10).

Most U.S. railroad companies rely on local and State trespassing ordinances to bolster their enforcement attempts and on local police departments to enforce trespassing and vandalism laws. However, most police departments respond “as needed” rather than having regular patrols. Additional information on various enforcement practices is contained in *Section VI*.

Railroad and trail officials on several of the existing trails studied reported some relief from trespassing. Several others reported no change (some with recurring problems), although at least one reported what they felt to be an increase in trespassing. The key to trespassing relief appears to be good design, particularly separation and maintenance.

On the Lehigh River Gorge Trail, Pennsylvania, much of the trail is relatively close to the tracks (less than 4.6 m (15 ft) from the track centerline) and is not separated by fencing. Railroad officials report trespassing is indeed a frequent problem. In contrast, as a condition of the sale of the property, CSX required the Three Rivers Heritage Trail, Pennsylvania, to build a chain-link fence the entire length with no opening or fence breaks allowed. Trespassing relief is expected.



However, fencing alone does not always solve the problem. On an RWT section of the Outremont Spur in Montreal, Canada, Canadian Pacific Railway officials noted 23 locations where the fence had holes. They also observed numerous locations where gates were not locked or secured properly. These incidents serve as evidence of significant continued trespassing and determined vandalism.

Risk Reduction: Vandalism

Railroad officials report the most common types of vandalism incidents on RWTs are fence cutting, dumping, and graffiti. Continuing problems are associated with several trails, including the ATSE, California, and Burlington Waterfront Bikeway, Vermont. Others, such as the Platte River Trail, Colorado, and Schuylkill River Trail, Pennsylvania, are associated with decreased problems. There are few reports of increased problems. Some trail agencies have installed innovative features to solve both trespassing and vandalism problems simultaneously, such as the “living fence” — tall and thick vegetation separating the trail from tracks — on the Burlington Waterfront Trail.

Review and Strengthen State Statutes

Trail managers should work to strengthen protections afforded by State statutes (see *Appendix B*). For example, RUSs should cover both recreational and transportation trail use. A number of States have enacted laws that require railroads to fence their rights-of-way under certain circumstances, and impose liability on the railroad for livestock that are injured on unfenced railroad corridors.¹⁶ In general, such laws are enacted for the benefit of adjacent landowners along the corridor and not for the benefit of the public at large (*Barbee v. Southern Pacific Co.*, 99 P. 541 (Cal. App. 1908)). In the absence of a statute, a railroad company does not have a duty to build fences to prevent trespassers from coming onto its property,¹⁷ though fencing appears to offer significant trespassing relief. However, fencing is not a practical or cost-effective option for many railroads, particularly for lengthy corridors in rural areas. Thirty States have passed laws relating to trespassing on railroad property, and the Federal Railroad Administration has developed a model State trespassing law that imposes misdemeanor penalties for entering or remaining on a railroad right-of-way (see **Table 4.1** on page 45).

Crossings

The consolidation and closure of highway-rail at-grade crossings remains a key element in the U.S. DOT’s action plan to improve grade crossing safety. As part of this continuing national effort to improve rail safety and reduce costs associated with highway rail crossings, many Class I railroads, as well as the FRA and many State departments of trans-

Nationwide At-grade Crossings (2000):

Publicly owned	154,084
Privately owned	98,430

¹⁶ These fencing laws are identified and summarized in Appendix B. In addition, fencing obligations can be imposed by municipal ordinance. See *Heiting v. Chicago, R. I. & P. R. Co.*, 96 N.E. (Ill. 1981) (Railroad’s violation of City ordinance requiring fence was proximate cause of injury to child who entered right-of-way at location where fence had previously existed and was torn down.)

¹⁷ See *Nixon v. Montana, W. & S. W.R.*, 145 P. 8 (Montana, 1914); *Nolley v. Chicago, M., St. P. & P. R.*, 153 E.2d 566, 569-70 (8th cir. 1950); *Scarborough v. Lewis*, 518 A.2d 563 (Pa. 1986).



portation, are working to close existing at-grade rail crossings (FRA, 1994) in order to reduce liability exposure and incidents. For example, from 1991 to 1999, they closed 33,599 public and private at-grade crossings, an 11.5 percent decrease.

Typical criteria for closure of public at-grade crossings are:

- Redundant or unnecessary to meet motorist needs, and
- Usually requires hearings, a public forum, and/or City Council approval.

Typical criteria for closure of private at-grade crossings are:

- Unlicensed, nonpermitted, illegal, redundant, or alternate access exists, and
- Decision between the railroad and the user.

An RWT feasibility study must include a detailed assessment of crossings and should seek to close existing at-grade crossings, if possible, or redesign the crossings to accommodate the RWT safely. It should be noted that closing existing at-grade crossings can have a detrimental impact on pedestrian access.

A railroad's liability may depend on whether the railroad has adequately maintained the crossing or complied with State statutes controlling the signals and warnings that are required (Kuhlman, 1986). The railroad may minimize its liability by requiring trail managers to indemnify the railroad for liability in the event of an injury to trail users, to the extent permitted by State law, and by requiring insurance coverage of this risk.



Derailed train. Bourbonnais, IL

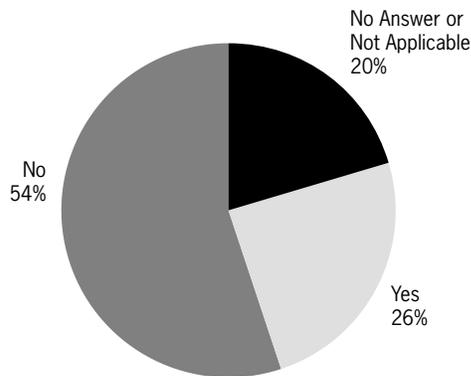
Indemnification

To the extent practicable and reasonable, trail management organizations should enter into indemnification agreements that absolve railroad companies of liability responsibility for injuries related to trail activities. Less than half the case study trail agreements require the government entity to indemnify the railroad against claims (see **Figure 4.6**). For RWTs like the Mission City Trail, California, and Schuylkill River Trail, Pennsylvania, the City or County assumes all liability.

The extent to which government agencies possess the authority to enter into reasonable indemnification agreements depends on the law in that State. Public agencies may be more limited in their ability to enter into indemnification agreements than private trail managers. For example, a governmental entity may be barred by its State constitution from imprudently assuming the liability of another entity.¹⁸ Other States have, by statute, specifically granted agencies indemnification authority.¹⁹

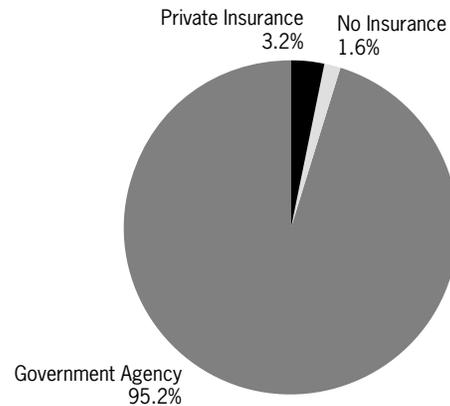
¹⁸ See, e.g., *Chicago & N.W. Transp. Co. v. Hurst Excavating, Inc.*, 498 F.Supp. 1, 4 (N.D. Iowa 1980) (relying on Section 1 of Article VII of the Iowa Constitution.)

¹⁹ For example, Oregon law provides authority for the parks department to indemnify "an owner of private land adjacent to an Oregon recreation trail . . . for damage clearly caused to the land of the owner, and property therein, by users of such trail . . ." Oregon Rev. Stat. § 390.9980.



Source: Rails-to-Trails Conservancy, 2000

FIGURE 4.6 Requirement for indemnity, by percentage of RWTs



Source: Rails-to-Trails Conservancy, 2000

FIGURE 4.7 Source of liability insurance, by percentage of RWTs

In the event of a derailment, the issue would be whether or not the derailment was caused by the railroad's negligence; if so, the railroad likely would be held responsible for injury to any persons lawfully using a trail alongside the railroad right-of-way. However, the railroad's liability would be no different from its liability to persons injured on any other adjacent public highway, sidewalk, or crossing. The question from the railroad's perspective is whether the trail is bringing people into close contact with the rail line who would otherwise not be there. The railroad will seek to be indemnified for all potential incidents including derailments.

Insurance

Railroads may be concerned that trail users might sue them regardless of whether the injuries were related to railroad operations or the proximity of the trail. These concerns are best addressed through insurance and, to the extent permissible under State law, through indemnification agreements with trail managers. Because of the many jurisdictions that have some involvement in an RWT—including the owner of the right-of-way, the operator of the railroad, and the trail manager(s)—one important function of a license agreement is to identify liability issues and responsible persons through indemnification and assumption of liability provisions. In most instances, the railroad will seek an agreement by which the trail manager agrees to purchase comprehensive liability insurance in an amount sufficient to cover foreseeable liability costs. The railroad also may ask the trail manager to assume liability, as well as responsibility for the legal defense, in the event of damage or injury sustained by virtue of the trail use of the property.²⁰

The relevant government agencies' umbrella policies insure 95 percent of the existing RWTs against liability. Many government agencies are self-insured (see **Figure 4.7**). Insurance has been invoked very few times from injuries related to RWT activities (RTC, 2000). Railroad companies interviewed for this report declined to provide information about claims, citing privacy concerns.

²⁰ Indeed, in Alaska, any State or municipality using railroad lands for a public trail or walkway is required to indemnify and hold the railroad harmless for liability and claims arising from such use. Alaska Stat. § 42.40.420 (Michie 2000).

In very few cases, a private or nonprofit organization such as the snowmobile club for the Railroad Trail, Michigan, carries a supplemental insurance policy for the trail. However, the Lake State Railroad company official expressed doubt that the additional \$2 million policy would be sufficient in the case of a serious claim. For the planned Kennebec River Rail-Trail, the City of Augusta, Maine, will pay an additional \$2,000 annually to add railroad indemnification to their insurance.

As mentioned earlier, the City of Portland, Oregon, carries a \$10 million annual insurance policy on the Steel Bridge Riverwalk. Class I railroads often require \$5 million to \$10 million insurance policies for other activities permitted on their rights-of-way.

To the extent practical and reasonable, trail management organizations should purchase or provide liability insurance in an amount sufficient to cover foreseeable liability costs and pay the costs for railroad company insurance for defense of claims.