

Across the Line

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## **CALIFORNIA'S RECREATIONAL USE AND TRAIL IMMUNITY STATUTES**

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Every once in awhile the California Legislature gets it right. In 1963 California adopted a Recreational Use Statute, strikingly similar to NRS 41.510, which makes private landowners immune from liability for injuries suffered by people who enter their land free of charge for recreational purposes. (Civil Code, § 846.)

Also in 1963, the Legislature adopted a complementary law protecting public landowners from lawsuits filed by citizens using public roads and trails for recreational purposes. (Government Code, § 831.4.)

Both laws were enacted in response to closures of large parcels of public and private land—to encourage landowners to allow use of their property for recreational activities. Good public policy.

### **Government Code Section 831.4 – Trails**

Government Code section 831.4 provides that public entities are not responsible for injuries caused by a condition of any unpaved road or any trail which provides access to fishing, hunting, camping, hiking, riding (animal and vehicular), watersports, recreational or scenic areas. The law also protects

private property owners who deed public easements to municipalities for those same recreational purposes. Practice tip: don't just allow use of a trail on your property, deed an easement to a public entity or qualified land trust for the trail.

#### Expansive Interpretation of Section 831.4

California courts interpret the immunity provided by section 831.4 broadly, encompassing paved and unpaved trails and roads, even sidewalks and paths, that are used for recreational purposes, including hiking, biking, skating, etc, or used for providing access to another recreational area. The immunity applies to the negligent maintenance of trails, the negligent design of trails and the location of trails. (*Amberger-Warren v. City of Piedmont (2006) 143 Cal.App.3d 1074, 1078.*) Also see (*Prokop v. City of Los Angeles (2007) 150 Cal.App.4th 1332*) reinforcing that the immunity applies to the design of the trail because the design is a "condition" of the trail.

#### Recreational Use Statute

Subject to three exceptions, the Recreational Use Statute (Civil Code, § 846.) protects private landowners from lawsuits for injuries sustained by people who are allowed to enter their land free of charge for recreational purposes. The California Legislature has broadened the statute since it was adopted in a series of cases to encourage an open-gate policy.

#### Scope of Section 846

California's immunity applies to almost anyone with an interest in land. The statute was originally enacted to protect fee title holders only; however, legislative changes and court cases have expanded the protected class to any

party with “an interest in real property, whether possessory or non-possessory,” which includes easement holders. In one case, the California Supreme Court extended immunity to a rancher who held a grazing permit over federal lands. (*Hubbard v. Brown* (1990) 50 Cal.3d 189).

To enjoy this immunity, private landowners are not required to make their properties safe for use by others entering for any recreational purpose. Ordinary care is not the standard. As originally enacted “recreational purpose” included “fishing, hunting, camping, hiking and sightseeing.” A “recreational purpose” now “includes such activities as fishing, hunting, camping, watersports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting [whatever that is], recreational gardening, cleaning, hang gliding, winter sports, and viewing or enjoying historical, archeological, scenic, natural or scenic sites.”

Unlike Nevada, the California Legislature apparently could not bring itself to list trapping. Those darn Democrats.

Court cases have extended the immunity to include tree climbing on a vacant lot in a residential area, but declined to find recreational use for a child bicycling across private land to get to a friend’s house. (*Valladares v. Stone* (1990) 218 Cal.App.3d 362). The California Supreme Court found that an 8-year old who had entered an equipment yard to play on old farm equipment was a recreational user. (*Ornelas v. Randolph* (1193) 4 Cal.4th 1095).

Finally, California has diluted the requirement that recreationally-used property may not be improved. Previously, the recreationally-used property had to be unimproved, that is, without any structures, to entitle an owner to immunity. Court cases have clarified that the statute makes no distinction between natural and artificial conditions on the land. E.g. (*Casas v. U.S. (1998) 19 F.Supp.2d 1104*). The courts, however, seem to distinguish active construction sites or development projects, for which liability is more likely to be found, than existing improvements, like, in one case, a permanent concrete drainage ditch. (*Paige v. North Oaks Partners (1982) 134 Cal.App.3d 860*).

#### Exceptions to Use Statute

The California Recreational Use Statute creates three specific exceptions where landowners are not immune:

1. There is no immunity from liability if “landowners willfully or maliciously fail to guard or warn against a dangerous condition, use, structure or activity” on the land. If the landowner knows of the dangerous condition and knows that recreationists use the property, failure to protect or warn may impose liability. Signage usually suffices as a warning method.

2. If the landowner was paid or given consideration for granting permission to enter the property for recreational purposes, immunity does not apply. An injured motorcyclist who paid an entry fee to a racing association who had paid a rental fee to the U.S. government was found to have paid consideration.

3. The statute does not apply where the injured person was expressly invited onto the land by the owner. Cases have determined that promotional literature to the general public to hike in a national park did not constitute an “express invitation.”

Under a corollary California statute enacted in 1985, property owners, including public agencies, are not liable for any injury or death that occurs during or after the commission of certain felonies—like falling through a painted skylight during a burglary.

#### Public Lands

In two Ninth Circuit cases, the section 846 immunity was held to apply to federal property. (*Simpson v. U.S.* (1982) 652 F.2d 831). The California Supreme Court has ruled that the immunity does not apply to state lands, although Government Code section 831.7 contains a similar immunity for “hazardous recreational activity” on state lands, with even more exceptions than section 846.

#### Attorney Fees

While California does not have a broad-form prevailing party attorneys’ fees statute like NRS 18.010, Civil Code section 846.1 allows landowners who prevail in a section 846 case to seek partial reimbursement of attorney fees.

*This is another of a series of articles on California law - for Nevada lawyers - authored by members of the Truckee, South Lake Tahoe, Incline Village and Reno law firm of Porter Simon.*

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