

# LEGAL OPINION CONCERNING THE LIABILITY OF LANDING AIRPLANES ON PUBLIC LANDS FOR RECREATIONAL ACTIVITIES

## CLASSIFICATION OF ENTRANTS AND DUTIES OF CARE

Historically, the duty owed by landowners to those who enter upon their land was determined by the status of the entrant, either trespasser, licensee, or invitee. Because the duty owed to each category of entrant was different, (4) in order to determine the duty a landowner owed an entrant, it was critical to first determine the status of the entrant. (5) At times difficult, this chore became less burdensome following the Montana Supreme Court's decision in *Limberhand v. Big Ditch Co.*(6)

(1) A trespasser is person who enters or remains upon land in the possession of another without a privilege to do so, created by the possessor's consent or otherwise. Restatement of Torts (Second), Section 329 (1965).

(2) A licensee is a person who is privileged to enter or remain on land only by virtue of the possessor's consent. Restatement of Torts (Second), Section 330 (1965).

(3) An invitee is either a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public (public invitee); or a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land (business visitor). To be classified as an invitee, it is not enough to hold land open to the public; there must be some inducement or encouragement to enter, some conduct indicating that the premises are provided and intended for public entry and use, and that the public will not merely be tolerated, but is expected and desired to come. Restatement of Torts (Second), Section 332, pp. 178-179 (1965).

(4) Under the common law rules, a landowner owes licensees and trespassers a duty to merely avoid willful, wanton, or intentional conduct, but owes invitees a duty of ordinary care.

(5) The easiest way to illustrate the difference between an invitee or a licensee is by example: When a landowner tacitly permits the boys of a town to play ball on his vacant lot the boys are licensees only; but if the landowner installs playground equipment and posts a sign saying that the lot is open free to all children, there is then a public invitation, and those who enter in response to that invitation are invitees. Restatement of Torts (Second), Section 332, p. 179 (1965).

(6) 706 P.2d 491 (1985).

In *Limberhand*, the court reaffirmed its 1981, decision in *Corrigan v. Janney*(7) that a landowner owes a single duty of ordinary care to all entrants, regardless of their status.(8) Pursuant to statute, therefore, a landowner is liable for injuries caused by a failure to

exercise reasonable care under the circumstances,(9) a duty formerly owed only to invitees.(10)

Without taking into account the statutory ramifications of Montana's recreational use law, a pilot flying onto government land would, in all likelihood, be considered a licensee (provided that the land is not marked 'No Trespassing' and/or the government does not issue an outright ban to the land's use.)

(7) 636 P.2d 838 (1981).

(8) 706 P.2d at 496.

(9)MONT. CODF, ANN. Section 27-1-701. "Everyone is responsible not only for the result of his wilful acts but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person except so far as the latter has wilfully or by want of ordinary care brought the injury upon himself."

(10) This duty, however, does not apply in cases falling under Montana's recreational use act. In cases where a landowner gratuitously makes his land and/or water available to the public for recreational use, by statute the only duty of care a landowner owes to those recreational users is to refrain from willfully or wantonly injuring the entrant. MONT. CODF, ANN. Sections 70-16-301, 70-6-302 (1995).

**FEDERAL GOVERNMENT'S LIABILITY FOR INJURIES TO PRIVATE CITIZENS WHILE ON FEDERAL LAND LOCATED IN MONTANA**

INTRODUCTION

Because there is an ever-decreasing amount of undeveloped land to explore and enjoy and because much of the as-yet-undeveloped land is privately owned, over the last thirty years an increasing number of states have passed legislation designed to encourage landowners to open use of their lands and water to the public by shielding the landowners from liability for injuries to recreational users of the land.(1) Commonly known as recreational use statutes, over 40 states now have some version of these statutes.(2)

Although recreational use statutes were originally designed to encourage private landowners to open use of their lands to the public, the shield provided by these statutes has also been used by the Federal government to protect itself from liability for injuries occurring to recreational users of federal lands open to the public.(3) As a result, any claim brought against the United States by a person injured while engaging in recreational activity on federal land is, as a general rule, barred by the recreational use statute of the state in which the injury occurred.(4)

(1)W. PROSSER AND W. PAGE KEATON, PROSSER AND KEATON ON TORTS SECTION 60 PP. 415-416 (5<sup>TH</sup> ED. 1984).

(2)W. PROSSER AND W. PAGE KEATON. PROSSER AND KEATON ON TORTS Section 60, p. 415, (5th ed. 1984).

(3) See *Proud v. United States*, 723 F.2d 705 (9th Cir.) *cert. denied* 467 U.S. 1252 (1984); *Simpson v. United States*, 652 F.2d 831 (9th Cir. 1981); *Jones v. United States*, 693 F.2d 1299 (9<sup>TH</sup> Cir. 1982);

(4) See *O'Neal v. United States*, 814 F.2d 1285 (9th Cir. 1987), *McClain v. United States*, 445 F.Supp. 770 (D. Or. 1978); *Dorman v. United States*, 812 F.Supp 685 (S.D.Miss. 1993); *But cf. Seyler v. United States*, 832 F.2d 120 (9th Cir. 1987) (holding that Idaho's recreational use statute did not bar an action brought by a motorcyclist injured on a government maintained highway because application of recreational use statute to ordinary streets or highways would ignore purpose of statute and application of the statute to "any road or highway in Idaho ... Is clearly absurd.").

In Montana, the question of whether an injured party can recover against the United States for injuries suffered while engaging in a recreational activity on federal land was most recently answered - in the negative - in the case of *Fisher v. United States*. (5)

## II FEDERAL TORT CLAIMS ACT

The Federal Tort Claims Act authorizes suits against the United States for damages for injury or loss of property, or personal injury or death I 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. (6) The Tort Claims Act also provides that the United States shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances. (7) Thus, the test established by the Tort Claims Act for determining the United States' liability for the negligent acts or omissions of its employees is whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred. (8)

(5) 534 F.Supp. 514 (D. Mont. 1982). *Fisher v. United States* was decided prior to the 1987 and 1995 amendments to Section 70-16-302. In pertinent part, the pre-amendment version of Section 70-16-302 provided: "A landowner or tenant who permits ... any person to enter upon any property in the possession or under the control of such landowner ... for any recreational purpose... does not ... extend any assurance that such property is safe for any purpose or confer upon such a person the status of invites or license to whom any duty of care is owed..."

(6) 28 U.S.C. Section 1346(b).

(7) 28 U.S.C. Section 2674 (1948).

(8) *Rayonier Inc. v. United States*, 352 U.S. 315, 319, 77 S.Ct. 374, 376, 1 L.Ed.2d 354 (1957). See also, *Richards v. United States*, 369 U.S. 1, 6-8, 82 S.Ct. 585, 589-590, 7 L.Ed.2d 492 (1962).

### III. MONTANA'S RECREATIONAL USE STATUTE

Because Montana is uniquely endowed with scenic landscapes and areas rich in recreational value,(9) Montana's recreational use statute(10) was enacted to encourage landowners to make their lands freely available to the public by limiting the landowners' tort liability.(11) In Montana, a person who uses property for recreational purposes is owed no duty of care by the landowner with respect to the condition of the property, except that the landowner is liable to the person for any injury to person or property for an act or omission that constitutes willful or wanton misconduct.(12) This restriction on a landowner's liability applies to both private and governmental agency landowners;(13) is applicable regardless of whether the landowner has or has not given his permission to use the property;(14) and applies to land, roads, water, watercourses, private ways, and any improvements, buildings, structures, machinery, and equipment on the property(15)

(9)MONT. CODE ANN. Section 23-2-101 (19xx).

(10)MONT. CODE ANN. Sections 70-16-301, 70-16-302 (1995)

(11)*Fisher v. United States*, 534 F.Supp. 514 (D. Mont. 1982); See also *Jones v. United States*, 693 F.2d 1299 (9th Cir. 1982) ("The purpose of [Washington's Recreational Land Use Act] is to encourage owners or others in lawful possession and control of land and water areas or channels to make them available to the public for recreational purposes by limiting their liability toward persons entering thereon and toward persons who may be injured or otherwise damaged by the acts or omissions of person entering thereon.").

(12)MONT. CODE ANN. Section 70-16-302(i) (1995).

(13)MONT. CODE ANN. Section 70-16-302(2) (1995).

(14)MONT. CODE ANN. Section 70-16-302(1) (1995).

(15)MONT. CODE ANN. Section 70-16-302(1)-(3) (1995).

#### A. "Recreational Purposes"

"Recreational purposes", as used in Montana's recreational use statute, includes hunting, fishing, swimming, boating, water skiing, camping, picnicking, pleasure driving, biking, winter sports, hiking, touring or viewing cultural and historical sites and monuments, spelunking, or other pleasure expeditions.(16) The statute is applicable in any case where entry onto land is made for what could reasonably be regarded by the general public as a recreational purpose, regardless of some different purpose in the mind of a particular user.(17)

Therefore, even if an entrant is injured while engaged in an outdoor activity not expressly mentioned in the statute, a court would likely conclude that recovery is barred if the activity is similar to those described in the statute.(18) For example, one court has held that both snowmobiling and diving are within a statute governing "fishing, hunting, trapping, camping, hiking, sightseeing, or other similar

outdoor recreational use," because these activities are widely recognized as sports, involve some degree of physical exertion, and usually require open spaces.(19)

(16)MONT. CODE ANN. Section 70-16-301 (1995).

(17)*Fisher v. United States*, 534 F.Supp. 514 (D. Mont. 1982) (holding that a school field trip to a wildlife refuge, a trip which included a planned lunch period, was for a 'recreational purpose' because '[a]t the time of the accident the decedent was doing the things which are done on a children's picnic...'and" [a] visit to ... a wildlife refuge may be educational, recreational, vocational, or some combination of all three.").

(18)See generally, John C. Barrett, *Good Sports and Bad Lands: The Application of Washington's Recreational Use Statute Limiting Landowner Liability*, 53 WASH. L. REV. 1, 20 (1977).

(19)*Id. But see, Villanova v. American Federation of Musicians*, 301 A.2d 469 (N.J. Super. 1973), *cert. denied*, 308 A.2d 669 (1973) (holding that defendant was not entitled to protection of New Jersey's recreational use law when injured plaintiff was a member of a band involved in a free outdoor park concert.).

#### B. "Willful and Wanton Misconduct"

The term "willfully", when applied to the intent with which an act is done or omitted, denotes a purpose of willingness to commit the act or make the omission referred to; it does not require any intent to violate the law, to injure another, or to acquire any advantage.(20) Willful and wanton conduct tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent,(21) and lies between intent to do harm and the mere unreasonable risk of harm to another (i.e. ordinary negligence).(22)

(20)MONT. CODE ANN. Section 1-1-204(5) (1977). See, Restatement of Torts (Second), Section 500 (1965) (defining "conduct...in reckless disregard of the safety of another" as conduct in which an actor does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent," and then likening "reckless disregard" with "wanton or wilful misconduct." See also, *Boadle v. Unites States*, 472 F.2d 1014 (9th Cir. 1973) (utilizing the Restatement of Torts (Second) to define "invitee.").

(21)W. PROSSER AND W. PAGE KEATON, PROSSER AND KEATON ON TORTS Section 34, p. 214, (5th ed. 1984); See *Jones v. United States*, 693 F.2d 1299 (9th Cir. 1982) (quoting from the Washington Pattern Instruction, "willful misconduct" is the "intentional doing of an act ... or the intentional failure to do an act which one has the duty to do when he or she has actual knowledge of the peril that will be created and intentionally fails to avert the injury"; "wanton misconduct" is the "intentional doing of an act which one has a duty to refrain from doing

or the intentional failure to do an act which one has the duty to do, in reckless disregard of the consequences and under such surrounding circumstances and conditions that a reasonable person would know or should know that such conduct would in a high degree of probability result in substantial harm to another." In *Jones*, the parties and the court agreed that if Washington's Recreational Use Statute was applicable, the Government's liability would be measured under Washington's common law definitions of willful and wanton misconduct.).

(22)W. PROSSER AND W. PAGE KEATON, *PROSSER AND KEATON ON TORTS* Section 34, p. 212, (5th ed. 1984); See generally *Derenberger v. Lutey*, 674 P.2d 485 (Mont. 1983), citing *Adkisson v. City of Seattle*, 258 P.2d 461 (Wash. 1953) (quoting the Washington Supreme Court, "Negligence and willfulness imply radically different mental states.

#### IV. APPLICATION OF MONTANA'S RECREATIONAL USE LAWS TO FEDERALLY OWNED PROPERTY IN MONTANA

The applicability of state recreational use statutes to federally owned lands is well established both in Montana(23) and the Ninth Circuit.(24) The maximum liability which the United States can incur, therefore, is precisely equal to that which may be incurred by a private individual in the same circumstances.(25)

In the case of *Fisher v. United States*, the parents of a child who was killed while playing during a school field trip to a federally owned wildlife refuge brought a wrongful death action against the Government under the Federal Tort Claims Act. In their suit, the parents alleged that because the purpose of the field trip was educational and not recreational, Montana's recreational use statute did not apply and, therefore, because their daughter was an invitee of the Government, the Government owed her a duty of care.(26) The district court disagreed with the parents' contentions as to the purpose of the trip and, in accordance with the provisions of. Negligence conveys the idea of neglect or inadvertence, as distinguished from premeditation or formed intention. An act into which knowledge of danger and willfulness enter is not negligence of any degree, but is willful misconduct...").

(23)*Fisher v. United States*, 534 F.Supp. 514 (D. Mont. 1982).

(24)*O'Neal v. United States*, 814 F.2d 1285 (9th Cir. 1987); See *Gard v. United States*, 594 F.2d 1230, 1233 (9th Cir. 1979) cert. denied, 444 U.S. 866, 100 S.Ct. 138, 62 L.Ed.2d 90 (1979) ('The principle of encouraging landowners to open their land by limiting potential tort liability applies with equal force to the Government as to other landowners.');

*Proud v. United States*, 723 F.2d 705 (9th Cir.), cert. denied 467 U.S. 1252 (1984); *Jones v. United States*, 693 F. 2d 1299 (9th Cir. 1982); *Simpson v. United States*, 652 F.2d 831 (9th Cir. 1981).

(25)*O'Neal v. United States*, 814 F.2d 1285 (9th Cir. 1987); See also *McClain v. United States*, 445 F.Supp. 770 (D. Oregon 1978) ("In other words, a state may not protect private citizens from liability without also protecting the federal government.").

(26)534 F.Supp. 514, 515 (D. Mont. 1982).

Montana's recreational use statute, granted summary judgment in favor of the United States.(27)

#### V. CONCLUSION

As noted supra, the version of Montana's recreational use statute applied in *Fisher* is different than the version in effect today. However, because the intent of Montana's recreational use law remains the same as when it was first enacted, the outcome of *Fisher* - and other suits brought under the Federal Tort Claims Act for injuries suffered while using federal land for recreational purposes - would, in all likelihood, be the same today as it was in 1982.

Therefore, if a person or his property is injured while on federally owned land in Montana, unless the proximate cause of that injury was due to willful and wanton misconduct on the part of the Government, any claim brought by the injured party pursuant to the Federal Tort Claims Act would be barred by Montana's recreational use law.

(27)534 F.Supp. 514, 515-516 (D. Mont. 1982).