

DATE: July 6, 2007

TO: Laurie Osterndorf – AD/5

FROM: Michael A. Lutz – AD/5

SUBJECT: Legal Guidance on ATV Use

You have inquired whether there is any legislative directive or guidance that would govern the Department's decision making on the placement of all terrain vehicle trails. The most logical starting point for such a discussion is s. 23.33(8)(a), Stats., which states as follows:

The department shall encourage and supervise a system of all terrain vehicle routes and trails. The department may establish standards and procedures for certifying the designation of all terrain vehicle routes and trails.

The Department has from the very enactment of this language interpreted it to mean a direction to serve as a facilitator for the creation of a system of routes and trails by local units of government, but no more. This interpretation is consistent with the meaning of the words “encourage and supervise” as used in s. 23.33(8)(a), Stats., as shown below.

Encourage does not necessarily mean carrying on or being a party to carrying on work

A Wisconsin Supreme Court case held that “encourage” had no technical meaning:

“The word ‘encourage’ gives very little trouble as it has no technical meaning and may be considered to refer to the activity of advancing or promoting by educational means proper for the state to engage in. We see no great difficulty in construing the words ‘promote’ and ‘encourage’ to authorize the corporation to engage in such educational activities as are ordinarily proper for the state to engage in and to use the funds for this purpose. This court is bound to give to an act a construction that will avoid constitutional objections to its validity if it will bear it.” *State ex rel. Wisconsin Development Authority v. Dammann*, 280 N.W. 698, 712 (Wis. 1938).

Further, *Dammann* held that “encourage” does not include the concept of carrying on or being a party to the carrying on of work:

“...the fact that, in the very section in which that prohibition was embodied in the constitution first proposed, the state was expressly directed to encourage the making of such improvements by others, demonstrates convincingly that there was deemed to be and is such a material distinction between those two activities that the mere encouragement of others to engage in such works was not considered to constitute the carrying on, or being a party in the carrying on, of such work. It obviously would have been impossible for the state to comply with the direction to encourage such improvements by others if by the terms ‘carry on’ or ‘be a party in carrying on’ it was intended to also forbid the encouragement of others to make such improvements.” *Dammann*, 280 N.W. 698 at 713.

The accepted definition of encourage in a Seventh Circuit decision is: (1) to give courage to: inspire with courage, spirit or hope; hearten; (2) to spur on: stimulate, incite; and (3) to give help or patronage to: foster. *People v. Edwards*, 243 Ill. App. 3d 280, 288 (Ill. App. Ct. 1993). *Black's Law Dictionary* defines the word encourage as: to instigate; to incite to action; to embolden; to help. (8th ed. 2004).

The definition of "supervise" is limited to watching and directing others

Webster's online dictionary defines supervise as to "watch and direct", or "keep tabs on; keep an eye on; keep under surveillance." *Black's Law Dictionary* defines supervision as the "act of managing, directing or overseeing persons or projects." 1479 (8th ed. 2004) *Random House Webster's College Dictionary* defines supervise as "to watch over and direct (a process, work, workers, etc.); oversee; superintend." 1342 (McGraw-Hill ed., 1991).

The Department's implementation of the ATV program is consistent with the direction given in 23.33(8)(a), Stats.

The purpose of the department's ATV program, as stated by Wis. Adm. Code section NR 64.01, is to "establish standards for the implementation of the all-terrain vehicle program under s. 23.33, Stats," and it applies to owners, operators, dealer, towns, villages, cities, counties, the state and federal agencies. It establishes rules for registration, operation, testing, safety certification, accident reports, routes, general aid, trail aid, and law enforcement aids to counties. Through ch. NR 64, Wis. Adm. Code the Department has done exactly what it was directed to do by the Legislature. It has encouraged and supervised ATV use in the state.

Other statements of general authority would allow but not require motorized activities such as ATV's.

The purpose of the chapter that gives the Department its conservation powers is stated in Wis. Stat. sec. 23.09 as: "to provide an adequate and flexible system for the protection, development and use of forests, fish and game, lakes, streams, plant life, flowers and other outdoor resources in this state."

Wis. Stat. sec. 23.11(1) charges the Department with "general care, protection, and supervision of all state parks, of all state fish hatcheries and lands used therewith, of all state forests, and of all lands owned by the state or in which it has any interests, except lands the care and supervision of which are vested in some other officer, body or board; and said department is granted such further powers as may be necessary or convenient to enable it to exercise the functions and perform the duties required of it by this chapter and by other provisions of law. But it may not perform any act upon state lands held for sale that will diminish their salable value."

Wis. Stat. sec. 27.01(2)(i) authorized the Department to "Establish and operate in the state parks such services and conveniences and install such facilities as will render such parks more attractive for public use and make reasonable charges for the use thereof.

All of these provisions give the Department a great deal of discretion in determining the appropriate activities for its properties. There is neither a mandate nor prohibition on motorized uses.

The only other guidance on motorized uses comes not from the legislature but from our own Board. In Wis. Adm. Sec. NR 1.61, the Board directs that after traditional uses such as hunting, fishing, trapping,

walking and berry picking, Department lands shall be open for: “Other types of recreational uses including camping, bicycling, equestrian uses, field trials, snowmobiling or other motorized activities as authorized by the property master plan.”

Further guidance is found in the Master Planning for Department Land Rule where the Board has stated the following:

NR 1.60(4)(a)

(a) Management activities shall be compatible with the land's ability to support and sustain the intended management, development or recreational use.

NR 1.60(4)(b)

(b) In planning efforts, the effects of management activities on adjacent management areas are to be considered and, where adverse, are to be avoided whenever practicable.

Conclusion

Under the current legal framework, ATV's may be managed on Department lands like most other uses. There is no mandate that they be either favored or avoided. Their use on Department properties is essentially a management/policy decision subject to the master planning process.

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