

Now You Can!

New Policies for Liability Release Agreements
Insurance and Indemnification
on Federal Lands

WRMC 2025
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Introductions



How many of you...



Agenda

Topics We'll Be Covering

Key legal tools:

- **Liability release**
- **Indemnity**
- **Insurance requirements**

Key Questions:

- 1. What were the previous federal rules?**
- 2. What did the EXPLORE Act change?**
- 3. What should you do now?**

About Releases

- Usually release all claims
 - including negligence
 - but not gross negligence
- Protects from frivolous claims
- Enforceable for adults in most states
- Most states do not allow a parent to release a child's claim but some do



Releases – what was the problem?



National Park Service and
Forest Service (some regions)

Prohibited the use of releases and

Suggested had to use Visitor
Acknowledgement of Risks (VAR)

VAR – what was the problem?

- Does not include a liability release
- Probably conflicts with other provisions in your release
- It is not usually clear when which document applies
- So should not use both VAR and your release



Elliotsville Plantation, Inc.

How did orgs address that?

- NPS and USFS allowed orgs to create language to comply with the rule
- Created carve out language in the release
 - What applies when on federal land
 - “For activities that occur on National Park Service and U.S. Forest Service Region Four land and to the extent required by law...”
- But, wordy and complicated



All About Indemnity

- A promise by one party to protect a second party against a claim (usually by a third party)
- Two kinds:
 - Parent/participant protects outdoor organization from claims
 - Organizations protect federal agencies from claims by participants

Indemnity example 1 - Parent/Participant protects Organization

- Parent/participant agrees to protect outdoor organization from certain claims
- Protects organization from claims brought by a child
 - Achieves a similar result to a liability release for a child
- Protects organization from claims caused by the child
- *No problems or changes to this kind of indemnity*



Dave Wilson/flickr

Indemnity Example 2 -- Org protects agency



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- A outdoor organization seeking a permit is required to:
 - Protect the permit issuing agency from claims brought against the agency.
 - Brought by one of the organization's participants or a participant's family member.
- The organization is protecting the Agency.

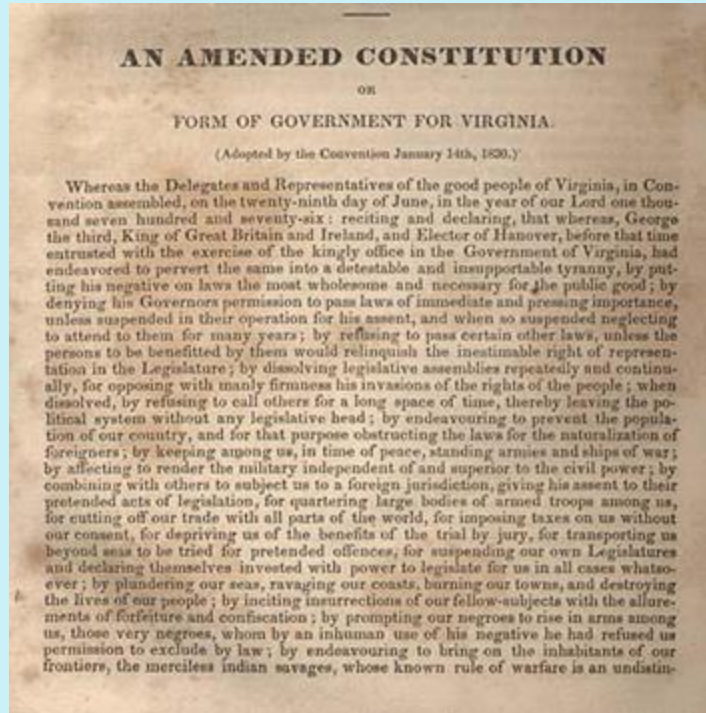
Indemnification – what was the problem?

- Problems arise when state and local government entities seek special recreation permits.
 - State universities.
 - Local park and recreation agencies.
- *Not a problem for private entities.*



Ohio University

Indemnification By State Entities



- Permitting agencies require indemnification.
- State government entities cannot provide indemnification *because*:
 - Indemnity is for an unlimited amount.
 - State constitutions limit spending beyond state budgets.

How did state entities address that?

- Name the agency as an additional insured.
- Attach a document disclaiming indemnification.
 - Creates ambiguity in contract terms.
 - May not actually comply with agency policy.
- Sign the permit unaware...



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The EXPLORE Act comes to save the day!

- Public Law 118-234 signed on January 4, 2025.
- Capstone of a decade of work.
- Lots of recreation-related content.
- Title III seeks to improve permitting for outdoor organizations.
- Section 319 - Liability (codified at 16 USC 8548)



Eric Schuette

Scope of the Act



- Generally, “FLREA” agencies
 - USFS and BLM -- yes.
 - NPS – no [CMIA].
- Exception - Section 319 covering liability (16 USC 8548).
 - Includes NPS Commercial Use Authorizations.
 - Does not include Concession Contracts (but NPS acting like included).

Overview of Section 319 (16 USC 8548)

- Subsection (a) - Insurance requirements.
- Subsection (b) - Indemnification by government entities.
- Subsection (c) - Exculpatory Agreements (releases).

138 STAT. 2836

PUBLIC LAW 118-234—JAN. 4, 2025

Public Law 118-234 118th Congress

An Act

To improve recreation opportunities on, and facilitate greater access to, Federal public land, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

—Jan. 4, 2025—
[U.S. GPO]

Expanding Public
Lands Outdoor
Recreation
Experiences Act,
16 USC 8401
note

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the “Expanding Public Lands Outdoor Recreation Experiences Act” or the “EXPLORE Act”.

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.

Sec. 2. Definitions.

TITLE I—OUTDOOR RECREATION AND INFRASTRUCTURE

Subtitle A—Outdoor Recreation Policy

Sec. 111. Congressional declaration of policy.
Sec. 112. Identifying opportunities for recreation.
Sec. 113. Federal Interagency Council on Outdoor Recreation.
Sec. 114. Recreation budget stream.

Subtitle B—Public Recreation on Federal Recreational Lands and Waters

Sec. 121. Biking on long-distance trails.
Sec. 122. Promoting America’s rock-climbing.
Sec. 123. Range access.
Sec. 124. Stewardship of overnight campsites.
Sec. 125. Federal priority land needs.
Sec. 126. Camp and shelter preservation enhancement.
Sec. 127. Multisport and nonmotorized access.
Sec. 128. Aquatic resource selection assistance.

Subtitle C—Supporting Gateway Communities and Addressing Park Overcrowding

Sec. 131. Gateway communities.
Sec. 132. Improved recreation visitation data.
Sec. 133. Monitoring for regional recreation decision making.

Subtitle D—Broadband Connectivity on Federal Recreational Lands and Waters

Sec. 141. Connect Our Parks.
Sec. 142. Broadband internet connectivity at designated recreation sites.
Sec. 143. Public lands telecommunications cooperative agreements.

Subtitle E—Public-Private Parks Partnerships

Sec. 151. Authorization for lease of forest service administrative sites.
Sec. 152. Partnership agreements creating tangible savings.
Sec. 153. Partnership agreements to enhance Federally owned campgrounds, resorts, cabins, and visitor centers on Federal recreational lands and waters.
Sec. 154. Fostering and sustaining opportunities for Federal recreational lands and waters.
Sec. 155. Pay-for-performance projects.

What the EXPLORE Act does – Insurance



Bob Wick/BLM

- Subsection (a) – Liability insurance required.
 - “Commensurate with the level of risk.”
 - Include the U.S. as an add’l insured.
 - New exception for low risk activities.
 - Low risk as determined by the Secretary.
 - Most outfitter and guide services considered high risk.

What the EXPLORE Act does – Indemnity

- Subsection (b) – indemnification requirement waiver.
 - “To the extent” that the government entity is limited in providing indemnity.
 - Must meet insurance minimums.
 - Must name U.S. as add’l insured (CGL policy, self-insurance or both).



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What the EXPLORE Act does - Releases

- Liability release agreements
 - Federal land managers can't prohibit use of "exculpatory agreements" (releases)
 - Applies to:
 - Recreation service providers
 - Commercial Use Authorization (CUA) holders
 - Does not officially apply to concessionaires

What the EXPLORE Act does - Releases

New Requirements:

- Need to add the United States as a released party
- Release may not waive claims for:
 - Gross negligence
 - Recklessness
 - Willful misconduct



Bob Wick/BLM

Insurance – What should you do now?



- Determine if “low risk” activity.
- If not, review your insurance coverage.
 - Ensure that it meets the minimum requirements.
 - Name the U.S. government as additional insured.

Indemnity – What should you do now?

- *Private entities and schools – no change.*
- Government entities:
 - Determine extent of indemnity prohibition.
 - Check insurance coverage(s).
 - Ensure they meet minimums.
 - Ensure they name U.S.A. as additional insured.



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Releases - What should you do now?



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- Liability release agreements
 - Remove carve out language
 - Stop using the VAR
 - Add US to released entities
 - May need to add exact language (like that provided by NPS)
- Confer with an attorney

Releases - What should you do now?

- Memo from US Dept of the Interior to NPS on this issue
- Includes exact language to be inserted:

“The undersigned further waives liability of the United States and acknowledges and agrees that the United States and its officers and employees are fully released from any liability for injuries, damages, or losses that the undersigned sustains as a result of or in connection with the undersigned’s participation in the activity.”

Implementation

- Section 319 - two year implementation deadline.
- Agencies have already changed policy regarding release forms.



In the permit process



- Memo states:
 - NPS “will not as a matter of standard practice, collect, review, or approve the...exculpatory agreements.”
- If you are asked for your release...

Take Home Action Steps

- Educate your staff about new rules.
- Review your liability release and other docs (with help of an attorney) to remove carve out, add U.S.A., and any required language.

- Stop using the VAR.
- For state entities, determine eligibility for relaxed indemnification requirement.
- Add U.S.A. as additional insured on your policy if required.

Questions?

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