

Climbing on Private Land: Ask First

Many great climbing areas are located on private lands. For a climber wanting to climb on private property, it is important to have a good understanding of the laws of the state in which the climbing is located. Most states require all recreational users to have permission from the landowner, or its lessee or agent before climbing on private property regardless of whether the land is posted or not. By definition, trespassing includes traveling to an area where you intend to climb. It is every climber's responsibility to know who owns the land on which he or she wants to climb, what access may be available to the crag, and whether there are any land use restrictions that may apply there.

Landowners are often reluctant to open their land to the public for a myriad of reasons. Typically, the land owner is concerned about **liability, loss of control of his/her property, degradation of the property by disrespectful users or overuse, security, privacy and personal safety, and the public developing rights to the use of the property**, i.e., access for the masses through a prescriptive easement.

The following Guide will help you address these areas of concern and provide you with a process for approaching a landowner about climbing on private property.

- Step One: Identify Parcels Landowners
- Step Two: Approaching the Owner
- Step Three: Address Potential Concern
- Step Four: Keep the Landowner Happy
- Step Five: What if Everything Doesn't Go as Planned?

Step One: Identify Parcels Landowners

Tax maps can be used to assess who owns the land on which you wish to recreate and can be found at your local county and town offices or online county government sites. You will need to have an idea of the general location of the property in order to utilize the maps. Roads that circumvent the property, aerial photos, land marks such as rivers, streams, hills, and the approximate acreage of the parcel can help identify the parcels on the tax maps.

Once you have identified the parcel, you will want to contact a local title company's service department and ask for copies of the assessor's parcel maps for the area and a list of property owners and their addresses referenced by parcel number. You can also try the county government office, as well. Land may be owned by individuals, entities or pseudo-governmental agencies, and the way in which you approach the owner may depend on the ownership type, as they may have different concerns about allowing recreational activities to occur on their land.

The following are different potential private land owners:

- Individual and families (the Jones)
- Private organization (Nature Conservancy)
- Businesses (ABC Corp.)
- Resident or absentee owners (the Jones' who use it one weekend a month or who rent it out)
- Developers (Landmark Land Co.)
- Pseudo-governmental agencies (Any town Water District)

Once you have the name of the landowner, check the telephone book or dexonline.com for additional contact information.

Step Two: Approaching the Owner

Once you have the owner's name (or the representative) and contact information, the next step is to contact him or her. It is best to think long-term when trying to decide whether or not to contact a landowner. Most landowners will eventually find out if the public is using their land for recreational purposes, and therefore it is usually a matter of how and when they find out. It is important to remember that private landowners really have no incentive to allow the general public to recreate on their land. Keeping this in mind will help you approach the land owner with their perspective in mind.

Most landowners prefer to be approached in person. However, if the landowner knows about climbing and has closed off the land, a diplomatic letter might be a better introduction. Irrespective of the approach, it is always best to start the conversation letting the landowner know what a rare and valuable resource he/she has for the climbing community. It is also a good idea to have a plan with solutions to any known or potential aversions the landowner has to people climbing on his/her land. Not only will you be prepared to address concerns, but you will also increase your credibility with the landowner by acknowledging and being knowledgeable of their concerns. Establishing your credibility with the landowner will be one of the major goals of your first meeting. Following are additional techniques to increase yours and the climbing community's credibility with the land owner:

- Put together a brochure or presentation about your climbing community – discuss what you have done and your track record. Be sure to include references and information about clean-ups and Adopt-a-Crags
- Think about it from the landowner's point of view and plug the right person in the right situation. For instance, if the landowner's niece climbs, you may want to talk to her first. Or, if the landowner is a local attorney in town and someone in your climbing posse is also an attorney, it would be a good idea to have that person be the liaison
- LOCAL persons are often the best local contact
- It is important to approach the landowner on behalf of the climbing community and not have 6 individuals come to the landowners separately
- Be patient, building relationships take time
- Consider coalition building with other climbing groups and tapping into the resources and expertise of climbing organizations, such as the Southeastern Climbers Coalition, who own land
- Establishing an individual climber (or yourself) as the "Cragmeister" to manage the property and act as liaison between the land owner and the climbing community

Step Three: Address Potential Concern

Landowners are reluctant to open their land to the public for a myriad of reasons. Typically, the land owner is concerned about **liability, loss of control of his/her property, degradation of the property by disrespectful users or overuse, security, privacy and personal safety, and the public developing rights to the use of the property**, i.e., access for the masses through a prescriptive easement.

Most of these issues are resolved by developing a trusting relationship with the landowner. For instance, if the landowner comes to the climbing community's liaison

about a concern over trash and graffiti and the climber promptly responds with a clean up and a notice on the local website, the landowner will gain trust in the climbing community's commitment to the health of the land.

Liability, however, is usually the number one reason why they close their land to the public for recreational use and it will be important to be well-informed of the following Acts, Statutes, and provisions prior to meeting with the landowner. Due to numerous protections afforded under a variety of statutes that limit liability for 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.

While most states currently have laws that limit landowner liability, these laws can vary greatly from state to state. The purpose of the following information is to provide a general picture of how these laws work and to answer some general questions regarding landowner liability. This information is intended as a starting point and reference guide for those interested in their state's liability laws. This is not meant to be the definitive source of information. Always contact a local attorney regarding the status of liability laws in your state.

- o **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 (1) trespassers, (2) licensees, and (3) invitees.

(1) *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.

(2) *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.

(3) *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.

o **Recreational Use Statutes**

"Recreational Use Statute" is a term given to legislation generally intended to promote public recreational use of privately owned land. 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 those owners of large acreages of land 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 or her property *for recreational purposes and without charge*.

Under prior common law (explained above), the landowner had 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 1) limit the duty of care owed by a landowner to recreational users to that of a trespasser, and 2) 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>

o **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 (1) keeps an artificial (non-natural) condition on his premises which is an attraction or allurement to a child; (2) involves an unreasonable risk of injury, *and* (3) 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."

Conclusion

Liability issues weigh heavily in almost all land use decisions. Private landowners are acutely aware of the consequences that liability exposure can bring. Fortunately, current legislation does much to alleviate liability concerns. Private landowners can look to their state Recreational Use Statutes for liability protection.

Climbers benefit greatly from these pieces of legislation. Individual responsibility lies at the heart of these statutes because they shift the risks to the recreational user in most cases. When landowners do not have to fear open-ended liability, they are more likely to welcome climbers (and others) to use their land. For a climbing advocate, knowledge of the laws affecting landowner liability is an indispensable tool for a successful dialog among all recreational users and landowners.

Step Four: Keep the Landowner Happy

Congratulations! You approached the landowner, established a relationship, and assuaged his or her fears about liability, loss of control, privacy, and degradation of the property. Through your efforts, the land owner gave the okay to use for recreation. By adopting the following suggestions, you can help assure that the landowner remains happy and the crag remains open.

- Maintain an open dialog with the landowner.
Check in regularly, be available via email or the phone, and try to get together with the landowner on an annual basis. By spending quality time with the landowner not only do climbers foster good relations, but it can make a world of difference in their perception of climbers.
- Address their concerns in a timely manner.

Respond promptly to all requests of the landowner and be sure to follow-up once the concern has been resolved. If the regular liaison to the climbing community will be out of town, give the landowner a back-up name and contact information. This simple gesture demonstrates that climbers are a responsible group.

- Perform routine cleanups and trail maintenance.
Nothing shows that you care about the land and the climbing and that you appreciate the landowner's generosity more than a clean-up of the area. Mitigating climbers' and other users' impacts is a great way to build the confidence of the landowner. Consider participating in the Access Fund's Adopt-a-Crag program as an avenue to demonstrate the conservation-nature of climbers.
- Promote responsible behavior by climbers at all times.
Develop a code of ethics for the area and don't be afraid to speak up when the action of others is not in line. Let other climbers know that the mis-actions of a few can spoil things for many.
- Do not publish any articles or guidebook information about a climbing area on private lands without the permission of the landowner.
The visitor capacity of an area is the maximum number and type of visitors that an area can accommodate, given desired future environmental conditions, climber experience, and the landowner expectations. With climbing on private land, visitor-capacity issues may arise when climber levels increase to the extent that use adversely affects the climbing experience, environmental resources, or infringes on the expectations of the landowner. While sharing the sweet lines might seem like a good idea, if that landowner isn't prepared for an influx of activity it could spell the end of the crag.

Step Five: What if Everything Doesn't Go as Planned?

You may find out that the landowner's daughter just won the ABS Nationals and she works with your climbing buddy and she still says "no." Or the landowner is hesitant but would open the area to a limited number of climbers if they signed waivers. Now what?

A good motto when working with private landowners is to "expect the unexpected." Every situation is different and hardly any two relationships are ever the same. The good news is that many climbers and climbing organizations have established good relationships with private landowners; you will probably not be charting new territory. Resources are available, so it may be a matter of knowing where to look. Below are some tips to overcome the hurdle or two that might come your way.

- **The landowner said "no."**
Be sure to thank the landowner for his or her consideration. Follow-up with a note of gratitude with your contact information and let the landowner know that you are available if they have any questions about climbing in the future. Get the word out to the local climbing community that the area is not open to climbing. By respecting the landowner's wishes, climbers are building their reputation as respectful neighbors.

The door is not shut, however. Use the interactions that you have already had with the landowner as a stepping stone. Courteously approach them the

following year asking if they might reconsider. Even if the landowner never allows climbing on the land while under his/her ownership, the climbing community might be the first people they think of when they consider selling the land.

- **Permits**

The landowner says yes, but wants to limit the number of climbers. By not publicizing the area, the number of climbers who know about and visit the area might not reach a level of concern for the landowner. If word gets out and use increases, it might be beneficial to set up a system of self-regulation. Some climbing organizations have on-line sign-up, others set-up an agreement with the landowner that only members of the organization can climb on the land, or others make a certain number of permits available at the trailhead on a first-come first-served basis. It is important to keep in mind that regulating the number of climbers will take creativity and perseverance. However, limiting the number of climbers is sometimes the only way that a landowner will allow climbing.
- **Waivers**

What if the landowner wants all users to sign waivers before coming onto the land to climb? Contractual waivers, express assumptions of risk, or liability releases are a common and sometimes effective way for a landowner to limit their liability to users. While probably not necessary with RUS, Common Law protections, and the Assumption of Risk doctrine, landowners may want use waivers as “added protection.” Implementing and administering waivers, as with permits, can absorb much of a local climbing group’s resource. It will, therefore, be important to set up a system that is easy to use and easy to regulate. Again, many local climbing organizations have waiver systems in place; they will be a useful resource as you work with the landowner to develop a system that meets both of your needs.
- **Warning Signs**

Generally, it is acceptable to use 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 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). However, if signage helps ease a landowner’s concerns about potential liability, it is an inexpensive and easy to implement strategy.

Conclusion

Approaching a private land owner can be a scary proposition. What if they say no? What if they say yes, but with conditions? What if, what if . . . ? It is good to think about a long-term objective when you first approach a land owner. You may not get the result you want in the first meeting, but you have taken the first step to building a relationship with that person.

Access Fund

P.O. Box 17010, Boulder, Colorado 80308
303.545.6772 Fax 303.545.6774
E-mail: info@accessfund.org Web: www.accessfund.org

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