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

AN AMENDED CONSTITUTION

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FORM OF GOVERNMENT FOR VIRGINIA

(Adopted by the Convention January 14th, 1830.)

Whereas the Delegates and Representatives of the good people of Virginia, in Convention assembled, on the twenty-ninth day of June, in the year of our Lord one thouand seven hundred and seventy-six; reciting and declaring, that whereas, George the third, King of Great Britain and Ireland, and Elector of Hanover, before that time entrusted with the exercise of the kingly office in the Government of Virginia, had endeavored to pervert the same into a detestable and insupportable tyranny, by putting his negative on laws the most wholesome and necessary for the public good; by denving his Governors permission to pass laws of immediate and pressing importance, unless suspended in their operation for his assent, and when so suspended neglecting to attend to them for many years; by reflixing to pass certain other laws, unless the persons to be benefitted by them would relinquish the inestimable right of representation in the Legislature; by dissolving legislative assemblies repeatedly and continually, for opposing with manly firmness his invasions of the rights of the people; when dissolved, by refusing to call others for a long space of time, thereby leaving the political system without any legislative head; by endeavouring to prevent the population of our country, and for that purpose obstructing the laws for the naturalization of foreigners; by keeping among us, in time of peace, standing armies and ships of war; by affecting to render the military independent of and superior to the civil power; by combining with others to subject us to a foreign jurisdiction, giving his assent to their pretended acts of legislation, for quartering large bodies of armed troops among us. for cutting off our trade with all parts of the world, for imposing taxes on us without our consent, for depriving us of the benefits of the trial by jury, for transporting us beyond seas to be tried for pretended offences, for suspending our own Legislatures and declaring themselves invested with power to legislate for us in all cases whatsoever; by plundering our seas, ravaging our coasts, burning our towns, and destroying the lives of our people; by inciting insurrections of our fellow-subjects with the allurements of forfeiture and confiscation; by prompting our negroes to rise in arms among us, those very negroes, whom by an inhuman use of his negative he had refused us permission to exclude by law; by endeavouring to bring on the inhabitants of our frontiers, the merciless indian savages, whose known rule of warfare is an undistin-

- 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...



Elliots ville Plantation, Inc.

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 apportunities on, and facilitate greater access to, findered public land, and for other purposes He it exacted by the Senate and House of Representations of the United States of America in Congress assembles RECTION 1. REPORT TITLE; TABLE OF CONTENTS. (a) SHORT TYLE .- This Act may be cited as the "Expanding Lends Outdoor Recreation Experiences Act or the the TABLE OF CONTENTS .- The table of contents for this Act Sec. 1. Short title table of assistants. Sec. 2. Defaultors. TITLE 1-OUTDOOR EXCREATION AND INFRASTRUCTURE Buletitle A-Outdoor Servention Policy Congressional declaration of policy. Modifying apparticulties for increasion. Federal Interruptory Council on Outdoor Stemation. Secretion budget crossrue. Bubbble 5--Public Receivables on Pederal Recovational Lands and Waters 101. Sking or long-dainers beds. 101. Protecting America's rock-similary. Preserve Avernor vick conteng.
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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, selfinsurance 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

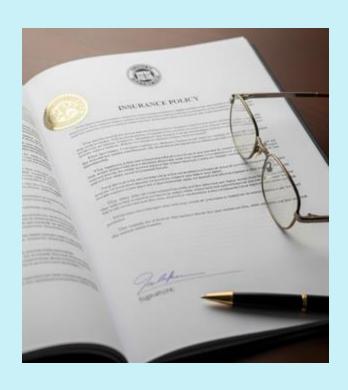
New Requirements:

- 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?



Elliotsville Plantation, Inc.

- 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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