

Hike at Your Own Risk: In Support of No-Rescue Wilderness Designations

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ABSTRACT

As the popularity of the National Park system continues to grow, more Americans are venturing into remote and wild areas. Unfortunately, this trend has also corresponded with increased reports of injury and calls for medical rescue. Fueled by the sharing of adventurous photos on social media, hikers frequently head into isolated and exotic locations, often inexperienced in outdoor settings, equipped only with their cell phones.

Those lost or in need of medical help in National Parks or other wilderness settings trigger a search and rescue (SAR) operation. A team of trained professionals conducts a search for missing or injured persons, with the goal to return them to safety. However, SAR operations have far-reaching implications for both the rescuer and the rescued, including who has a duty to rescue, legal liability for injuries, and who should ultimately bear the cost of these operations.

At the federal level, the government will provide search and rescue at no cost. In contrast, a minority of states have implemented controversial laws that allow the state to recoup costs directly from the person in need of rescue. This Comment will examine the broad field of SAR and the impracticability of the current regime.

This Comment will also advocate to modify the current system in select areas in favor of “No-Rescue” wilderness designations, in which the government would be prohibited from providing rescue services on government-managed land. A No-Rescue designation would deter inexperienced hikers, resolve the financial and safety burden on search and rescue teams, and further the intended goal set forth in the Wilderness Act: that land set aside “shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment.”

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I. INTRODUCTION

On an early morning in May 2017, rock climber John Thornton Jenkins fell almost 600 feet while climbing on Mount Hood, a popular climbing destination in the state of Oregon.¹ Jenkins survived the initial fall and shortly after, a fellow climber placed a call to the local sheriff's office to request a medical evacuation.² Despite the quick action, it took numerous phone calls and approximately four-and-a-half hours until a helicopter arrived at the remote mountain location to transport Jenkins to proper medical services.³ Ultimately, Jenkins was pronounced dead after arriving at a Portland, Oregon hospital.⁴

1. See Meagan Flynn, *He died after a fall on Mount Hood. His family blames hours-long wait for rescue.*, WASH. POST (May 15, 2018, 2:44 AM), <https://wapo.st/2q2w3WG>.

2. *See id.*

3. *See id.*

4. *See id.*

Consequently, the circumstances surrounding Jenkins' death resulted in a wrongful death lawsuit, alleging that the sheriff's office and 911 operators negligently delayed medical rescue services.⁵ The lawsuit claimed that, but for the over two-hour delay in the helicopter dispatch Jenkins would still be alive.⁶

Unfortunately, injuries and deaths in remote natural areas, while certainly tragic, are not uncommon.⁷ "A lot more Americans are getting out to hike and camp. State and national parks are booming. But there's a big downside . . . [More people are] getting lost or hurt and that's putting new pressure on first responders."⁸ The frequency with which search and rescue (SAR) operations are now employed has strained financial and personnel resources of the government agencies responsible for managing natural areas.⁹

In addition to the increased number of people using parks and natural areas, social media has encouraged users to head into remote areas without proper training or the necessary experience.¹⁰ The steady increase in injuries that lead to rescue services has sparked a debate—whether the person in need of rescue should be responsible for the often extraordinary financial costs of providing that rescue.¹¹ This Comment continues that debate and further argues that, in certain circumstances, no rescue should be provided at all.¹²

Part II provides a broad overview of the current SAR regimes at both the federal and state level, including the overarching policy to assume the duty to rescue, the potential liability of SAR operations, and the various approaches employed by government agencies to recoup the financial costs of SAR.¹³

Next, Part III analyzes what constitutes a no-rescue wilderness designation and identifies the weaknesses and impracticability of the current SAR regimes.¹⁴ This Comment ultimately recommends that land managing agencies designate certain no-rescue areas to resolve the issues of excessive financial costs and liability on behalf of the agencies and

5. *See id.*

6. *See id.*

7. *See* Brian Mann, *More Americans Head Into The Wild Unprepared For . . . The Wild*, NPR (Oct. 25, 2017, 10:13 AM), <https://n.pr/2nMCWuL>.

8. *Id.*

9. *See id.*

10. *See id.* ("[P]eople find out about a beautiful mountain or a canyon hike on Facebook or Instagram and they just head out, without doing research or networking with more experienced hikers.")

11. *See* Tiffany Sharples, *Get into Trouble Outdoors — Who Pays for the Rescue?*, TIME MAG. (Apr. 25, 2009), <http://bit.ly/2OPxcv0>.

12. *See infra* Part III.

13. *See infra* Part II.

14. *See infra* Section III.A–C.

further protect natural areas for future generations, as intended by the Wilderness Act.¹⁵

Part III concludes with a case study, which provides an example of how a land manager should implement a no-rescue area in an existing location, Mount Hood, Oregon.¹⁶ Finally, Part IV offers concluding statements on the issues raised in this Comment.

II. BACKGROUND

This section will provide an overview of basic SAR concepts and the current approaches to SAR under federal and state jurisdictions. First, this section addresses what constitutes SAR, the monetary costs, and the potential liability of both the rescuers and the rescued person(s).¹⁷ Then, this section describes SAR on federal land, specifically, the policy of federal land managers regarding whether SAR is appropriate and which party will bear the costs.¹⁸ Finally, this section examines the range of approaches taken by states regarding the recovery of the monetary costs incurred by a search and rescue operation.¹⁹

A. *Search and Rescue Basics*

SAR, simply defined, is the activity of “looking for people who are lost or in danger.”²⁰ This definition, however, does not consider factors such as which party is responsible for the rescue, how and by whom SAR is funded, and whether legal obligations exist surrounding SAR. These initial factors are important to recognize before one can understand the broad field of SAR because the implications of each SAR operation differ depending on which party provides the rescue and which party ultimately bears the financial burden.

1. Search and Rescue in Wilderness Settings

In populated areas, authorities or other responsible parties will come when called for help, without question. The situation changes for outdoor recreators²¹ who may be several miles, or even mountain ranges, away from the nearest person.

15. *See infra* Section III.B–C.

16. *See infra* Section III.D.

17. *See infra* Section II.A.

18. *See infra* Section II.B.

19. *See infra* Section II.C.

20. *Search and Rescue*, COLLINS ONLINE DICTIONARY, <http://bit.ly/2MeEh6s> (last visited Dec. 20, 2019).

21. An outdoor recreator is a person who has participated in an outdoor activity, such as hiking, camping, rafting, rock climbing, and more. *See generally Outdoor Recreation FAQs*, WILDERNESS SOCIETY, <http://bit.ly/2qeRILw> (last visited Jan. 29, 2020).

According to the Department of Homeland Security's National Search and Rescue Plan²² of the United States, SAR consists of "[s]earch operations, rescue operations, and associated civilian services provided to assist persons and property in potential or actual distress in a non-hostile environment."²³ In plain language, a rescue operation is triggered when a person cannot return to the trip's place of origin because the person is either unable to find the way back or because of physical or mental incapacity.²⁴ At the federal level, agencies often hire their own personnel, supplemented by volunteers, to perform rescue operations.²⁵

Between 1992 and 2007, the National Park Service²⁶ (NPS) conducted 65,439 SAR operations.²⁷ In 2017 alone, there were 182 fatalities and approximately 1,500 reports of injury or illness.²⁸ Moreover, visiting American National Parks has become more popular in recent years,²⁹ which has led to increased injuries and increased rescue operations.³⁰ In fact, more popular parks (such as Yosemite National Park) experience up to 250 SAR operations per year.³¹

Similar statistics exist at the state level.³² With an increased number of rescue operations and comparatively smaller budgets and human and economic resources, states are facing increased pressure regarding their

22. The National Search and Rescue Plan is a voluntary agreement among federal agencies that provides a uniform policy and guidelines for search and rescue services. *See National Search and Rescue Plan of the United States*, HOMELAND SECURITY DIGITAL LIBR., <http://bit.ly/2MBCpnx> (last visited Jan. 29, 2020).

23. U.S. COAST GUARD, THE NATIONAL SEARCH AND RESCUE PLAN OF THE UNITED STATES, at 1 (2016), <http://bit.ly/2SdSdS6> [hereinafter *SAR Plan*].

24. *See* Matt Rocheleau, *These 6 charts show the most common reasons people need rescues in national parks*, BOS. GLOBE (Nov. 18, 2016, 7:18 AM), <http://bit.ly/2OIlbaQ> ("The most common factors that contributed to the people who needed help were: fatigue/physical condition, 22.8 percent; people being insufficiently informed or making an error in judgment, 18.8 percent; falls, 10 percent . . .").

25. *See generally Search and Rescue Site Program*, NAT'L PARK SERV., <http://bit.ly/35ojaGG> (last visited Jan. 29, 2020) (describing Yosemite's SAR team and volunteer needs).

26. *See Definitions - N*, NAT'L PARK SERV., <http://bit.ly/33sXMON> (last visited Dec. 20, 2019) (defining the National Park Services as "[a] bureau within the United States Department of Interior . . . [that] preserves unimpaired the natural and cultural resources and values of the national park system for the enjoyment, education, and inspiration of this and future generations").

27. Travis W. Heggie & Michael E. Amundson, *Dead Man Walking: Search and Rescue in the U.S. National Parks*, 20 WILDERNESS & ENV. MED. 244, 248 (2009).

28. *See 2017 Annual SAR Dashboard*, ARCGIS ONLINE, <http://bit.ly/2B6sLE2> (last visited Jan. 29, 2020) [hereinafter *SAR Dashboard*].

29. *See National Park System Sees More Than 330 Million Visits*, NAT'L PARK SERV. (Jan. 29, 2020), <http://bit.ly/2MBnj1B> (over 330,882,751 recreation visits in 2017).

30. *See* Mann, *supra* note 7.

31. *See id.*

32. *See id.*

SAR programs.³³ Given the nature of remote location rescues,³⁴ the nearest towns/municipalities cannot bear the increased financial cost associated with the higher number of SAR operations each year.³⁵ The number of SAR operations conducted per year is concerning from a hiker-safety standpoint. But SAR operations are also problematic because the operations are costly for the government. Moreover, the liability for both a land manager and the individual rescuers is exceptionally high.³⁶

2. Costs of SAR

The true burden of search and rescue comes not only from the overall number of incidents but also from the immense cost of each individual incident.³⁷ For instance, the use of a rescue helicopter can incur up to \$1,600 per hour, a cost typically borne by the government;³⁸ in 2017 alone, the NPS spent more than \$3 million dollars,³⁹ with around 71,700 personnel hours committed to SAR operations.⁴⁰ Because budgets, equipment, and personnel are stretched to their outer limits, many states have challenged the traditional SAR policies.⁴¹

3. Potential Liability of SAR Efforts

While costs are a major concern in the area of SAR operations,⁴² questions of liability also exist in the event of injury to the rescuer or the rescued person.⁴³ Under the “rescuer doctrine,” nonprofessional rescuers

33. *See id.* (“More people are showing up in wild lands unprepared . . . that’s putting new pressure on first responders.”).

34. *See Definitions - R, NAT’L PARK SERV.*, <http://bit.ly/32gw0Vy> (last visited Dec. 20, 2019) (defining remoteness by the “distance and difficulty of accessing [a location] from the nearest commercial center”).

35. *See* Katie Herrel, *Paying for Wilderness Search and Rescue: Private Cost, or Public Obligation?*, BACKPACKER MAG., <http://bit.ly/2INNqkN> (last updated Feb. 8, 2017) (“[M]any wilderness gateway communities are small towns, in lightly populated counties with miniscule tax bases, ill-equipped financially to handle a sudden surge in pricey helicopter evacuations.”).

36. *See infra* Sections II.A.2–3.

37. *See* Sharples, *supra* note 11 (“[T]hough most of the rescuers are volunteers, costs can still add up for equipment and resources — such as leasing a helicopter, and maintaining ropes and radios.”).

38. *See id.*

39. *See* Amy Lieu, *National park searches, rescues costing millions, figures show*, FOX NEWS, <https://fxn.ws/2MB2xPA> (last updated Aug. 14, 2018).

40. *See SAR Dashboard, supra* note 28 (noting that 38.7K hours consisted of unprogrammed hours: actual, over-time, hazard-pay hours, emergency hire and unscheduled part-time, and intermittent employee time).

41. *See infra* Section II.C.; *see generally* Jimmy Tobias, *Is Search and Rescue a Public Service? Not Exactly.*, OUTSIDE ONLINE (June 4, 2015), <http://bit.ly/35sebou> (“At least six . . . states have controversial laws that enable officials to recover SAR costs.”).

42. *See infra* Section II.A.2.

43. This section focuses on the liability of the rescuers themselves. For more information about the potential liability of the government, *see infra* Section II.B.2.

are generally able to recover for their own injuries caused by the negligence of the person in need of rescue.⁴⁴ In situations where rescue is performed by a professional rescuer, however, recovery against the rescued individual is not available.⁴⁵ This “professional rescuer doctrine” limits recovery because “the business of professional rescuers [is] to deal with certain hazards, and such an individual cannot complain of the negligence which created the actual necessity for exposure to those hazards.”⁴⁶ Therefore, as a result of the professional rescue doctrine, an individual employed as a member of a SAR team is generally prohibited from monetary recovery for injuries obtained as a result of the rescue.⁴⁷

In contrast to the professional rescuer doctrine, a rescued person themselves may potentially recover directly from a nonprofessional rescuer.⁴⁸ In *United States v. Lawter*,⁴⁹ the Fifth Circuit held that a rescuer has a duty to ensure that a rescue is not negligently performed and that the person in need of rescue is not left in a worse-off position.⁵⁰ In *Lawter*, the Fifth Circuit noted that regardless of the lack of liability of the United States as a party, the United States Coast Guard personnel incurred liability when they assumed the duty to rescue and the Coast Guard thus negligently caused the death of the person in need of rescue.⁵¹ Although individual rescuer liability is still an issue with SAR operations, liability for government entities has been cabined by the Federal Tort Claims Act.⁵²

B. *The Federal Approach*

The federal Approach to SAR is governed under the National Search and Rescue Plan of the United States (the “Plan”).⁵³ Under the Plan, federal agencies conduct SAR operations voluntarily for outdoor recreators in need of rescue on federally-owned land.⁵⁴ Additionally, federal agencies agree to bear all financial costs associated with SAR.⁵⁵

44. W.C. Crais III, Annotation, *Rescue Doctrine: Negligence and Contributory Negligence in Suit by Rescuer Against Rescued Person*, 4 A.L.R.3d 558, § 3 (1965).

45. 2A STUART M. SPEISER ET AL., *AMERICAN LAW OF TORTS* § 9:23 (2018) (“The professional rescuer doctrine bars recovery by anyone whose very occupation or calling is rescue work.”).

46. *Id.*

47. *See id.* (“When the injury is the result of a hazard generally recognized as being within the scope of dangers identified with the particular rescue operation, the doctrine will be unavailable to that plaintiff.”).

48. *See id.*

49. *See United States v. Lawter*, 219 F.2d 559, 562 (5th Cir. 1955).

50. *See id.*

51. *See id.* (“For the uncontradicted evidence shows that the Coast Guard, pursuant to long established policy, affirmatively took over the rescue mission, excluding others therefrom, and . . . negligently brought about her death.”).

52. *See* 28 U.S.C. § 1346 (2018); *see also infra* Section II.B.2.

53. *See SAR Plan*, *supra* note 23, at 1.

54. *See id.* at 13.

55. *See id.* at 13.

Therefore, the legal obligations of federal agencies and the potential liability associated with conducting SAR operations are worth exploring.⁵⁶

1. Duty to Rescue and the Policy of Federal Land Managers

A citizen does not have a constitutional right to be rescued and the government does not have an affirmative duty to provide rescue services.⁵⁷ Accordingly, federal land managers (like the NPS) are not mandated to provide rescue services.⁵⁸ However, federal agencies have voluntarily assumed the duty to rescue by signing onto the Plan.⁵⁹ Under the Plan, the NPS is responsible for:

[E]mergency services on lands and waters administered by NPS, assists visitors within [NPS units], and aids authorities in neighboring jurisdictions. Civil SAR operations, including emergency medical aid, are conducted in a wide variety of environments such as remote, rural, and roadless areas, lakes, rivers and oceans, and deserts, mountains and caves, and often require extended response times and the use of specialized equipment.⁶⁰

Therefore, although a constitutionally recognized duty to provide rescue services does not presently exist, federal agencies have decided to provide rescue to “satisfy [their] humanitarian, national, and international commitments and obligations.”⁶¹

The duty to rescue has complex implications, involving tort concepts.⁶² A rescuer has an affirmative obligation to refrain from leaving the victim in a worse-off position once a rescue has begun.⁶³ However, this tort law approach does not apply at the federal level, as evidenced by federal case law.⁶⁴ If a federal agency or agent undertakes a rescue, there

56. See *infra* Section II.B.1–2.

57. See *Brown v. Pa. Dep’t of Health Emergency Med. Serv. Training Inst.*, 318 F.3d 473, 478 (3d Cir. 2003) (holding that there is “no federal constitutional right to rescue services, competent or otherwise”); see also *Salazar v. City of Chi.*, 940 F.2d 233, 237 (7th Cir. 1991) (“Government generally has no constitutional duty to provide rescue services to its citizens . . .”).

58. See RESTATEMENT (SECOND) OF TORTS § 314 (AM. LAW INST. 1965) (“The fact that the actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.”).

59. See *SAR Plan*, *supra* note 23, at 1.

60. See *SAR Plan*, *supra* note 23, at 7.

61. See *id.* at 1.

62. See RESTATEMENT (SECOND) OF TORTS § 323 (AM. LAW INST. 1979) (stating that once rescue has been undertaken “a duty to use reasonable care to assist another in danger has been imposed”).

63. See *id.* (“One who undertakes . . . to render services to another which he should recognize as necessary for the protection of the other’s person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care . . .”).

64. See, e.g., *Brown v. Commonwealth of Pennsylvania, Dep’t of Health Emergency Med. Servs. Training Inst.*, 318 F.3d 473, 478 (3d Cir. 2003) (“Although state tort law

is no obligation to do so competently.⁶⁵ Although federal agencies such as the NPS appear to be legally insulated in their rescue attempts, nonetheless suits are still pursued⁶⁶ and agencies are not altogether immune from liability.⁶⁷

2. Sovereign Immunity Under the Federal Tort Claims Act

In 1946, the United States waived its sovereign immunity under the Federal Tort Claims Act (FTCA) for tortious actions committed by federal employees when those employees' actions were in the scope of employment.⁶⁸ Under the FTCA, the United States waived sovereign immunity for

injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government . . . under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.⁶⁹

Though the FTCA permits suits for negligent federal employee conduct, exceptions are carved out, such as discretionary decisions by employees, which are shielded from judicial review.⁷⁰ The United States Supreme Court has defined a “discretionary decision” as an action that “involves the permissible exercise of policy judgment.”⁷¹ Thus, in order to determine whether federal employee actions fall under the discretionary function exception to the FTCA, courts employ a two-part test: (1) whether the challenged action is a matter of choice for the employee and, if the challenged action is a matter of choice; and (2) whether the choice is grounded in social, economic, and political policy.⁷²

This discretionary function exception to the FTCA creates further questions regarding whether rescuers are liable for their rescues. For example, which actions taken by federal agents incur liability, particularly

might provide a remedy for a state's negligent rescue attempt, it neither logically nor legally follows that federal constitutional law must do the same.”)

65. *See id.*

66. *See supra* Part I.

67. *See infra* Section II.B.2.

68. *See* 35 AM. JUR. 2D *Federal Tort Claims Act* § 1 (2019) (“With the enactment of the [FTCA], Congress provided a comprehensive remedy against the United States for tort claims resulting from the negligent or wrongful acts or omissions of federal employees while acting within the scope of their employment or office . . .”).

69. 28 U.S.C. § 1346(b) (2018).

70. *See* 35A AM. JUR. 2D *Federal Tort Claims Act* § 193 (2019) (explaining that the FTCA “does not apply to any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved is abused”).

71. *Berkovitz v. United States*, 486 U.S. 531, 538 (1988).

72. *See id.*

in the search and rescue context? Although a highly contested point, the Tenth Circuit has discussed whether SAR decisions fall under the FTCA discretionary function exemption. In *Johnson v. Department of Interior*,⁷³ the Tenth Circuit held that NPS rangers' decisions regarding whether to conduct rescue operations and how the operation is carried out were shielded from judicial review pursuant to the discretionary function exception of the FTCA.⁷⁴ The NPS argued, and the Tenth Circuit agreed, that SAR decisions must be based on considerations of safety, human and economic resources, and the appropriate level of governmental interference.⁷⁵ The Tenth Circuit reasoned that these considerations were the type that Congress intended to shield from liability under the FTCA.⁷⁶ Other circuit courts have agreed that SAR operations fall squarely within the discretionary function exception because there is no federally prescribed course of action for employees to follow, and agencies must consider personnel and resources when determining the course of action.⁷⁷ In other words, agencies undertaking SAR must make choices based on the circumstances and public policy considerations.

3. Who Bears the Cost of Rescue?

“Cost recovery” is a concept where the party who originally paid the financial costs of rescue is later entitled to reimbursement for the costs of the SAR operation.⁷⁸ The Plan's policy is that each federal agency will bear the cost and funding of SAR operations.⁷⁹ Agencies (like NPS) fund SAR operations that occur on federal lands without any reimbursement from the rescued person.⁸⁰ Because the agency considers SAR costs in its annual budget, SAR efforts are thereby tax-payer funded.⁸¹ In contrast to the federal approach, which favors the rescued person, the approaches taken at the state level vary in protections offered to the rescued person, as discussed below.

73. *Johnson v. Dep't of Interior*, 949 F.2d 332, 334 (10th Cir. 1991).

74. *Id.* at 340.

75. *Id.* at 339.

76. *Id.* at 340 (“We seriously doubt Congress intended to expose these decisions to second guessing of courts far removed from exigencies of the moment.”).

77. See *Wickenheisser v. United States*, No. 2:14-cv-635-DB, 2017 U.S. Dist. LEXIS 94045, at *13 (D. Utah June 19, 2017); see also *Shansky v. United States*, 164 F.3d 688, 696 (1st Cir. 1999); *Blackburn v. United States*, 100 F.3d 1426, 1434 (9th Cir. 1996); *Kiehn v. United States*, 984 F.2d 1100, 1105 (10th Cir. 1993).

78. See *Tobias*, *supra* note 41.

79. See *SAR Plan*, *supra* note 23, at 13.

80. See *id.*

81. See *Laura Moss, When hikers need help, who pays for rescue?*, MOTHER NATURE NETWORK (updated June 19, 2019), <http://bit.ly/2VDUpBP>.

C. State Approaches

Similar to federal land managing agencies, the majority of state land managers voluntarily assume the duty to rescue.⁸² Like the federal government, states do not have an affirmative duty to provide rescue services.⁸³ The majority state approach is exemplified in the case of *Kiokun v. State*.⁸⁴

In *Kiokun*, the state of Alaska was sued for wrongful death after the state police failed to conduct a SAR operation for individuals trapped in a car on a remote, unmaintained road.⁸⁵ The court held that there was no “mandatory duty” on behalf of the police to conduct a rescue and that “the decision whether to initiate a search and rescue operation remains one of policy.”⁸⁶ The court looked to the plain language of the SAR statute that only permitted a SAR to be conducted and left the decision whether to conduct a SAR operation up to the discretion of the police department.⁸⁷ The court further reasoned that the decision to conduct a SAR was based on public safety and resource allocation, and thus immune from a tort claim as a discretionary function of the police department.⁸⁸ The Supreme Court of Alaska’s approach demonstrates how the federal and state approaches to duty and liability for SAR operations are largely indistinguishable.

Although the majority view is that no affirmative duty to rescue exists, a minority of states allow state agencies to recover the monetary costs of SAR directly from the rescued person, once the agency voluntarily assumes the rescue.⁸⁹ The states that allow for recovery of SAR costs highlight both the litany of options for cost-recovery programs and also the difficulty in the practical application of such programs.⁹⁰ The minority of states that allow for cost recovery vary in the monetary amount that can be recovered and the behavior that triggers the ability for states to

82. See Tobias, *supra* note 41 (stating that for the majority of states, “[s]earch and rescue is a pure public service”).

83. See RESTATEMENT (SECOND) OF TORTS § 314A (AM. LAW INST. 1979) (stating that there is no affirmative duty to aid or protect outside of a special relationship or as otherwise “required by law”).

84. See *Kiokun v. State*, 74 P.3d 209, 211 (Alaska 2003).

85. See *id.* at 211.

86. *Id.* at 218–19.

87. See *id.* at 218.

88. See *id.* at 217.

89. See Tobias, *supra* note 41 (stating that New Hampshire and “[a]t least six other states have controversial laws that enable officials to recover SAR costs”).

90. See *infra* Section II.C.1–2.

recover.⁹¹ Moreover, these minority states diverge in how often the particular state is permitted to use this power.⁹²

1. Cost Recovery Based on Culpability

At least seven states have cost recovery programs for SAR operations.⁹³ Out of these states, New Hampshire most frequently uses this program and charges those who have been rescued for the cost of the SAR operation.⁹⁴ New Hampshire's SAR statute provides that "[a]ny person determined . . . to have acted negligently in requiring a [SAR] . . . shall be liable to the department for the reasonable cost of the department's expenses for such [SAR] response."⁹⁵ The New Hampshire statute intends for recovery to be unavailable in circumstances in which hikers or outdoor recreationists were not overtly culpable in their need to be rescued.⁹⁶ Thus, the negligence standard employed by the cost-recovery statute requires a case-by-case analysis of the facts to determine whether a reasonable person would have taken similar actions under similar circumstances.⁹⁷

For example, in *New Hampshire Fish and Game Department v. Bacon*,⁹⁸ the New Hampshire Supreme Court found a hiker liable for rescue and allowed the state to recover \$9,186.38 in costs.⁹⁹ The court stated that the negligence standard contemplated by the statute required that the defendant-hiker hike in the same manner as a reasonable hiker in the same circumstances.¹⁰⁰ The court reasoned that the hiker, a 59-year-old man who had previously undergone four hip surgeries, was negligent when he sustained injuries after hiking in 30–70 miles-per-hour wind and rain and later required rescue.¹⁰¹ This New Hampshire case highlights the fact-specific nature, and requisite level of judicial inquiry, of imposing culpability requirements in SAR cost-recovery programs.¹⁰²

Other state approaches fall on a spectrum regarding the level of culpability they require for a state to recover costs. Similar to New

91. See Sharples, *supra* note 11 (explaining that there is "no hard and fast rule" for behavior that triggers SAR cost recovery).

92. See Katie Zezima, *Those Lost in Wilderness May Find Bill for a Rescue*, N.Y. TIMES (Dec. 28, 2008), <https://nyti.ms/2ottEUR> (stating that a state SAR law leaves it up to the Attorney General to make the decision to charge for a rescue).

93. See Tobias, *supra* note 41.

94. See *id.* (noting that New Hampshire has charged for more than 60 SAR operations, totaling \$70,000).

95. N.H. REV. STAT. ANN. § 206:26-bb (2018).

96. See Zezima, *supra* note 92 (noting that charging for SAR is in response to the increased number of individuals who "venture unprepared into the wilderness").

97. See N.H. Fish & Game Dep't v. Bacon, 116 A.3d 1060, 1065 (N.H. 2015).

98. See *id.*

99. *Id.* at 1063.

100. *Id.*

101. *Id.*

102. *Id.* at 1065.

Hampshire, Oregon imposes a traditional tort negligence standard in its cost recovery legislation.¹⁰³ Employing a higher standard than both New Hampshire or Oregon, Hawaii only allows for recovery when the rescued person acted with intentional disregard for personal safety, including intentionally disregarding a warning or notice.¹⁰⁴ Similarly, California allows for recovery when the rescue was caused by an intentional act in knowing violation of *any* federal or state law or local ordinance.¹⁰⁵ The California statute, however, limits SAR cost recovery to when the conduct that resulted in rescue also resulted in a criminal conviction of the rescued person for such conduct.¹⁰⁶ Unlike other states, Utah takes a county-level approach that allows individual counties, such as Grand County which encompasses two of the National Parks, to recover SAR costs in circumstances in which the person rescued acted recklessly.¹⁰⁷

In contrast to other states that require some general level of culpability in order to trigger SAR recovery, Maine allows recovery for all costs directly related to the operation from the person in need of rescue.¹⁰⁸ The Maine statute, therefore, is the strictest state cost recovery approach because it authorizes the rescuing agency to charge anyone who calls for rescue, regardless of the circumstances or level of culpability that lead to SAR.¹⁰⁹

2. SAR Card Programs

Another approach to SAR cost recovery is to place the burden on the hiker *before* a rescue is necessary.¹¹⁰ The flagship program—the Colorado Outdoor Recreation Search and Rescue (COSAR) card—allows outdoor recreators to purchase a card that ensures that the person in need of rescue will not be charged.¹¹¹ The card’s reasonably affordable price of just \$3 per year¹¹² contributes to a state fund that reimburses the costs of SAR operations in Colorado.¹¹³ Although superficially similar to an insurance

103. OR. REV. STAT. ANN. § 404.270 (West 2018) (noting that a public body may obtain reimbursement under this section only when reasonable care was not exercised by the individuals for whose benefit the search and rescue activities are conducted).

104. See HAW. REV. STAT. ANN. § 137-2 (West 2018).

105. See CAL. GOV’T CODE § 26614.7 (West 2018).

106. See *id.*

107. See UTAH CODE ANN. § 53-2a-1102 (West 2018); see also *Walter v. Stewart*, 67 P.3d 1042, 1049 (Utah Ct. App. 2003) (“While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it.”).

108. ME. REV. STAT. tit. 12, § 10105 (2018).

109. *Id.* (allowing cost recovery from the rescued person but including no additional mens rea standard).

110. See generally Tobias, *supra* note 41 (explaining that SAR Card programs work by paying into the program to get the benefits before participating in outdoor recreation).

111. See *Colorado Outdoor Recreation Search and Rescue Card FAQs*, COLO. SEARCH & RESCUE BD., <http://bit.ly/32bHzgR> (last visited Dec. 20, 2019).

112. *Id.*

113. *Id.*

program, the COSAR card simply contributes to the state SAR fund that covers operational expenses like equipment and mileage but will not cover expenses such as medical transportation, which may still be billed to the rescued.¹¹⁴ Notwithstanding the COSAR program, Colorado officials still conduct rescue operations for those without the card and generally do not charge to recoup costs.¹¹⁵

Similarly, Utah has implemented a card program, but with a large caveat: a person may still be liable for expenses if the person recklessly or intentionally creates a situation requiring an emergency response—even with the purchase of the SAR card.¹¹⁶

D. Insurance Programs

Another alternative approach to SAR cost recovery is for the individual to acquire an insurance policy that covers the costs incurred from a SAR.¹¹⁷ This approach is used in much of Europe.¹¹⁸ While SAR card programs¹¹⁹ allow funds for conducting SAR operations, these funds do not apply beyond the scope of the SAR operations themselves, and individuals are still on the hook for transportation and medical services.¹²⁰ Additionally, when outdoor recreators find themselves in circumstances in which liability for rescue attaches, traditional insurance typically does not cover the rescue costs.¹²¹

In the United States, there are several options to purchase so-called “rescue insurance.”¹²² Perhaps the most common in the outdoor community is the American Alpine Club membership.¹²³ Benefits of membership include coverage for rescue, which kicks in once a member leaves the trailhead.¹²⁴ Another notable option for rescue insurance is GEOS Alliance, which offers a range of rescue coverage for members up

114. *Id.*

115. *See* Tobias, *supra* note 41.

116. UTAH CODE ANN. § 53-2a-1102 (West 2018).

117. *See* Herrel, *supra* note 35.

118. *See* Sharples, *supra* note 11.

119. *See supra* Section II.C.2.

120. Herrel, *supra* note 35 (“[SAR Card] policies don’t cover medical costs.”).

121. Hanalarock, *Should You Get SAR Insurance This Summer?*, LOVE BACKCOUNTRY (June 14, 2016), <http://bit.ly/2VBIjJq> (“[I]n most cases, your regular insurance won’t cover a search and rescue mission, but it will cover your bills once you’re at the hospital. This of course depends on the type of insurance you have.”).

122. *See* Herrel, *supra* note 35 (listing options for rescue insurance in the United States).

123. *See generally Our Vision*, AM. ALPINE CLUB, <https://americanalpineclub.org/> (last visited Jan. 29, 2019) (American Alpine Club is an organization of outdoor recreators that advocates responsibility in outdoor sports and offers insurance coverage for SAR operations).

124. *See AAC Rescue Benefits*, AM. ALPINE CLUB, <http://bit.ly/2Mc5OU> (last visited Dec. 20, 2019) (noting that AAC membership automatically insures for any land-based activity beyond the trailhead).

to \$100,000 per incident.¹²⁵ Under this program, members are required to purchase a supporting satellite-phone device that is capable of reaching and alerting the monitoring agency responsible for coordinating the rescue.¹²⁶

The current SAR systems are impracticable because they do not adequately address the rising number of wilderness rescue and substantial costs to agencies that provide SAR.¹²⁷ The governing body of law regarding rescue supports the implementation of certain “No-Rescue” wilderness designations to address the ineffectual SAR system currently in place.¹²⁸

III. ANALYSIS

The current SAR system, in which the federal government bears the cost of SAR and the state systems allow for limited cost recovery, should be modified and replaced with certain no-rescue designations.¹²⁹ First, state cost recovery systems are unworkable in practice due to the ambiguous standards of culpability that trigger cost recovery.¹³⁰ Second, although the SAR card (and similar insurance programs) may resolve the cost issue for SAR operations, these programs likely would not deter hikers from participating in unprepared or unwise wilderness recreation. And little evidence exists to suggest that people choose to enroll in insurance in advance.¹³¹ Third, a no-rescue designation removes uncertainty in cost recovery, has a large deterrence effect, and best serves the intended purpose for undeveloped wilderness areas.¹³² Most importantly, no-rescue designations can be implemented at both the state and federal level in appropriate areas.¹³³

A. *No-Rescue Wilderness Designations*

The current field of SAR operations and the accompanying laws are ill-suited to achieve the goals of the Wilderness Act, which requires land managers to preserve the “recreational, scenic, scientific, educational,

125. See *Search and Rescue (SAR) Membership*, GEOS TRAVEL SAFETY, <http://bit.ly/2INO69P> (last visited Jan. 29, 2020).

126. See *id.*

127. See *infra* Sections III.B–C.

128. See *infra* Part III.

129. See *infra* Section III.A.

130. See *infra* Section III.B.

131. See Everett Porter, *5 Reasons Why You Need Medical Evacuation Coverage*, FORBES (June 6, 2017, 10:45 AM), <http://bit.ly/2MDvjyR> (noting that, although travel insurance is often used, it does not adequately cover medical evacuation to an appropriate medical care facility).

132. See 16 U.S.C. § 1131 (2018) (The wilderness act “shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment”).

133. See *infra* Section III.D.

conservation, and historical use” of lands designated as wilderness.¹³⁴ Modifying current SAR laws and implementing a policy of no-rescue in certain areas will reduce pressure on SAR coordinators, deter inexperienced persons from attempting outdoor activities they are unprepared for, and help preserve natural areas as the Wilderness Act intended.¹³⁵

1. No-Rescue Wilderness Defined

A “no-rescue wilderness” designation refers to a defined land area in which hikers and other recreators cannot call on the government for rescue in the event a rescue is needed.¹³⁶ In fact, “the managing agency would be absolved, indeed prohibited, from intervening on behalf of any recreationist in distress [in] these areas.”¹³⁷ A no-rescue designation, however, does not necessarily mean that a person would be left with no hope in the event of injury because, although the injured person or party cannot rely on the land manager or government for rescue, private rescue at personal cost is still available.¹³⁸

2. What Would No-Rescue Look Like? A Past Proposal

Leo McAvoy and Daniel Dustin, advocates for no-rescue wilderness designations, proposed implementing the first no-rescue designation in Gates of the Arctic National Park in Alaska.¹³⁹ In their proposal, McAvoy and Dustin set out guidelines for no-rescue designations, such as the lack of formal trail systems or signage, and highlighted that the only obligation for the Alaskan Park Service would be to deliver information on the associated risks and, most importantly, assure that no government rescue would be offered.¹⁴⁰ A no-rescue designation would, therefore, be identified and developed according to several enumerated factors.

These factors include: (1) a remote and undeveloped land area of a park; (2) the absence of any informational or navigational signage; (3) the absence of any man-made facilities, including hiking trails or campsites; and, chiefly, (4) the managing agency must disseminate the information

134. See 16 U.S.C. § 1133 (2018); see also *supra* Sections III.B–C.

135. See *infra* Section III.A.3.

136. Leo H. McAvoy & Daniel L. Dustin, *In Search of Balance: A No-Rescue Wilderness Proposal*, 9 WESTERN WILDLANDS 2, 2 (1983).

137. *Id.*

138. See *id.* at 5.

139. See *id.* at 4 (noting that this location was chosen for its remote location, low visitation, and because, at the time of proposal, the park’s management plan was incomplete); see also *Maps*, NAT’L PARK SERV., <https://www.nps.gov/gaar/planyourvisit/maps.htm> (last visited Dec. 20, 2019) (stating that Gates of the Arctic is a 8.4 million acre wilderness managed by the NPS, located in Northern Alaska).

140. See McAvoy & Dustin, *supra* note 136, at 5.

that recreators who enter will not be entitled to SAR.¹⁴¹ These guiding factors can help land managers develop no-rescue designations in appropriate areas in other National Parks and government-managed wilderness areas and natural areas.

3. Benefits of No-Rescue Designations

Supporters of the no-rescue wilderness designation believe that it is more consistent with the purpose of the Wilderness Act.¹⁴² No-rescue allows recreators to have an unfiltered experience with nature, and would ultimately save the government the time and expenses of SAR operations.¹⁴³ At a fundamental level, the outdoor adventure community encourages people to test themselves without a safety net.¹⁴⁴ A former president of the American Alpine Club stated, “[p]ersonally, I like the idea of no-rescue wilderness because it means you’re committed to taking care of yourself and not putting others at risk.”¹⁴⁵ The concept of no-rescue may provide an additional element for recreators that cannot be found anywhere else: the chance to test one’s limits with the implication that rescue is not a viable option in the event of failure.¹⁴⁶

Aside from the individual motivations for supporting no-rescue, the Wilderness Act also supports no-rescue.¹⁴⁷ Wilderness is characterized as land “untrammelled by man” which retains its “primeval character.”¹⁴⁸ No-rescue designations, without man-made trails or regular SAR, are therefore consistent with the act.¹⁴⁹ The Wilderness Act contemplates natural areas without human development and no-rescue designations support this legislative goal by requiring the absence of human facilities and prohibiting invasive SAR operations.¹⁵⁰

Finally, limiting the number of rescue operations has the benefit of reducing the high costs that the government bears each year. When land managers at the state and federal level experience budget restrictions, performing fewer rescue operations could potentially save hundreds of

141. See McAvoy & Dustin, *supra* note 136, at 4–5.

142. See *supra* Section III.A.

143. See *infra* Section III.B.

144. See McAvoy & Dustin, *supra* note 136, at 4 (“[Supporters of no-rescue wilderness] covet that tingling condition of aliveness that is jeopardized by the abdication of responsibility for one’s actions. To them, risk recreation offers one of the few opportunities to experience that condition.”).

145. Jenifer Warren, *What If We Ignored the SOS?*, L.A. TIMES (Nov. 30, 1993, 12:00 AM), <https://lat.ms/2Bark7U>.

146. See McAvoy & Dustin, *supra* note 136, at 4.

147. See 16 U.S.C. § 1133 (2018) (“[W]ilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use.”).

148. *Id.*

149. See Rick Harwell, *A “No-Rescue” Wilderness Experience: What are the Implications?*, PARKS & RECREATION, June 1987, at 34, 35.

150. See 16 U.S.C. § 1133 (2018); see also Section III.A.1.

thousands per year.¹⁵¹ With no-rescue designations, land managers will no longer wonder how they must provide for the growing number of SAR operations or if they can recover the expenses.¹⁵² No-rescue designations have clear benefits, these designations are further supported when contrasted with the impracticable SAR regimes currently implemented.

B. The Current SAR Cost Recovery System is Impracticable

States that employ cost recovery based on culpability must determine whether the rescued person failed to meet the standard of care required by state law.¹⁵³ Although a state like New Hampshire requires only a general negligence standard to recoup costs, determining what constitutes negligence can prove difficult when hikers have differing levels of ability and knowledge.¹⁵⁴ Further, statistics show that “someone needs to be rescued by [the New Hampshire Fish and Game Department] from the New Hampshire wilderness every two-and-a-half days.”¹⁵⁵

Returning to the facts in *Bacon*,¹⁵⁶ the defendant believed that he was adequately prepared with the necessary equipment before his hike.¹⁵⁷ Ultimately, the New Hampshire Supreme Court disagreed and found that the defendant was negligent in undertaking the hike.¹⁵⁸ This case underscores the difficulty in determining what constitutes negligence when hiking trails vary widely in difficulty and hikers vary dramatically in skill and experience.¹⁵⁹ With no bright-line rule for negligence, hikers entering a wilderness area cannot be certain whether they will be liable to the state in the event they require SAR.¹⁶⁰ In fact, “some mountaineers agree that requiring [those in need of rescue] to bear some financial burden

151. See Harwell, *supra* note 149, at 34–35.

152. See Tobias, *supra* note 41 (quoting a Utah county SAR coordinator as stating, “We had to start charging because it was so expensive to conduct these operations in our county”).

153. See *supra* Section II.C.

154. See N.H. REV. STAT. ANN. § 206:26-bb (2018); see also *supra* Section II.C.1.

155. See Rocheleau, *supra* note 24.

156. See N.H. Fish & Game Dep’t v. Bacon, 116 A.3d 1060, 1065 (N.H. 2015); see also *supra* Section II.C.1.

157. See *Bacon*, 116 A.3d at 1065 (“The defendant argue[d] that he did not act negligently because he was prepared for the conditions, physically capable, had proper equipment, and had adequately planned his hike.”).

158. See *id.*

159. See Moss, *supra* note 81 (noting that data suggests most rescues are for inexperienced hikers on unfamiliar terrain, occurring between an elevation of 5,000 to 15,000 feet).

160. See *Bacon*, 116 A.3d at 1065 (reasoning that a person violates RSA 206:26–bb by not acting as a “reasonable person would have acted under the same circumstances”); see also Sharples, *supra* note 11 (“The problem is there’s no hard and fast rule for what counts as negligence. Going hiking in the early evening and then getting lost in the dark without a flashlight is considered distinct from an accident such as slipping and breaking your leg . . .”).

is reasonable . . . Is the rock climber who makes a mistake, they ask, more negligent than parents who allow their child to wander into the woods?”¹⁶¹ This highlights the difficulty in determining the negligence standard—the rock-climbing community may deem an activity perfectly reasonable, whereas the government SAR team may disagree and charge for SAR costs.

Notably, because no state employs a negligence *per se* standard¹⁶² agencies must exercise discretion or litigate to determine what constitutes “reasonable” behavior in each particular instance.¹⁶³ No state SAR statute currently enumerates specific behaviors, like hiking after sundown, that would automatically allow the state to recover costs.¹⁶⁴ For this reason, some judicial fact-finding is necessary to determine if the rescued persons acted unreasonably in requiring government rescue.

C. SAR Cost Recovery Programs Do Not Adequately Deter

Moreover, because applying the cost recovery laws is impracticable, these laws likely do not serve the intended deterrence effect.¹⁶⁵ When the standard for liability is a sliding scale of reasonableness, tailoring one’s behavior absent a clear standard is difficult, if not impossible.¹⁶⁶ Although the rationale that “laws like [charging for SAR] could discourage the inexperienced, the young, and people without resources from venturing out,” hikers often have no model of behavior to prevent being charged by the state for rescue.¹⁶⁷ Without a bright-line rule to determine when a recreator would incur liability for rescue, there is no clear indication that hikers would change their behavior in the wilderness or be deterred from entering, to begin with.¹⁶⁸

In fact, though charging for SAR does not prevent inexperienced individuals from entering wilderness areas in the first place, charging may deter outdoor recreators from calling for rescue in a true emergency

161. See Warren, *supra* note 145.

162. See *supra* Section II.C.1.

163. See Zezima, *supra* note 92 (“If a case is found to meet the threshold of negligence, it is passed on to the attorney general, who makes the final decision on whether to bill the hikers.”).

164. See *supra* Section II.C.1.

165. See Tobias, *supra* note 41 (“Implicit in these policies is the message that public services like search and rescue are a financial transaction, and that risk-taking in the wilderness is only for those with backwoods savvy or a big bank account.”).

166. See Sharples, *supra* note 11 (“[I]f you are to hold people responsible for negligence, then there has to be a very clear notion of competence, yet in most backcountry scenarios there is no absolutely correct way to behave.”).

167. See Tobias, *supra* note 41.

168. See Andrew F. Popper, *In Defense of Deterrence*, 75 ALB. L. REV. 181, 183 (2012) (“Cases that result in an articulation of clear norms or principles will have more of a deterrent effect than those that do not.”).

situation.¹⁶⁹ For example, in Colorado, situations in which people did not call for help include “a climber who hobbled down a 3,000-ft. mountain with a broken ankle; a woman who set out on her own to locate her missing husband; [and] a lost and bewildered runner who hid from rescue crews.”¹⁷⁰ The fear that individuals will delay calls for help to avoid being charged for rescue is why the National Association for Search and Rescue (NASAR) opposes charging at all.¹⁷¹ Accordingly, the current SAR systems (especially the policy of charging for rescue) do not adequately deter outdoor recreators from entering the wilderness and may even cause increased harm by delaying SAR requests.

D. *Implementing No-Rescue*

To date, no jurisdiction has implemented a no-rescue wilderness designation.¹⁷² However, federal and state agencies are free to set SAR policy based on the number of resources, public safety, and other social and political grounds.¹⁷³ Therefore, to implement a no-rescue designation, a particular agency must amend or enact a SAR statute to include no-rescue language. The agency can rely on prior case law, which protects from SAR liability as a discretionary function.¹⁷⁴

1. Amending SAR Laws

The legal system gives federal agencies and individual states broad discretion in conducting SAR operations. First, a minority of states have chosen to charge for rescue in order to recover the high costs of rescue.¹⁷⁵ When passing legislation to allow for cost recovery, a state can choose any level of culpability as a basis for recovery. New Hampshire, for example, went so far as to lower the threshold from “recklessness” to “negligence” in order to more easily recoup its SAR expenses.¹⁷⁶ New Hampshire is a

169. See Sharples, *supra* note 11 (“Howard Paul, former president of the Colorado Search and Rescue Board, worries that people will hesitate to call for help if they know it will come with a price tag.”).

170. *Id.*

171. See Tobias, *supra* note 41; see generally *About NASAR*, NAT’L ASS’N FOR SEARCH & RESCUE, <http://www.nasar.org/about/> (last visited Jan. 29, 2020) (NASAR is a national organization that represents the interests of SAR volunteers and organizations).

172. See *supra* Sections II.B–C.

173. See *Johnson v. Dep’t of Interior*, 949 F.2d 332, 339 (10th Cir. 1991) (“[SAR] decisions are grounded in social and economic policy, and thus are shielded from liability under the FTCA.”); see also *Kiokun v. Alaska Dep’t of Pub. Safety*, 74 P.3d 209, 218 (Alaska 2003).

174. See *supra* Section II.B.2.

175. See *supra* Section II.C.

176. See Zezima, *supra* note 92 (describing the amendment of a 1999 New Hampshire law to lower the threshold).

prime example of the amount of control individual states have over SAR.¹⁷⁷

Although states can choose to amend their SAR laws through the legislative process, policies of federal agencies, such as the NPS, are governed by the Plan.¹⁷⁸ Therefore, federal agencies bound by the Plan must make amendments according to procedures set out in the United States National Search and Rescue Committee Interagency Agreement.¹⁷⁹ This committee formulates the SAR Plan for participating agencies.¹⁸⁰ The amendment process requires the committee to notify each applicable agency of the proposed amendment, followed by a 60-day comment period.¹⁸¹ If no agency objects, the proposed amendment is adopted into the SAR Plan.¹⁸²

2. Government Liability for No-Rescue

Although the legislative and administrative processes to implement no-rescue are relatively straightforward, concerns with the level of liability for land managers still exist.¹⁸³ The fear of government liability is legitimate, but the FTCA and the doctrine of assumption of the risk may assuage those fears when federal and state agencies choose to designate no-rescue areas.¹⁸⁴ The FTCA shields agencies from suits “based upon the exercise or performance or the *failure* of a federal or state agency to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government”¹⁸⁵

As interpreted by the Tenth Circuit in *Johnson*,¹⁸⁶ a land manager’s SAR operations fall within the exception to the FTCA.¹⁸⁷ State decisions

177. See Harwell, *supra* note 149, at 36 (arguing that courts give deference to states for discretionary activities, such as implanting SAR laws).

178. *SAR Plan*, *supra* note 23, at 4.

179. U.S. COAST GUARD, NATIONAL SEARCH AND RESCUE PLAN OF THE UNITED STATES, at 18 (2016) <http://bit.ly/2nJ4iSr> (explaining that federal agencies, such as the NPS, voluntarily sign the interagency agreement to be bound by the policy set forth by the National Search and Rescue Committee).

180. *Id.*

181. *Id.*; see also 5 U.S.C. § 553 (2012 & Supp. 2017) (defining a comment period as an opportunity for “interested persons . . . to participate in the rule making through submission of written data, views, or arguments”).

182. See U.S. COAST GUARD, NATIONAL SEARCH AND RESCUE COMMITTEE INTERAGENCY AGREEMENT, at 4 (2016) <http://bit.ly/2tDPLtO>.

183. See Harwell, *supra* note 149, at 35.

184. See Harwell, *supra* note 149, at 35.

185. 28 U.S.C. § 2680 (2012 & Supp. 2017) (emphasis added); see also *supra* Section II.B.2.

186. See *Johnson v. Dep’t of Interior*, 949 F.2d 332, 339 (10th Cir. 1991).

187. See *id.* at 338 (“No statute imposes a duty to rescue, nor are there regulations or formal Park Service policies which prescribe a specific course of conduct for search or rescue efforts. Instead, the decision if, when or how to initiate a search or rescue is left to the discretion of the SAR team.”).

regarding whether to conduct SAR operations are similarly protected as a discretionary function of the responsible agency.¹⁸⁸ Under this authority, both states and federal agencies can decline to provide rescue services, as long as the decision is “grounded in social, economic, and political policy.”¹⁸⁹ Courts give deference to decisions concerning safety, human resources, economic resources, and the desired level of governmental interference (which should be minimal according to wilderness principles).¹⁹⁰ Agencies could, therefore, cite to social, economic, or political rationales when choosing to implement a no-rescue designation to protect themselves from liability.

Although courts have given deference to SAR decisions, liability is also limited under the assumption of the risk doctrine.¹⁹¹ Under this doctrine, an individual who had (1) knowledge of the risk and appreciated the magnitude of the risk; and (2) voluntarily met that risk, would be prohibited from subsequently recovering for the alleged negligence of the land manager.¹⁹² In the context of no-rescue wilderness designations, land managers could use the assumption of the risk as a shield to limit their liability by taking steps to adequately warn recreators before they enter.¹⁹³

Offering more support for a defense to liability is the remote nature of the no-rescue areas:¹⁹⁴ undeveloped and remote areas carry with them more obvious inherent risk, decreasing the liability compared to constructed trails that are monitored closely by land managers.¹⁹⁵ Because no-rescue designations are inherently risky and land managers would have little to no involvement in maintaining the area, assumption of the risk would, therefore, cabin any negligence claims against the land manager.

3. Case Study

The following hypothetical case study exemplifies how no-rescue wilderness could be implemented in an existing location today. When land managers set out to designate an area as a no-rescue area, they should make this selection based on the guidelines set forth by McAvoy and Dustin.¹⁹⁶

188. *See* *Kiokun v. Alaska Dep’t of Pub. Safety*, 74 P.3d 209, 218 (Alaska 2003) (holding that initiating a SAR is a decision of policy and protected under discretionary function immunity).

189. *Berkovitz v. United States*, 486 U.S. 531, 536, (1988).

190. *See Johnson*, 949 F.3d at 339.

191. *See* 30 AM. JUR. 3D *Proof of Facts* § 161 (2019) (“Negligence claims for sports injuries are commonly met with an assumption of risk defense. This defense has traditionally been a complete bar to the plaintiff’s recovery, and is based on the maxim ‘volenti non fit injuria,’ meaning ‘no wrong is done to one who is willing.’”).

192. *See id.*

193. *See* Harwell, *supra* note 149, at 36.

194. *See id.* (explaining that less legal liability for land managers is assumed in “primitive and unimproved” areas).

195. *See id.*

196. *See supra* Section III.A.2.

Lands that are appropriate for no-rescue wilderness designations are (1) remote and undeveloped land area of a park; (2) lack any informational or navigational signage; and (3) absent of any man-made facilities, including hiking trails or campsites.¹⁹⁷ Most importantly, when the area is designated as no-rescue, the managing agency must alert the recreators who enter that they will not be entitled to SAR.¹⁹⁸

The focus of this case study is Mount Hood National Forest (Mt. Hood), a federally managed land area located near Portland, Oregon.¹⁹⁹ Mt. Hood is a fitting location for a no-rescue designation because the land area is remote, a popular destination for rock climbers, and frequently garners media attention for injuries and rescues.²⁰⁰ The United States Forest Service²⁰¹ should identify areas in Mt. Hood that are the most remote and undeveloped and designate as the no-rescue zone. In doing so, Oregon could base this determination on McAvoy and Dustin's guidelines, such as the lack of existing signage and trails developed by Forest Service personnel.²⁰²

The Forest Service should consider an area known as "Devil's Kitchen," a difficult climb of 11,239 feet in elevation, located in the Mt. Hood Wilderness.²⁰³ This area is a remote, undeveloped location and has been the site of a recent wrongful death suit involving failure to provide SAR services.²⁰⁴ Next, the Forest Service must publicize the designation. Publication is possible via posting information on the Mt. Hood website, at entrances to the National Forest land, and with signage at the perimeter of the no-rescue zone. As McAvoy stated, "the managing agency would be responsible for providing basic information describing the area, informing users of the principal risks in the proposed outing and informing them that under no circumstances would outside assistance be available to anyone while in the area."²⁰⁵

197. See McAvoy & Dustin, *supra* note 136, at 4–5.

198. See *id.*

199. See *Mt. Hood National Forest*, USDA.GOV, <https://www.fs.usda.gov/mthood> (last visited Jan. 29, 2020) ("[T]he Mt. Hood National Forest extends south from the strikingly beautiful Columbia River Gorge across more than sixty miles of forested mountains, lakes and streams.").

200. See Herrel, *supra* note 35 ("Every time there's a high profile rescue like the televised episodes on Mt. Hood, there's always plenty of pundit thundering about irresponsible adventurers.").

201. The Forest Service is a federal land management agency under the Department of Agriculture that oversees land owned by the Department. See *Meet the Forest Service*, USDA.GOV, <http://bit.ly/317rlyh> (last visited Jan. 29, 2020).

202. See McAvoy & Dustin, *supra* note 136, at 5.

203. See *Devil's Kitchen Headwall*, TIMBERLINE MOUNTAIN GUIDES, <http://bit.ly/2IJ7zlr> (last visited Jan. 29, 2020).

204. See Flynn, *supra* note 1; see also Aimee Green, *Family of dead Mount Hood climber settles lawsuit over delayed helicopter rescue for \$25,000*, OREGONLIVE (May 4, 2019), <http://bit.ly/2OGugRo>.

205. See McAvoy & Dustin, *supra* note 136, at 5.

For Mt. Hood, the no-rescue designation would have benefits such as fewer SAR operations and deter outdoor recreators from entering remote and potentially dangerous mountain areas.²⁰⁶ The rock-climbing community of Mt. Hood would also benefit from the opportunity to “experience self-reliance” without the safety net that SAR provides.²⁰⁷ Although the guidelines identified by McAvoy and Dustin provide a framework for identifying no-rescue zones, land managing agencies should be free to use their expertise and judgment to determine where and how they choose to implement a no-rescue designation.

IV. CONCLUSION

SAR operations exist to help people in need of emergency services when they are lost or injured in natural areas.²⁰⁸ With the growing popularity of state and national parks, however, the government agencies responsible for administering SAR are overburdened and underfunded.²⁰⁹ As a result, the traditional regime of government-funded SAR has been amended by states to allow for cost recovery directly from the rescued person.²¹⁰

Despite the minority approach that allows a state to recoup the financial costs associated with SAR, uncertainty exists about which behaviors trigger the rescuer to be charged and whether legal liability may nonetheless endure for negligent SAR operations.²¹¹

Accordingly, government agencies that manage remote or wilderness lands should employ a system of no-rescue wilderness areas, in which the agency is prohibited from conducting SAR.²¹² A no-rescue designation, while inappropriate for some areas,²¹³ will deter the inexperienced from entering natural lands, reduce the high financial burden of conducting SAR, and remove questions of liability for land managers that otherwise would voluntarily assume the duty to rescue.²¹⁴ Land managers should carefully select locations for no-rescue designation, using the guiding factors identified to ensure that the natural wonders are protected for future generations.²¹⁵

206. *See supra* Section III.A.3.

207. *See supra* Section III.A.3.

208. *See supra* Section II.A.

209. *See supra* Section II.A.

210. *See supra* Sections II.B.C.

211. *See supra* Section III.B.

212. *See supra* Section III.A.

213. *See* McAvoy & Dustin, *supra* note 136, at 4–5 (noting that areas suitable for no-rescue are only those that are remote in nature and lack man-made development or facilities).

214. *See supra* Section III.A.

215. *See supra* Section III.A.

Unquestionably, no-rescue has clear benefits in the context of preserving resources and limiting liability. But it also supports the legislative intent behind the Wilderness Act: “A wilderness, in contrast with those areas where man and his works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain.”²¹⁶

216. 16 U.S.C. § 1131 (2018).