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M E M O R A N D U M

TO: Colorado Public Access Task Force
c/o Stephen C. Norris
Colorado Department of Natural Resources

FROM: Lawrence A. DeClaire
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Tom Charlton
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Natural Resources Section

RE: Memorandum of Law Concerning Access to Public Lands and Related Issues

This memorandum responds to the Colorado Public Access Task Force's request for identification of law applicable to various issues it has identified concerning access to public lands and related matters.

With the exception of the sections concerning liability and "other specific issues" which were prepared by Mr. DeClaire, it represents the research and writing of Mr. Charlton, a law student at the University of Denver. Mr. Charlton's work was done as an internship in natural resources law through the University, but his time and efforts went well beyond that required for the internship. Mr. Charlton's work was done under the supervision of Mr. DeClaire, who has reviewed, in some cases revised, and approved his written analyses and conclusions.

The memorandum is intended only as general guidance for making an initial evaluation of the legal issues involved in public access and related matters. If and when an agency decides to take action to regain public access across a blocked road or to take other action, representatives of the agency should first consult their legal counsel to discuss the specific facts involved and how the law applies.

Finally, this memorandum should be read in connection with the memorandum of law to be submitted to the Task Force by attorneys representing the federal agencies, which memorandum you have advised will focus on applicable federal law, including federal statutes and regulations.

If members of the Task Force have any questions concerning this memorandum, please contact Larry DeClaire at the Attorney General's Office.

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I. DEFINITION OF PUBLIC HIGHWAYS AS GOVERNED BY STATE AND FEDERAL LAW

A. COLORADO LAW

Public highways in Colorado are defined as:

1. All roads over private lands dedicated to public use by deed. Section 43-2-201(1)(a), C.R.S. (1984).

2. All roads over private or other lands dedicated to public use by due process of law and not vacated by the Board of County Commissioners. Section 43-2-201(1)(b), C.R.S. (1984).

3. All Roads over private lands which have been used adversely without interruption or objection on the part of the owners of such lands for twenty consecutive years. Section 43-2-201(1)(c), C.R.S. (1984).

4. All roads over the public domain. Section 43-2-201(1)(e), C.R.S. (1984).

Highways and roads do not have to be accessible to motor vehicles, Shively v. Board of County Commissioners of Eagle County, 148 Colo. 353, 411 P.2d 782 (Colo. 1966), and can include footpaths. Simon v. Pettit, 651 P.2d 418 (Colo. App. 1982). A road may steadily deteriorate and still be a public highway provided the public still uses it. Shively, supra.

A road may be a public highway even though it reaches but one property owner. Leach v. Manhart, 96 Colo. 397, 43 P.2d 959.

Maintenance by public authorities as evidence of a public highway:

Maintenance of a road by a county authorities is not sufficient alone, to make a road public Martino v. Fleenor, 148 Colo. 136, 365 P.2d 247 (Colo. 1961).

The incorporation of a county road into the county road system and the subsequent receiving of state funds to maintain the road, will support a finding of a public highway as it is evident of an assertion by the county of the public nature of the road. Board of County Commissioners of the County of Saguache v. Flickinger, 687 P.2d 975 (Colo. 1984).

Listing of the road by the county tax assessor for tax purposes is also persuasive. Board of County Commissioners of Mesa County v. Wilcox, 35 Colo. App. 215, 533 P.2d 50 (1975).

Failure to maintain as evidence of abandonment:

Failure to maintain a highway is not sufficient for a finding of abandonment. Uhl v. McEndaffer, 123 Colo. 69, 225 P.2d 839 (Colo. 1950); Shively v. Board of County Commissioners of Eagle County, 148 Colo. 353, 411 P.2d 782 (Colo. 1965); 39A C.J.S. sec. 132.

B. FEDERAL LAW

RS 2477 Right-of-Ways:

Revised Statute 2477 (formerly codified as 43 U.S.C. 932) provides: "The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

This provision grants a right-of-way for the construction of highways across federal land provided they are constructed or initiated in accordance to Colorado law.

Acceptance of 2477 grants results from use by the public and does not require any action by state or local government provied that such acceptance does not conflict with state law. Leach v. Manhart, 96 Colo. 397, 43 P.2d 959 (Colo. 1935).

The use by one person is sufficient to establish a 2477 right-of-way. Id.

The subsequent reservation of surrounding land for public use will not establish the public's interest in a 2477 highway. Federal patents are subject to pre-existing federal 2477 right-of-ways. Sullivan v. Condas, 76 Utah 585, 290 P.2d 954

(1930).

Prescriptive period is not necessary:

A 2477 right-of-way may be acquired by prescription where provided for by law § 43-2-201(e). However, § 43-2-201(1)(b), C.R.S. (1984) declares all roads on public lands as public highways. Consequently, under Colorado law, a 2477 right-of-way exists upon its construction and use on federal land and doesn't require any statutory period of use prior to becoming public.

Limitations of 2477 right-of-ways:

1. This provision was superseded by FLPMA and does not apply to highways constructed after 1976.

2. RS 2477 applies only to federal lands not reserved for public use at the time of the right-of-way was established.

3. It conveys an easement and not title to the land. Oregon Shortline R. Co. v. Murray City, 2 Utah 2d 427, 277 P.2d 798 (1954).

4. RS 2477 cannot establish highways in ways which violate state laws. Copper Co. v. Reese, 12 Ariz. 226, 100 P.2d 777 (1909).

5. A 2477 right-of-way may not be constructed on a pre-existing patent. Ball v. Stephens, 68 Cal. App. 2d 843, 158 P.2d 207 (1947).

6. The grant remains in abeyance until a highway is established. U.S. v. 9,947.71 Acres of Land, More or Less in Clark County, State of Nevada, 220 F. Supp. 328 (D.C. Nev. 1963); McAllister v. Okangan County, 51 Wash. 647, 100 P. 146 (1909); see BLM manual.

7. 2477 right-of-ways may be subject to vacation or abandonment procedures by local authorities provided such abandonment or vacation is done pursuant to Colorado law.

BLM's interpretation of R.S. 2477:

(All references are to the BLM Manual # Rel. 20229, § 2801.)

In order to have a valid right-of-way, there must have been an actual construction of a highway. Mere use is insufficient to constitute a valid 2477 right-of-way. Construction does not have to have occurred all at once and maintenance of a road over several years may equal construction. When public funds are spent on a road it will be considered public. BLM Manual, § 2801(B)(1)(a).

If the history of the road is unknown or questionable, its existence in a condition suitable for public use is evidence of construction sufficient to cause a grant under R.S. 2477. BLM Manual BLM 2801(B)(1)(a).

"Roads that have had access restricted to the public by locked gates or other means shall not be considered public highways." BLM Manual, § 2801(B)(1)(b). We read this section to mean that roads constructed obstensively for restricted or limited use and whose access by the general public is obstructed from their inception, are not public highways.

The state in which the road is located must have a procedure (formal or informal) to confirm a RS 2477 right-of-way as a public highway. In Colorado, this confirmation is provided in § 43-2-201(e), C.R.S. (1984).

Maintenance and alteration of RS 2477 right-of-ways: Where a pre-1974 right-of-way requires relocation or where any action is commenced to change a public road to a non-public road, "the RS 2477 right-of-way should be terminated and a new FLPMA right-of-way issued." BLM Manual, § 2801(4).

II. STATE, COUNTY, AND CITY HIGHWAY SYSTEMS

A. STATE HIGHWAY SYSTEM

The state highway system consists of:

1. Federal-aid primary roads,
2. Federal-aid secondary roads, and
3. The interstate system -- those highways which are part of the national system of interstate and defense highways under the Federal Highway Act.

Federal primary and secondary roads may be added or deleted by the state highway department according to need, as determined by the department; but any deletions from the federal aid secondary system must be mutually decided by the federal government, the state, and the affected county. Section 43-2-101(3), C.R.S (1984).

Abandonment of State Highways:

Colorado law provides that upon relocation of a state highway, any portion of the old highway considered by the highway commission to be unnecessary as a state highway, shall be abandoned. Upon abandonment, the road or portion of the road can become a county road upon the adoption of a resolution to that effect by the Board of County Commissioners or upon the adoption of an ordinance to that effect by the city council or local governing body within 90 days of abandonment. Otherwise, title to the highway will revert to the owner of the land under the highway. Section 43-2-106, C.R.S. (1984).

B. THE COUNTY ROAD SYSTEM

Primary and secondary roads:

County road systems consist of primary and secondary roads. Primary roads are chosen by the county commissioners on the basis of "greatest general importance." Section 43-2-109, C.R.S. (1984).

All roads not on the county primary system for which the boards of county commissioners assume responsibility shall be secondary system. Section 43-2-110(2), C.R.S. (1984).

The selection and categorization the county roads is accomplished by a map upon which the board of county commissioners detail which roads are to be secondary and primary; then a hearing is held as to its adoption.

The map does not limit the ability of the board of county commissioners to adopt or vacate other roads.

Public highways not on the county map system:

Whether or not a road is on a county map will not effect its

status as a public highway. If the highway is public within the meaning of § 43-2-201, C.R.S. (1984), it cannot be vacated or abandoned except in a manner provided by law.

Abandonment of County Highways:

1. Where the board of county commissioners determines upon relocation that the existing road portion is to be abandoned as part of its primary road system and "it appears that such an abandoned portion is necessary for use as a secondary road then such abandoned portion shall become a secondary road." Section 43-2-113, C.R.S. (1984).

Otherwise, title to the abandoned highway will revert to the owner of the surrounding land. Section 43-2-113, C.R.S. (1984).

We found no express provisions allowing such abandoned highways to become part of a city or town's road system.

III. ESTABLISHING HIGHWAYS BY ADVERSE POSSESSION

(NOTE: The phrase "adverse use," rather than "adverse possession" is generally used to denote acquisition of an easement as opposed to a fee title; and the resulting easement is generally called a "prescriptive easement.")

Section 43-2-210(c), C.R.S. (1984) codifies existing common law for public highways by adverse possession. Board of County Commissioners of the County of Saguache v. Flickinger, 687 P.2d 975 (Colo. 1984). To establish a public highway by prescription, interested parties must demonstrate the following:

1. The public must have used the road under a claim of right and in a manner adverse to a landowner's property interest;

2. The public must have used the road without interruption for a statutory period of 20 years and;

3. The landowner has had actual or implied knowledge of the public's use of the road and has made no objection to such use. Board of County Commissioners of the County of Saguache v. Flickinger, supra.

Prescription confined to a specific line or way:

To establish a highway by prescription, use of the highway must be confined to a specific line or way. Shively v. Board of County Commissioners of Eagle County, 148 Colo. 353, 411 P.2d 782 (1966). Prescriptive rights may not be used to pass through a tract of land without regard to a specific path. Starr v. People, 17 Colo. 458, 30 P. 64 (1892).

Presumption of adverse use:

There is a presumption that use of a road across private land is adverse where such use is shown to have been made for a prescribed period of time. Shively v. Board of County Commissioners of Eagle County, supra.

This presumption will not extend to where the route in question is unmarked or does not follow a clear defined line. Simon v. Pettit, 651 P.2d 418 (Colo. App. 1982). Further, presumption of adverse use is inapplicable where the land involved is vacant, unenclosed, and unoccupied. Simon v. Pettit.

Mere failure to interrupt or object to public use does not constitute permissive use because the statute requires that the use be both adverse and without objection. Boulder Medical Arts, Inc. v. Waldron, 31 Colo. App. 212, 500 P.2d 170 (1972).

Gates and other obstructions:

The establishment of a gate across a highway during the statutory period may or may not prevent prescription by making use of the road permissive. The difference between passive acquiescence and permission can be a very fine line.

If a property owner erects gates across a roadway but leaves its gates unlocked, then ordinarily the public's use of the road is deemed permissive. This was affirmed by the Colorado Supreme Court in Lang v. Jones, 36 Colo. App. 20, 535 P.2d 242 (1975), aff'd., 191 Colo. 313, 552 P.2d 497 (1976), 3 Colorado Law Annotated Public Highways, § 7, p. 570.

However, the Colorado Court of Appeals has held that the mere existence of an unlocked gate does not necessarily establish permissive use, but must be considered along with other uses of

spite of past maintenance of the road by the county and the WPA.

These cases revolve around the issue of intent. If the obstruction is used with the specific intent to keep the public out, then any use of that road may be considered permissive. If the gates are used primarily for livestock, it will not prevent use by prescription. These issues are dealt with on a case-by-case basis and in this area, the Colorado appellate courts have been deferential to trial courts.

The use of gates and other obstructions on a highway already public will not end the public's rights in it. Once a public highway is established, it may only be abandoned or vacated in a manner pursuant to Colorado law. Rights such as fee ownership of roads or rights-of-way owned by governmental entities may not be adversely possessed. Section 38-41-101, C.R.S. (1984). Nor may a public easement (not owned by a governmental entity) be adversely possessed. Bowen v. Turgoose, 136 Colo. 137, 314 P.2d 694 (1957).

Continuity of use by the public as a requirement of prescription:

Use by the public must be continuous and not intermittent during the statutory 20-year period. Williams v. Town of Estes Park, 43 Colo. App. 265, 608 P.2d 810 (1979). However, continuous use does not mean constant use. Rather, it means freedom to exercise such use without interruption by the owner against whom the right is asserted. Use may be seasonal and still be continuous. Agricultural Ditch & Reservoir Co. v. Gleason, 696 P.2d 802 (Colo. App. 1984), reversed in part, Hutson v. Agricultural Ditch & Reservoir Co., 723 P.2d 736 (Colo. 1986).

Courts have found adverse use to be interrupted by unambiguous act by the owner which "evidences and gives notice to the public of his intention to exclude the public from the uninterrupted use of the highway." 39A C.J.S. Highways § 8(b). Mere verbal objection or abortive attempts by the owner to exclude the public may not be sufficient to interrupt adverse use.

The use of gates, fences, the posting of notices, the closing of a private way at night may be sufficient to interrupt prescriptive use. 39A C.J.S. Highways § 8(b).

IV. VACATION AND ABANDONMENT

A. ABANDONMENT

Possible abandonment upon relocation of state and local highways:

Colorado statutes §§ 43-2-106 and 43-2-113, C.R.S. (1984), provide for abandonment upon relocation of a highway. For state highways, Colorado law provides:

> When a portion of a state highway is relocated and because of such relocation a portion of the route as it existed before such relocation is, in the opinion of the [state highway] commission, no longer necessary as a state highway, such portion shall be considered as abandoned and title shall revert to the owner of the land through which such abandoned portion may lie ....

Section 43-2-106, C.R.S. (1984).

With state highways, abandonment is not immediate, however.

> If it appears that the abandoned portion is necessary for use as a public highway, street or road then such abandoned portion shall become a county highway upon the adoption of a resolution to that effect by the board of county commissioners, or a city street, upon the adoption of an ordinance to that effect by the city council or local governing board within ninety days after such abandonment by the commission.

Section 43-2-106, C.R.S. (1984).

Failure of the Board of County Commissioners to pass a resolution adopting the abandoned portion as necessary for a public highway, within the 90 days specified by the statute, will result in the reversion of title to owners of property abutting or surrounding the highway. William v. Town of Estes Park, 43 Colo. App. 265, 608 P.2d 810 (Colo. App. 1979).

There is a similar provision for county primary highways. The only difference is that the board of county commissioners determines upon relocation whether a road is to be abandoned and

> [i]f it appears that such abandoned portion is necessary for use as a secondary road then such abandoned portion shall become a secondary road.

Section 43-2-113, C.R.S. (1984).

Private cause of action to have a road leading to public land closed as abandoned:

Sections 43-2-201.1(4)(a) and (b), C.R.S. (1984) provide for an individual to have a road across his private property declared abandoned.

> Notwithstanding the provisions of subsection (1) of this section (Prohibiting closure of highways extending to public lands) any owner ... may post notice of intent to close a road crossing such land if such road has been abandoned. Said owner shall promptly notify the board of county commissioners ... (who) shall publish notice of such proposed closure in a newspaper of general circulation ... and shall post notice of such proposed closure at each end of the road described in the notice. If the board of county commissioners receives no objection to such proposed closure within eighteen months after such publication, the road described in such notice shall be closed to public access.

If there are any objections to the proposed closure to public access, a public hearing must be held to hear such objections before a final decision on the proposed closure. Section 43-2-201(4)(b), C.R.S. (1984). This is a subsection of a section prohibiting closure of roads to public lands; so presumably this abandonment provision applies only to those roads.

Case law:

Whether abandonment has taken place is a question of fact and may vary from case to case. Board of County Commissioners of Mesa County b. Wilcox, 35 Colo. App. 215, 533 P.2d 50 (1975); Gilpin County v. Ball, 506 P.2d 413 (Colo. 1973); Shively v. Board of County Commissioners of Eagle County, 148 Colo. 353, 411 P.2d 782 (1966).

Colorado courts have found de facto abandonment where there has been non-user coupled with an intent by local government or the public to abandon. Koenig v. Gaines, 165 Colo. 371, 440 P.2d 155 (Colo. 1968).

Mere non-user in and of itself is insufficient for a finding of abandonment. Uhl v. McEndaffer, 123 Colo. 69, 225 P.2d 839 (Colo. 1950).

The existence of an alternate route as evidence of abandonment:

Long disuse plus the construction and use of another route instead of the original may be sufficient to establish abandonment. Koenig v. Gaines, 165 Colo. 371, 440 P.2d 155 (1968); Board of County Commissioners of Mesa County v. Wilcox, supra. The existence of another road to the same destination is insufficient to constitute abandonment unless the public uses the alternate route to the exclusion to the original. C.J.S. sec. 134, Koenig v. Gaines; Board of County Commissioners of Mesa County v. Wilcox.

Failure to maintain a highway as evidence of abandonment:

Failure to maintain a highway is not sufficient for a finding of abandonment. Shively v. Board of County Commissioners of the County of Eagle, 148 Colo. 353, 411 P.2d 782 (1966).

Abandonment and adverse use:

Highways whose use is discontinued may not be lost to the public by prescription. Section 38-41-101, C.R.S. (1984); Bowen v. Turgoose, supra. Encroachments or obstructions will not diminish the public rights in a public highway or constitute an abandonment in favor of the abutting owner. 39A C.J.S. Highways § 133.

Use of only a portion of a right-of-way width does not signify

that the unused portion is abandoned. Board of County Commissioners of Mesa County v. Wilcox, supra.

B. VACATION

Roads may be vacated by county resolution or by town ordinance. § 43-2-303(1)(a) and (b), C.R.S. (1984). The result of such vacation is it extinguishes any public interest in the highway and vests title in the abutting owners.

Vacation proceedings can only be conducted as prescribed by law. Vade v. Sickler, 118 Colo. 236, 239, 195 P.2d 390 (1948). Thus they may be vulnerable to procedural attacks. 39A C.J.S. Highways § 113a. Section 43-2-303(1)(a), C.R.S. (1984) provides that cities and towns may vacate by ordinance subject to provisions in its charter and the constitution and the statutes of the State of Colorado. Boards of County Commissioners are also empowered to vacate roadways entirely within their boundaries. Roads constituting political boundaries require joint action by the bordering political entities. Although no further specific procedures are prescribed, presumably there must be some due process considerations such as notice and opportunity for a public hearing and compliance with required procedures for official action.

Colorado law does provide that "[a]ny written instrument of vacation or a resubdivision plat purporting to vacate or relocate roadways ... which remains of record ... for a period of 7 years shall be prima facie evidence of an effective vacation of such roadways." Section 43-2-303(4), C.R.S. (1984). This will not apply if there is an action commenced against the vacation within the 7-year period. Id.

Vacation of a public highway will not extinguish existing easements:

Colorado statutes, § 43-2-303, C.R.S. (1984), conferring power on local authorities to discontinue or vacate highways, precludes vacation where it would deprive the owner of land access to a public highway:

> (2) No roadway or part thereof shall be vacated so as to leave any land adjoining said roadway without an established public road connecting said land with another established public road ....

(Emphasis added.)

Section 43-2-303(2) may be interpreted to prohibit the vacation of roads which provide access to public as well as private lands. Unfortunately, there is no case law or legislative history readily available which concern public lands.

V. RESPONSIBILITIES OF LOCAL GOVERNMENT TO MAINTAIN PUBLIC HIGHWAYS

Section 43-2-111(1), C.R.S. (1984) provides that:

> The county systems, both primary and secondary roads, shall be assigned to the county for construction and maintenance.

Any primary county roads (those of greatest importance) constructed after December 3, 1953 must conform to standards adopted by the state for similar roads on its system. Section 43-2-114, C.R.S. (1984).

There are no requirements for secondary roads except that the county assumes responsibility for those roads, § 43-2-111(2), C.R.S. (1984), and that they receive funds for only those secondary roads they keep "open, used and maintained." Section 43-4-207(2)(b), C.R.S. (1984).

Funding for maintenance and repair:

The counties receive funds for maintenance and repair from:

1. State funds from the highway users tax fund, § 43-4-207, C.R.S. (1984 & 1988 Supp.);

2. From a county road and bridge fund created through county property taxes. § 43-2-203, C.R.S. (1984); and

3. From federal matching funds when available and upon approval by the state.

Funds sent to the counties by the state may be used "only on the

construction,engineering, reconstruction, maintenance, repair, equipment, improvement, and administration of the county highway system" § 43-4-207(1), C.R.S. (1988 Supp.).

Methodology of state allocation of funds to counties:

> 1. 20 percent of the funds are allocated on the basis of the number of rural motor vehicle registrations. § 43-4-207(2)(a), C.R.S. (1984); and
>
> 2. 80 percent shall be allocated to the counties on the basis of mileage of "open, used and maintained public highways as defined in § 43-2-201." § 43-4-207(2)(b), C.R.S. (1984).

"Open used and maintained" means those highways which are "legally open to public travel by ordinary motor vehicles at all times, usable at all times except during adverse weather conditions, and maintained by work or county maintenance crews ...." Id. Until vacated or abandoned, public highways will exist whether they are maintained or not.

While it doesn't appear that counties are required to maintain all roads in their systems, they may receive funds only for public roads they maintain. Thus counties cannot legally abandon or vacate a public highway and continue to receive highway funds for that road.

Requirement on counties to qualify for state funds:

To qualify for state funds a county must submit certain information to the state in the form of an annual revised map, a proposed budget and annual reports. Failure to do this will result in funds being withheld.

County road budgets: The county has to prepare annually, a preliminary road budget which shows separately, the anticipated revenues and expenditures for the county road system. § 43-2-119, C.R.S. (1984).

Annual county reports: The board of county commissioners must prepare annual reports to be filed with the Division of Highways. These reports must:

1. Identify the separate amounts and sources of all money available.

2. Provide a detailed statement of expenditures by categories. These categories include rights-of-way, construction, maintenance, acquisition of equipment and administration. § 43-2-120, C.R.S. (1984 & 1988 Supp.).

These reports are public documents and must be published.

County map revisions: The Board of County Commissioners must submit to the State Department of Highways a map indicating:

1. Any changes in the mileage of any road within the county system and;

2. Any changes in the classification of those roads.

Section 43-2-120(5), C.R.S. (1988 Supp.).

State inspection of county projects: The State may inspect construction projects by the county which involve the expenditure of state or federal funds. Section 43-2-122, C.R.S. (1984).

VI. LIABILITY

A. LIABILITY OF PERSONS ILLEGALLY BLOCKING PUBLIC ROADWAY

Persons who illegally block public roadways are subject to criminal liability. See section VII. 3 below.

Such persons are also subject to civil liability. In addition to being subject to a judgment granting equitable relief (i.e., being required to open and refrain from further obstructing the road), they may also be held liable for money damages. Although a person may not be entitled to recover for any general inconvenience suffered in common with the general public, he may recover damages for a special and peculiar injury he suffers dif-

ferent in degree and different in kind from those sustained by the public generally. 39 Am. Jur. 2d, Highways § 311 (1968). In Jackson v. Kid, 13 Colo. 378, 22 P. 504 (1889), plaintiff was awarded damages when access to his private property was denied by a railroad company's continuous obstruction of the public roadways which were the only means of access to plaintiff's property. Damages were set at the reduced rental value of the property. The interest protected by right of private action for obstruction of a public highway is that of right of access and unobstructed travel. Pace v. American Radiator & Standard Sanitary Corp., 346 F.2d 321 (7th Cir. 1965) (defendant owed duty to protect children from dangers resulting from its project on or adjacent to public street).

B. LANDOWNER LIABILITY TO PERSONS INJURED WHILE ON HIS PROPERTY

Landowners are often concerned about liability to persons who enter upon their land. In Colorado the generally applicable standard of care owed to someone on another's property is set forth in § 13-21-115, C.R.S. (1987). Three separate standards are set forth and the standard of care varies depending upon whether the "visitor" is upon the premises with permission and, if so, for whose purposes. Subsection (3) provides:

> 13-21-115. Actions against landowners.
>
> (3) (a) If the plaintiff entered or remained upon the landowner's real property without a privilege to do so, which privilege is created by the consent of the landowner, the plaintiff may recover only for damages willfully or deliberately caused by the landowner.
>
> (b) If the plaintiff entered or remained upon such property with the consent of the landowner, but the entry was for the plaintiff's own purposes and not the purposes of the landowner, the plaintiff may recover only for damages caused by the landowner's deliberate failure to exercise reasonable care in the conduct of the landowner's active operations upon the

> property or by the landowner's failure to warn of dangers which are not ordinarily present on property of the type involved and of which the landowner actually knew.
>
> (c) If the landowner has expressly or impliedly invited the plaintiff onto the real property for the purposes of the landowner, the plaintiff may recover for damages caused by the landowner's deliberate failure to exercise reasonable care to protect against dangers which are not ordinarily present on property of the type involved and of which he actually knew.

The owner is liable to a trespasser -- e.g., a person who wanders off a public right-of-way onto surrounding private land -- only for damages he willfully or deliberately causes! This standard is so tough, with one exception, landowners need not be concerned about being held liable to injuries sustained by trespassers.

One exception to this is, however, persons under 14 years of age who are attracted unto the property by an "attractive nuisance." (See below.)

The standards of care owed to persons on the property with permission are also relevant. Where public access may not be had as a matter of right, such access may be acquired by purchase or lease of a right-of-way for access across land or of a broader easement for use of land (e.g., easement for public hunting or fishing). Acquisition of such easements usually involves satisfying the landowner that his risks of liability are minimal. Under § 13-21-115, a landowner may not be held liable to a permissive user injured while on an easement unless he had actual knowledge of the danger on the property which caused the injury and deliberately failed to exercise reasonable care to protect against it.

As concerns the doctrine of attractive nuisance, landowners are generally most concerned about children being injured at or near a body of water. Although this statute expressly does not abrogate the doctrine of attractive nuisance as applied to persons under 14 years of age, under Colorado case law streams and other bodies of water in their natural state are deemed not to form the basis for an attractive nuisance. Denver Tramway Corp. v.

Callahan, 112 Colo. 460, 150 P.2d 798, 799 (1944); and the perils of bodies of water are deemed to be obvious even to children of tender years such that no liability attaches under the doctrine. Phipps v. Mitze, 116 Colo. 288, 180 P.2d 233, 235 (1947).

Further, to encourage landowners to make their private lands available for public recreation and other purposes, the Colorado General Assembly has adopted additional statutory provisions to protect landowners from liability.

Pursuant to § 33-41-103, C.R.S. (1988 Supp.), under specified circumstances the liability of a landowner who makes his property available for public recreation is limited to the same extent as that of the state ($400,000 maximum per incident; $150,000 per person).

Further, pursuant to § 24-30-1510(3)(e), C.R.S. (1988), of the State Risk Management Act, the state may agree to defend and hold harmless a lessor of property leased to the state (though apparently not a grantor of an easement in perpetuity) from claims arising from alleged negligent acts or omissions ot the state or its employees.

Finally, H.B. 1092 passed by the 1989 General Assembly adopted a new § 33-41-103(2)(e)(II.5), C.R.S. (1988) which provides for notice to lessors of recreational land leased to the state that they have a "right to bargain for indemnification from liability for injury resulting from use of the land by invited guests for recreational purposes." "Invited guests" is basically defined as authorized users and visitors. There is, however, no corresponding provision in the Risk Management Act to allow such risk to be covered under that Act, such that if a state agency agrees to indemnification, the state agency would have to purchase liability insurance or put its own funds at risk. (The Colorado Division of Parks and Outdoor Recreation provides the owners of Barr Lake such protection through a commercial liability insurance policy.)

There is no provision, however, for a state agency to become responsible for any liability that might result from negligent acts or omissions of the landowner lessor or his employees and agents. However, the above-cited statutory provisions otherwise provide considerable protection from such liability so that any risk is minimal.

VII. OTHER SPECIFIC ISSUES

1. FAILURE OF STATE AND LOCAL GOVERNMENTS TO RECOGNIZE "PUBLIC HIGHWAYS" AS DENIED IN R.S. 2477.

In the event the facts and law seem to require a conclusion that a particular road is public, but local governments refuse to recognize it as such and close the road or allow its closure without proper legal procedures, a civil lawsuit may be brought against the local government entity by adversely affected parties. Such suit could seek to have the roadway declared open to the public (declaratory relief) and seek injunctive relief in the form of mandamus requiring removal of obstructions and a prohibition on further interference. Unless acting in bad faith, the responsible local officials would not likely be liable for any resulting damage resulting from the closure.

2. ACCESS POINTS WHICH ARE LEGALLY BLOCKED BY PRIVATE PARTIES.

By definition, if a road has been legally blocked, a private party has no legal recourse to force its reopening, though a governmental entity with eminent domain authority could condemn a right-of-way for public use. A private or governmental entity could also secure access through a voluntary purchase or lease of a right-of-way or some other mutual agreement.

3. ACCESS POINTS WHICH ARE ILLEGALLY BLOCKED BY PRIVATE PARTIES.

Persons who illegally close public roads are subject to criminal prosecution. The unauthorized closure of a public road is a misdemeanor pursuant to § 43-2-201.1, C.R.S. (1984). Further, newly enacted § 33-6-115.5, C.R.S. (1988 Supp.) (H.B. 1166) makes it a class 2 petty offense to erect barriers with the intent to deny ingress to lawfully designated hunting, trapping and fishing areas. A court conducting such criminal proceedings could and normally would order the defendant to open any road illegally closed.

As with a road closed by a governmental agency, the appropriate civil remedy for a road illegally closed by a private party is a declaratory order determining the property rights of the parties, together with any necessary injunctive relif to open and keep the public road open. Civil damages may be availabe as discussed above.

Section 33-6-129, C.R.S. (1984), makes it a misdemeanor to remove, damage, deface or destroy any real or personal property or wildlife habitat under control of the Division of Wildlife. And § 33-6-128, C.R.S. (1984), makes it a separate offense to willfully damage or destroy any wildlife den or nest without regard to ownership of the property where it is located.

Littering. Colorado's general littering statute is § 18-4-511, C.R.S. (1986). It applies to both public and private property, makes littering thereof a pretty offense punishable by a fine of $20 to $500, though such fines may be suspended on condition the violator agrees to gather and remove litter from a specified property or properties.

5. ILLEGAL POSTING OF PUBLIC LANDS.

Subsection 33-6-116, C.R.S. (1984 & 1988 Supp.) also addresses this issue. It provides:

> 33-6-116. Hunting, trapping, or fishing on private property - posting public lands.
>
> (2) It is unlawful for any person to post, sign, or indicate that any public lands within this state, not held under an exclusive control lease, are privately owned lands.

Violation is a misdemeanor.

VIII. SAMPLE CORRESPONDENCE

More and more frequently, landowners are blocking public access on roads that cross their private property. On occasion the Colorado Division of Wildlife has intervened (generally on behalf of hunters and fishermen) to secure a reopening of such roads. Though litigation is sometimes ultimately required to resolve issues, a great deal of success has been achieved without litigation by the Attorney Generals's presenting the Division's legal position to the offending landowners. Two sample letters sent on behalf of DOW are enclosed for your information. They should be

helpful in showing how the above-discussed law applies and what evidence is needed to support a claim that a road is open to the public. They are (a) a March 26, 1985 letter concerning the Douglas Pass Road in Garfield County and (b) a September 2, 1988 letter concerning Marion Gulch and Aspen Gulch Roads also in Garfield County.

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