RISK MANAGEMENT

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Risk Management

Risk management, the process of evaluating and limiting exposure to potential liability, is a fundamental concern of land managers and owners. When evaluating recreational activities that are perceived to involve an unusual degree of exposure to risk, risk management often becomes an issue of heightened concern; caving, kayaking, mountain biking, canyoneering, and rock climbing are but a few examples of the types of activities that fall under this scrutiny. In an age when outdoor activities have been overly sensationalized by the media, the perception of risk associated with these activities is often overstated and misunderstood. Private land owners and, on occasion some public agencies, consider restricting, or even prohibiting activities like climbing under the false pretense that by doing so, they're engaging in effective risk management.

Due to numerous protections afforded under a variety of statutes that limit liability for land managers and private landowners who open their lands for public use, it is not necessary to restrict or prohibit recreational activities as a means to reduce exposure for potential liability.

Broad liability limitations are provided for landowners, land managers, and agencies which allow and provide for recreation opportunities such as climbing. These acts, statutes, and provisions include:

POWERED BY CLIMBERS

DISCLAIMER & WARNING: The following information is provided as a general overview of the ranges of issues related to risk management for climbing on public lands. This includes, but is not limited to, rock and ice climbing, mountaineering and bouldering. The issues and opinions presented here are applicable to private individuals climbing for recreational purposes and are not intended to address issues that arise from commercial guiding, organized events, or group activities. The statutes and acts cited, and information contained herein are all subject to change, and varies according to the state or federal jurisdiction in which the issues arise. This information is not provided as legal advice. Please contact your attorney or risk management office for specific legal advice.

Governmental Immunity Acts & Governmental Tort Claim Acts

As a general rule, political subdivisions of the government, including federal and state agencies, municipalities, and county governments, and their employees are generally protected from liability for acts conducted within the scope of their duties and employment unless expressly waived by statute. This is also referred to as sovereign immunity.

Historically, government agencies have enjoyed immunity for the consequences of the decision of federal land managers and local officials regarding climbing. These decisions, based on the land manager's evaluation of a myriad of competing concerns, are discretionary and, consequently, immune under the discretionary function of the employees' job. When the liability protections of governmental immunity and its exception are coupled with the protections offered by states' statutory liability protections in the form of Recreational Use Statutes, finding sovereign liability becomes almost an adjudicatory impossibility.

Governmental agencies cannot be sued without its consent or without a specific waiver of its sovereign immunity. United States v. Orleans, 425 U.S. 807 (1976). A limited waiver of sovereign immunity has been explicitly granted by the Federal Tort Claims Act ("the Act"). 28 U.S.C. § 1346(b). The Act waives 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 while acting within the scope of his office or employment, 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. Id.

This waiver of immunity is subject to the "discretionary function exception" ("the Exception"), which states that the provisions of section 1346(b) of the Act do not apply to:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or 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 be abused. 28 U.S.C. § 2680 (emphasis added).

In Berkovitz v. United States, 486 U.S. 531 (1988), the Supreme Court set out a two-part test to determine the scope of the Exception. First, for a court to properly find subject matter jurisdiction for a claim under the Act, it must determine whether the challenged conduct "is a matter of choice for the acting employee" or whether it is specifically prescribed by a federal statute, regulation, or policy. Zumwalt v. U.S., 928 F.2d 951 (10th

Cir. 1991), *quoting* Berkovitz, 486 U.S. at 536. "If the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect." Id.

Second, if the conduct is one of judgment or choice, "a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield." Id. The Exception was designed "to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." Id. at 536-37. Therefore, the decision of the governmental actor is only protected if "based on considerations of public policy." Berkovitz, 486 U.S. at 537. If the Exception applies—that is, the agency has exercised its discretionary judgment grounded in social, economic or political policy—then claimants are denied jurisdiction to raise negligence claims.

Climbing Activity and Negligence Claims on Federal Land: *Johnson v. U.S.*

In applying the Act to claims specific to climbing activity, the court in Johnson v. U.S., 949 F.2d 332 (10th Cir. 1991) held that the National Park Service's climbing regulation and rescue decisions in Grand Teton National Park were shielded from liability under the Exception. In noting that there was "no statute, regulation, or policy specifically prescrib[ing] a course of action for the National Park Service to follow", the court found that "[d]ecisions as to the extent or nature of mountain climbing regulation are truly the product of the Park Service's independent judgment—they are discretionary." Id. at 337. Finding that the plaintiff had no cause of action giving rise to either a negligence claim based on a breach of a duty to warn, or under a negligent rescue scenario, the court clearly announced that:

> decisions if, when and how to regulate mountain climbing in Grand Teton National Park go to the essence of the Park Service's judgment in maintaining the Park according to the broad statutory directive. By their very nature, these decisions involve balancing competing policy considerations pertaining to visitor safety, resource availability, and the appropriate degree of governmental interference in recreational activity. The Park Service's actions, insofar as they relate to the regulation of mountain climbing in Grand Teton National Park, are therefore shielded from judicial review by the discretionary function exception. Id.

Thus, the court found that climbing invoked social, economic or political policy considerations, relying on the government's assertions that "the inherent dangers of mountain climbing are patently obvious." Johnson, 949 F.2d at 337.

The Court recognized that "the record here indicates that the Park Service's decision not to place additional warnings in the Teton Range, whether explicit or implicit, was part of the overall policy

decision to limit governmental regulation of climbing." As the 10th Circuit recognized in a later case, "[s]ince the overall decision (in Johnson) to minimally regulate climbing was a discretionary policy decision, the component decision to not post warnings was also protected by the discretionary function exception." Kiehn v. United States, 984 F.2d 1100, 1104 (10th Cir. 1993). Thus the discretion inherent to the Park Service's general hands-off policy applies generally to all agency decisions regarding climbing.

Recreational Use Statutes

"Recreational Use Statute" is a term given to legislation generally intended to promote public recreational use by limiting the liability of landowners toward persons entering for such purposes. These laws, which exist in some form in all 50 states, provide limitation on a landowner's liability for personal injuries or property damage suffered by land users pursuing recreational activities on the owner's land, with the provision that no fee is charged for that use. The underlying policy of a Recreational Use Statute is that the public's need for access to recreational land has outpaced the ability of local, state, and federal governments to provide such areas and landowners should be encouraged to help meet this need. Recreational Use Statutes generally provide that a landowner does not owe either a duty of care to keep the property safe for entry or use, or a duty to give any warning of a dangerous condition, use, structure, or activity on their property to anyone using his of her property *for recreational purposes and without charge*.

Under common law (explained below), the landowner has different duties of care depending on whether a person was on the land as a trespasser, licensee, or an invitee. The greatest duty of care was owed to an invitee and no duty was owed to an unknown, adult trespasser. Under a Recreational Use Statute, recreational users, who under common law are licensees, are treated in the same manner as trespassers and thus the landowner owes them no duty of care. The protection of the statute is lost, however, if the landowner charges for the use of the land or if the landowner is guilty of malicious conduct.

Who is a landowner?

In order to be protected under a Recreational Use Statute, a person must qualify as an "owner" under the statute. Most Recreational Use Statutes broadly define "owner" to include the legal owner of the land, a tenant, lessee, occupant or person in control of the premises. Some statutes also consider the holder of an easement an "owner."

Recreational Use Statutes *do not grant immunity*, i.e., provide that the landowner cannot be held liable, rather they

- limit the duty of care owed by a landowner to recreational users to that of a trespasser, and
- limit the total amount of the landowner's liability

The protections afforded under Recreational Use Statutes vary from state-to-state, and therefore it is recommended to consult with a local attorney to determine the applicability of these statutes to your public lands. The Recreational Use Statutes for all 50 states are found at: http://www.law.utexas.edu/dawson/recreate/recreate.htm

Assumption of Risk Doctrine

People assume the risk of injury or damage if they voluntarily or unreasonably expose themselves to injury or damage with knowledge or appreciation of the danger and risk involved. This doctrine is fundamental to all forms of outdoor recreation including climbing. Assumption of risk requires knowledge of the danger, and consent to it. As a practical matter assumption of risk has broad applicability to recreational rock climbing and is frequently used as an affirmative defense in recreational sports cases. In other words, someone engaged in an obviously risky activity like rock climbing assumes the risk of injury as a result. The defense is generally effective regardless of whether the theory of recovery is based on negligence, reckless conduct, or strict liability.

Attractive Nuisance Doctrine

This doctrine imposes liability for landowner negligence resulting in a physical injury to a child (for example in Colorado this doctrine only applies to children under 14 years of age). It was developed to permit recovery when a landowner

- keeps an artificial (non-natural) condition on his premises which is an attraction or allurement to a child
- involves an unreasonable risk of injury, *and*
- is located in a place where it might be expected that children are likely to congregate. Generally the object that caused the attraction must be unusual and extraordinarily attractive, not an ordinary matter.

Under this doctrine could a climbing area or cliff be construed as an attractive nuisance? Not likely. A case in Kansas City, Missouri (*Bagby v. Kansas City, 92 S.W.2d 142) (MO, 1936*) denied recovery to a boy injured by rockfall while playing on a cliff. The city was held NOT negligent in failing to post warning signs indicating the danger of climbing. The opinion stated: "the rock cliff itself was notice of danger, more impressive than any warning sign....to hold that the city was negligent in not making the cliff reasonably safe for a children's playground would mean the elimination of the cliff."

State Common Law

Underlying the analysis of a landowner's potential liability for climbing-related injuries is common law (as compared to laws created by statute or agency rulemaking) which includes the concept of negligence. Common law is particular to each state, and consultation with a local attorney is recommended to determine the common law in your state.

Generally, negligence exists where a person (in this case a landowner) owes a recognized duty of care to take reasonable precautions to prevent or alleviate unreasonable risks of harm to other persons and fails to do so.

The degree of duty imposed on landowners depends on the status of the person entering the premises. The three general categories recognized by common law are trespassers, licensees, and invitees.

» Trespasser

The legal duty owed to a trespasser is slight, only to use not more force than is necessary to terminate the trespass or not to intentionally injure the trespasser.

» Licensee

A licensee is a person who enters the premises of another, with permission, for their own purpose. The legal duty generally owed to licensees consists primarily of warning them of any dangerous condition, unless specifically exempt by statute law.

However, an important exception to a landowner's duty to reasonably guard or warn others of harm is the common law idea that no duty to guard or warn exists where the risk is an "open and obvious natural condition." The primary reason for this exception is that a land user is as capable as the owner of recognizing and appreciating the risk of injury presented by an "open and obvious" danger, and because it is "natural," the owner does not bear responsibility for its creation. A popular example of an "open and obvious natural condition" is a cliff. In the case, Roten v. United States, the court concluded that the U.S. Forest Service had not breached its standard of care by not placing warning signs near a cliff and noted that "the court believes….that those coming to a recreation area featuring rugged, natural terrain as its main attraction are best guarded and protected by the obvious imposing dangers of the cliffs they come to see." The "open and obvious natural condition" of cliffs means that, in nearly every situation, landowners will not appreciably increase their liability merely by allowing climbing.

» Invitee

An invitee is a person coming onto the premises for a purpose related to the business of the owner such as fee recreation. The legal duty to protect an invitee is higher than that owed a licensee. The invitee has a right to expect that the premises are reasonably safe and that warnings will be given about any conditions on the premises that cannot be made safe by the landowner.

The Effect of these Laws on Recreational Rock Climbing on Public Lands

Climbing: A Welcome and Historic use on our Public Lands

Rock climbing, ice climbing, bouldering and mountaineering are practiced almost universally on our nation's diverse public lands. Throughout our National Park system, as administered by the National Park Service, climbing is considered a "welcome and historical use." In parks like Yosemite, Joshua Tree, and Rocky Mountain climbing has been a popular pursuit for more than half a century. While the NPS supports and encourages climbing, it also recognizes that "climbing poses personal risk to the participants, and that climbers bear the sole responsibility for their own safety while pursuing the activity. Any greater involvement by land managers in climber safety changes the liability position" (City of Rocks National Reserve, NPS, Climbing Management Plan, March 1998).

Climbing is also a welcome and historical use on other agency lands including hundreds of sites managed by the US Forest Service, Bureau of Land Management, US Fish & Wildlife Service, and Army Corp of Engineers. At the state and regional level, climbing is equally popular. State parks in New Hampshire, New York, Pennsylvania, West Virginia, North Carolina, Wisconsin, Colorado, South Dakota, Utah, Washington and California, to name but a few, offer a variety of rock climbing opportunities.

Climbing is also practiced and encouraged on open space lands, whether managed by local government, or by non-profit organizations. For example, the Shawangunks of New York, one of the nations' most renowned climbing sites, is owned and managed by the Mohonk Preserve as part of a 7,000 acre nature preserve. The Nature Conservancy owns climbing sites in Utah and Connecticut. In Colorado, the Access Fund owns and manages the Golden Cliffs Preserve, an open space preserve that offers hiking and climbing, in additional to several other climbing areas.

Conclusions about Exposure to Liability

The combined affect of Government Immunity Acts, Recreational User Statutes, and the Assumption of Risk and Attractive Nuisance Doctrines has created an atmosphere in this country where landowners, land managers, and agencies can and should encourage important and historical uses of our public lands like rock climbing, without the fear of being exposed to frivolous liability lawsuits. We recommend that you consult with local legal counsel regarding any specific concerns about the legal issues presented in this discussion, or any others.

Additional Risk Management Issues & Strategies

Climber Safety

Safe climbing practices are fundamental to fostering and sustaining responsible enjoyment of our public lands. Both the manufacturers of climbing equipment, and the climbing community continually focus on developing new methods and technology to improve safety. Making more durable ropes, building stronger and longer-lasting safety anchors, and designing more effective climber education programs are but a few of the areas where safety has been enhanced in recent years. We encourage land managers to promote the highest safety standards possible, but acknowledge that this must be carefully approached in order to limit the potential liability of the landowner, land manager or agency.

While supporting safe climbing practices through educational programs like "Climb Smart" are not likely to increase exposure to liability, specifying the type of equipment climbers can use, or implementing certification programs that attempt to "qualify" climbers, undoubtedly will increase such exposure. It should never be the intent of land managers or a climbing management program, to judge or physically control safety as it relates to rock climbing, climbing equipment, or the conditions present on climbing routes.

Public Safety

On occasion climbing takes place in areas where other park users can observe, or at times even interact directly with climbers. In certain cases this can potentially affect public safety. For example, in Yosemite, where popular climbing areas are located directly above roads or trails, management measures have been taken to reduce the risk of rockfall to the public. In contrast, at Devils Tower National Monument, the loop trail that circles the tower is a popular spot from which visitors can observe climbers. In this case the trail is far enough back from the base of the tower to not place visitors at risk of rockfall.

Due to widely varying circumstances and conditions there are no steadfast rules one could easily apply to public safety concerns. Instead a case-by-case evaluation should be made prior to determining the best approach for addressing public safety concerns. In our experience most can be amicably resolved while continuing to provide for climbing opportunities.

Here are a few examples of some typical public safety scenarios:

Example A

A popular hiking trail runs adjacent to the base of a climbing cliff. Land managers are concerned that hikers could be injured by rock fall.

» Potential Solution

Realign trail far enough back from cliff to provide reduced risk of rockfall. In addition to reducing the likelihood of rock fall reaching the trail, this will also serve to segregate differing use patterns, thus eliminating potential user conflicts.

Example B
A spur trail leading from a popular hiking trail provides direct access to a climbing site. The spur is steep and potentially dangerous for the average hiker, and since it only provides access for technical climbing the land manager wants to discourage use by hikers.

» Potential Solution
Install signage at start of spur stating: This is not a through trail - technical climbing access only. Proceed at your own risk!

Example C
Climbing takes place on a popular park overlook. A potential public safety matter exists: local land managers are concerned that overlook visitors may be attracted to stray dangerously close to the edge of the cliff by the presence of the climbers.

» Potential Solution
Have climbers install lowering anchors (aka top anchors) at the top of each route in order to eliminate the need for climbers to “top-out” on the routes. Such anchors should be positioned far enough below the top edge of the cliff as to not be visible from the top of the overlook, hence visitors will not be aware that climbing is taking place and therefore less-prone to stray near the edge of the cliff.

Fixed Safety Anchors

Fixed safety anchors including bolts, pitons and other in-situ gear, are a critical component for safe climbing. In addition, when used as top anchors they often provide environmental benefits by reducing cliff top impacts that result from foot traffic on the delicate soils near the edge of the cliff. Fixed safety anchors have historically been installed and maintained by climbers. This has served an important role in limiting potential liability for landowners, land managers, and agencies.

Over the past decade an increasing number of land managers have become involved in the management of climbing. One of the most challenging issues has been how to deal with fixed anchors, since from a risk management perspective they pose a unique challenge. As a general rule, the placement and maintenance of fixed anchors should be undertaken by climbers and climber stewardship groups, and not by the land management agency. This approach will keep land managers as far removed from potential legal liability issues as possible, and is therefore a crucial risk management consideration. The fundamental issue is that the more you regulate, the more likely you are to create legal obligations and duties. Therefore, the less an agency regulates fixed anchors, the less potential liability they will be exposed to.

There are a handful of cases where agencies have chosen to be involved, at least to a limited degree, in the management of fixed anchors. Usually the respective agencies have worked in close collaboration with the local community to insure that placement and maintenance of the anchors remains the sole responsibility of climbers, thereby limiting both the agencies’ responsibility and potential liability. Existing statutes also indicate that land managers can further limit their liability by not becoming

involved in decisions of when and where fixed anchors should be placed. Climbers and climber organizations have the expertise to install and maintain these anchors, and thus it is appropriate that climbers should provide this valuable community service.

Enhancing Risk Management Through Creative Means

Warning Signage

Generally, it is appropriate to enhance risk management through the use of signage targeted at warning climbers and other recreationists of dangerous conditions, such as the presence of a cliff area. Such signage can also be used to officially post disclaimers like “Warning – Climb At Your Own Risk.” However, Common Law and Recreational Use Statutes & Landowner Liability Acts, limit the duty of care owed by a landowner to recreational users, and generally state the landowner has no responsibility to give warning of a dangerous condition (such as a cliff) or activity (such as climbing). As a result, land managers are not required to post such signage.

Below is a sample warning sign that could be posted at the bottom and or top of a cliff area. Lettering should be in a highly visible color that contrasts with a light background color, and the text should be visible from a reasonable distance.

Sample Warning Signage

WARNING - CLIMB AT YOUR OWN RISK

Obtain proper training and guidance before climbing.

YOU ALONE ARE RESPONSIBLE FOR YOUR SAFETY.

Rock and Ice Climbing and associated activities (such as Rappelling) are inherently dangerous.

SUBSTANTIAL RISK OF INJURY AND DEATH EXIST!

Permission to climb here is conditioned upon your assumption of all risk of injury to person and property. Climbing risks include, but are not limited to: falling; collisions with both manmade and natural objects; falling rocks, ice and other debris; failure of equipment or anchors; adverse weather; human error; slippery surfaces; negligence of other users.

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