

Legal Issues Every Forest Steward Should Know

Legal Issues and Stewardship Planning

Family forest owners have legal responsibilities that should be recognized during development of a forest stewardship plan. Attending to these responsibilities is likely to require time, professional assistance, and money.

The purpose of this handout is to improve family forest landowner awareness of common legal issues, not to provide a comprehensive view. Specific information is available from legal professionals, natural resource professionals, insurance agents, government personnel, and others. The Information and Services Guide in your notebook describes additional sources of information for many of the topics introduced below.

Landowner Liability

What is it?

The concept of liability, or legal responsibility, is based on society's assumption that there is almost never anything such as an accident. Someone is ultimately responsible. The degree to which a property owner is found to be responsible for an accident on their property is a measure of liability. Landowners should prepare for the likelihood some attempt will be made to hold them legally responsible for accidents on their property.

Insurance

Liability is always an issue with real estate that involves a residence. It is impossible to obtain a bank mortgage without evidence of liability insurance. Many homeowner policies routinely extend liability coverage to surrounding forest property. Check with your insurer and get written clarification on the liability coverage extended to your forest property. If you own land without buildings check with your insurer to verify the status of your liability coverage. Acquiring liability insurance for undeveloped land is relatively inexpensive.

Contractor liability

If contractors will be working on your property make sure they carry general liability coverage that is adequate to cover damages or injuries to others that might occur during execution of your contract. Some owners request that the contractor's insurer list the owner as co-insured during the life of the contract.

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Ownership Issue:

Liability

Responsibility:

Protect against Liability

Action:

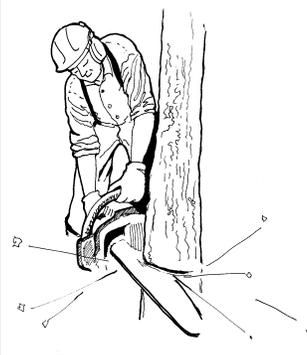
- Liability Insurance
- Written Agreements
- Posting
- Mark or Eliminate Hazards

Reducing liability

In addition to insurance, liability can be reduced in other ways. Always disclose known risks in writing to people who use your land. Written agreements can place appropriate responsibility with the property visitor. Have the agreement reviewed by a legal advisor.

Posting

Some land owners post their land to reduce personal liability for injuries sustained by uninvited visitors. Posting must be done properly to meet the requirements of state law. In Montana, notice must be placed on a post, structure, or natural object by marking it with written notice or with not less than 50 square inches of fluorescent orange paint; except when metal fence posts are used, in which case the entire post must be painted. Notice must be placed at each outer gate and main point of access to the property, including both sides of a water body crossing the property wherever the water body intersects an outer boundary line. If a property has been posted as described it is considered closed to public access.



Ownership Issue:

Workers on your Property

Responsibility:

Workman's Compensation Insurance

Action:

- Landowner provides coverage
- Worker obtains Certificate of Insurance
- Worker obtains Independent Contractor Exempt Certificate

Mark or Eliminate Hazards

Posting may not provide special protection if you know of hazards on your property or if you have created hazards to deter access. Make all reasonable attempts to mark or eliminate hazards on your property. For example, barricade and post the entrance to abandoned mines or wells. Avoid deliberate hazards. Constructing a poorly marked berm or ditch across a road to prevent 4-wheel drive access may be creating a deliberate hazard. If an injury occurs at the unmarked hazard the landowner may be liable.

Attractive Nuisance

In cases involving children, courts may overlook the act of trespassing and apply the principle of attractive nuisance. In such instances it is the landowner's responsibility to prevent children from accessing property that the owner recognizes as attractive to children. The purpose of the doctrine is to protect trespassing children from physical harm caused by a dangerous artificial condition, the risk of which they cannot appreciate, due to their age and inexperience. A pond in itself may not be an attractive nuisance, although if it is covered with sawdust and one might see it as a solid surface and not a deep pool, it could be considered an attractive nuisance.

Managing Liability

Good protection against liability is: appropriate posting of land, exercising of reasonable precautions in allowing land use, fencing or removing attractive nuisances, warning users about dangers, carrying appropriate and adequate liability insurance, and seeking competent legal advice before entering into any written agreements.

Montana Code Annotated 2015

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45-6-201. Definition of enter or remain unlawfully. (1) A person enters or remains unlawfully in or upon any vehicle, occupied structure, or premises when the person is not licensed, invited, or otherwise privileged to do so. Privilege to enter or remain upon land is extended either by the explicit permission of the landowner or other authorized person or by the failure of the landowner or other authorized person to post notice denying entry onto private land. The privilege may be revoked at any time by personal communication of notice by the landowner or other authorized person to the entering person.

(2) To provide for effective posting of private land through which the public has no right-of-way, the notice provided for in subsection (1) must satisfy the following requirements:

(a) notice must be placed on a post, structure, or natural object by marking it with written notice or with not less than 50 square inches of fluorescent orange paint, except that when metal fenceposts are used, the entire post must be painted; and

(b) the notice described in subsection (2)(a) must be placed at each outer gate and normal point of access to the property, including both sides of a water body crossing the property wherever the water body intersects an outer boundary line.

(3) To provide for effective posting of private land through which or along which the public has an unfenced right-of-way by means of a public road, a landowner shall:

(a) place a conspicuous sign no closer than 30 feet of the centerline of the roadway where it enters the private land, stating words substantially similar to "PRIVATE PROPERTY, NO TRESPASSING OFF ROAD NEXT ___ MILES"; or

(b) place notice, as described in subsection (2)(a), no closer than 30 feet of the centerline of the roadway at regular intervals of not less than one-fourth mile along the roadway where it borders unfenced private land, except that orange markings may not be placed on posts where the public roadway enters the private land.

(4) If property has been posted in substantial compliance with subsection (2) or (3), it is considered closed to public access unless explicit permission to enter is given by the landowner or the landowner's authorized agent.

(5) The department of fish, wildlife, and parks shall attempt to educate and inform all persons holding hunting, fishing, or trapping licenses or permits by including on any publication concerning the licenses or permits, in condensed form, the provisions of this section concerning entry on private land. The department shall use public media, as well as its own publications, in attempting to educate and inform other recreational users of the provisions of this section. In the interests of providing the public with clear information regarding the public nature of certain unfenced rural rights-of-way, the department may develop and distribute posting signs that satisfy the requirements of subsection (3).

(6) For purposes of this section, "land" means land as defined in [70-15-102](#).

(7) Civil liability may not be imposed upon the owner or occupier of premises by reason of any privilege created by this section.

History: En. [94-6-201](#) by Sec. 1, Ch. 513, L. 1973; amd. Sec. 21, Ch. 359, L. 1977; R.C.M. 1947, [94-6-201](#); amd. Sec. 1, Ch. 599,

L. 1985; amd. Sec. 1, Ch. 268, L. 1991; amd. Sec. 1663, Ch. 56, L. 2009. <http://leg.mt.gov/bills/mca/45/6/45-6-201.htm>

Montana Code Annotated 2017

TITLE 70. PROPERTY

CHAPTER 16. RIGHTS AND OBLIGATIONS INCIDENTAL TO OWNERSHIP IN REAL PROPERTY

Part 3. Gratuitous Permittee for Recreation

Recreational Purposes Defined

70-16-301. Recreational purposes defined. "Recreational purposes", as used in this part, includes hunting, fishing, swimming, boating, waterskiing, camping, picnicking, pleasure driving, biking, winter sports, hiking, touring or viewing cultural and historical sites and monuments, spelunking, or other pleasure expeditions. The term includes the private, noncommercial flying of aircraft in relation to private land.

History: En. Sec. 2, Ch. 138, L. 1965; R.C.M. 1947, 67-809; amd. Sec. 1, Ch. 531, L. 1987; amd. Sec. 8, Ch. 264, L. 1993; amd. Sec. 1, Ch. 303, L. 1995; amd. Sec. 1, Ch. 353, L. 2007.

Montana Code Annotated 2017

TITLE 70. PROPERTY

CHAPTER 16. RIGHTS AND OBLIGATIONS INCIDENTAL TO OWNERSHIP IN REAL PROPERTY

Part 3. Gratuitous Permittee for Recreation

Restriction On Liability Of Landowner -- Definitions

70-16-302. (Temporary) Restriction on liability of landowner -- definitions. (1) A person who uses property, including property owned or leased by a public entity, for recreational purposes, with or without permission, does so without any assurance from the landowner that the property is safe for any purpose if the person does not give a valuable consideration to the landowner in exchange for the recreational use of the property. The landowner owes the person no duty of care 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. For purposes of this section, valuable consideration does not include the state land recreational use license fee imposed under **77-1-802** or other funds provided under **77-1-815**.

(2) As used in this part, the following definitions apply:

(a) (i) "Airstrip" means improved or unimproved landing areas on private land used by pilots to land, park, take off, unload, load, and taxi aircraft.

(ii) The term does not include municipal airports governed under Title 67, chapter 10, part 1.

(b) "Flying of aircraft" means the operation of aircraft, including but not limited to landing, parking, taking off, unloading, loading, and taxiing of aircraft at an airstrip.

(c) "Landowner" means a person or entity of any nature, whether private, governmental, or quasi-governmental, and includes the landowner's agent, tenant, lessee, occupant, grantee of conservation easement, water users' association, irrigation district, drainage district, and persons or entities in control of the property or with an agreement to use or occupy property.

(d) "Property" means land, roads, airstrips, water, watercourses, and private ways. The term includes any improvements, buildings, structures, machinery, and equipment on property.

(3) The department of fish, wildlife, and parks, when operating under an agreement with a landowner or tenant to provide recreational snowmobiling opportunities, including but not limited to a snowmobile area, subject to the provisions of subsection (1), on the landowner's property and when not also acting as a snowmobile area operator on the property, does not extend any assurance that the property is safe for any purpose, and the department, the landowner, or the landowner's tenant may not be liable to any person for any injury to person or property resulting from any act or omission of the department unless the act or omission constitutes willful or wanton misconduct. (*Void on occurrence of contingency--sec. 8, Ch. 596, L. 2003.*)

70-16-302. (*Effective on occurrence of contingency*) **Restriction on liability of landowner -- definitions.** (1) A person who uses property, including property owned or leased by a public entity, for recreational purposes, with or without permission, does so without any assurance from the landowner that the property is safe for any purpose if the person does not give a valuable consideration to the landowner in exchange for the recreational use of the property. The landowner owes the person no duty of care 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. For purposes of this section, valuable consideration does not include the state land recreational use license fee imposed under **77-1-802**.

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History: En. Sec. 1, Ch. 138, L. 1965; R.C.M. 1947, 67-808; amd. Sec. 3, Ch. 209, L. 1987; amd. Sec. 8, Ch. 440, L. 1987; amd. Sec. 2, Ch. 303, L. 1995; amd. Sec. 2, Ch. 596, L. 2003; amd. Sec. 2, Ch. 353, L. 2007.

Workers on your Property

A landowner that hires workers may have responsibility for Workman's Compensation Insurance. Worker's Compensation Insurance is a state mandated insurance requirement that provides wage loss and medical benefits to employees injured on the job. An employer who carries the insurance is protected from legal action for damages from work-related injuries suffered by employees. Neither general liability nor health and accident insurance policies are substitutes for Worker's Compensation Insurance.

Employees

When a worker is your employee you must report his or her payroll to your worker's compensation insurer. The worker's compensation insurer then becomes liable for any work-related injury or occupational disease claims.

A worker is presumed to be an employee unless he or she can establish independent contractor status. If you provide the worker with tools and equipment, control the details of the work, and pay an hourly wage the worker is likely to be considered an employee. Coverage is available for seasonal and temporary employees. Employees performing certain tasks may be exempt.

Independent Contractors

Independent contractors should provide evidence of an exemption or proof that they have worker's compensation coverage on themselves and their employees before beginning work.

Exempt contractors can provide a certificate documenting their status. If an exemption exists, verify that it applies to the work you have hired the independent contractor to do.

Non-exempt contractors can show a Certificate of Insurance issued by workman's compensation as proof of their coverage. Check the expiration date on the certificate. If new workers arrive on the job make sure they are all covered.

To maintain independent contractor's status do not control the details of their duties like you would an employee. Do not furnish tools necessary to perform the work. Have a written contract that specifies the job to be completed, payment amounts, and penalty for breach of contract. Lump sum payment versus hourly wage is more supportive of an independent contractor relationship.

For more information contact a State Fund Customer Service Specialist at (800) 332-6102.

Timber Harvesting Slash Disposal

Slash (woody debris) created as a result of logging, thinning, or right of way clearing can become a wildland fire hazard. The state of Montana mandates steps family forest owners must take to reduce fire hazards created by forest management activities.

Landowners must:

- a. Obtain a Hazard Reduction Agreement (HRA) from the Department of Natural Resources and Conservation (DNRC), Forestry Division before cutting any timber. The agreement states how the slash will be disposed of and who is responsible for cleanup. The landowner is responsible for cleanup unless transferred by a contract.
- b. Notify all log purchasers of the HRA before delivery. The DNRC does this for landowners in most cases. Log purchasers withhold a bond for the state based upon the volume of material delivered. The bond is held until the hazard reduction is completed as described in the agreement.
- c. Slash must be treated as prescribed within the agreement within 18 months. State law does not require complete slash disposal. The terms of a HRA may not necessarily achieve a landowner's personal slash disposal objectives. A written contract between a logger and landowner should specify how slash disposal will be managed.

Burning

Before burning contact the DNRC forestry office or your local fire department for information regarding restrictions and permits. You'll need your property legal description for when applying for a burning permit.

Open burning is allowed from March 1 through November 30. The season can be extended or suspended due to conditions. The DNRC can provide information about state air quality regulations, and local burning regulations, which apply to specific areas. Between September 1 and November 30, call the DEQ ventilation hotline: 1-800-225-6779 or go to www.burnclosures.mt.gov Between December and February call the DEQ for permission: 460-444-3490.

County contacts are as follows:

Missoula 406-258-4755 Hotline: 406-258-4900 (Northern Missoula Co. Hotline: 406-677-2899)

Cascade: 406-454-6950; Yellowstone: 406-256-6841; Lincoln: 406-283-2443; Yellowstone: 406-751-8144



Ownership Issue:

Slash Disposal

Responsibility:

Hazard reduction agreement

Burning permit

Action:

- Before you harvest or thin trees
- Before you burn
- Contact Montana Department of Natural Resources and Conservation (DNRC), Forestry Division

Streamside Management Act

Stream, Lake or Wetland Projects

Family Forest landowners planning activities near streams, lakes and wetlands may have legal responsibility associated with two laws.

310 Law

Landowners are required to obtain a permit for any activity that may physically alter the bed and/or bank of a perennial stream or river. What is a perennial stream? A stream which flows during all seasons of the year. Who decides if a stream is perennial or not? The local conservation district.

The following activities on a perennial stream require a 310 permit: culvert & bridge installation or removal, stream bank stabilization, a diversion, dam, equipment crossing, pond construction, dredging, channel change or ford.

A landowner planning one of these activities should apply for a 310 permit at the local conservation district office. Conservation district supervisors (elected local citizens) have up to 60 days from the date of application to approve or deny a permit. Most districts meet on a monthly basis and process permits at that time. An on-site inspection with a district supervisor, fisheries biologist, and the landowner may be required. When a site inspection is required, the decision to approve, deny or seek modification to the permit takes place at the next district meeting.

404 Permit

Projects that will result in the discharge or placement of dredged or fill material into a lake, river, stream, wetland or other aquatic site require a 404 permit from the U.S. Army Corps of Engineers. Time required for permit authorization depends on the size and scope of the intended project.



Ownership Issue:

Stream, Lake or Wetland Project

Responsibility:

310 & 404 Permits

Action:

- Before work near perennial stream, contact Conservation District
- Before discharge of materials into a lake, river, stream or wetland, contact US Army Corps of Engineers

Property Easements

An easement grants specified rights to land owned by one entity to another who does not own the land. An example is a road easement where a landowner grants the right to construct or use a road across their property to provide access for a neighbor. The holder of the road easement is called the *grantee*, the property owner who has granted the easement is the *grantor*. The grantee should have a reference in the property deed. A deed is a document that describes the physical location of the property and the extent of an owner's rights. Owner knowledge of property rights is important for forest stewardship planning. For example, if you don't own all mineral rights on your property, permission may be required for the mineral rights owner to remove gravel from a pit on your property.

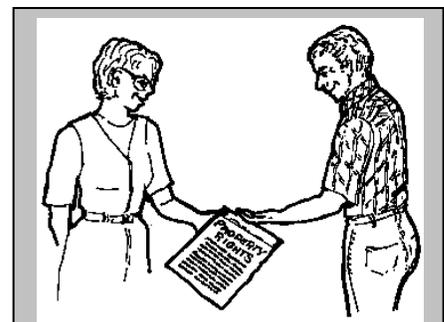
Conservation Easements

Landowners can voluntarily give up ownership rights to permanently protect certain features of their property.

Development rights may be sold or donated to a legal entity known as a land trust. Known as a transfer of development rights, the easement is designed by the grantor to specifically allow certain activities on the property while disallowing others. The easement can be as general or specific as the grantor requires, within the Internal Revenue Service's (IRS) limits. The IRS recognizes conservation easements granted for the following purposes:

1. Protection of natural fish, wildlife, or plant habitat.
2. Preservation of land for education and recreation by the public.
3. Preservation of farm and forest land open space for scenic enjoyment of the public or for public benefit resulting from government policy.

Land trust organizations will sometimes purchase easements to protect especially significant tracts, but usually they only accept gifts. The donor is generally expected to pay the cost of appraising the easement's value and the legal costs of drafting and recording the easement. A qualified appraiser determines the value of the property with, and without, easement restrictions. The difference between these two values is the amount of the charitable gift. For some people, the income and estate tax advantage of a gift to a land trust is appealing. IRS rules regarding charitable contributions generally apply to the gift of an easement and any endowments. Future buyers of the property are obligated to comply with all conditions of the easement. The land trust organization monitors the property to make sure conditions of the easement are being complied with. If not, legal action can be taken to protect the conservation features of the property.



Ownership Issue:

Property Easements

Responsibility:

Review Property
Title Report
Review Deed

Action:

- Obtain Legal Advice before starting project

Threatened or Endangered Species

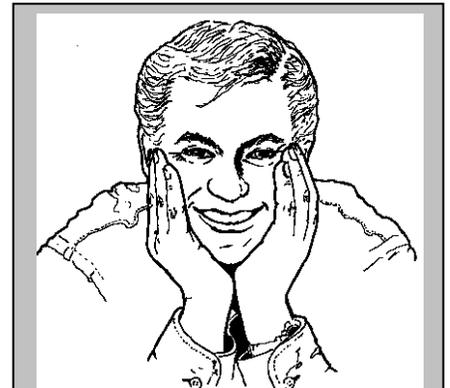
Congress passed the Endangered Species Act (ESA) in 1973 to help save species facing the risk of extinction, giving two federal agencies, the U.S. Fish & Wildlife Service and the National Marine Fisheries Service, responsibility for administering the law.

The ESA makes it unlawful for a person to *take* a listed species. Take means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or attempt to engage in any such conduct.” Harm is defined as “an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.”

There are no animals on the endangered species list that live in Montana’s forests. Threatened animals include; grizzly bear, Canada lynx, bull trout and the bald eagle. The water howellia is a threatened aquatic plant that grows in forested bogs in the Swan Valley. The Ute ladies’ tresses is a threatened orchid which grows in wet meadows and forested riparian areas. Westslope cutthroat trout are under consideration for listing as a threatened species.

Where to go for more Information

Stewardship advisors and other natural resource professionals can provide additional information about legal issues associated with their area of expertise. Their guidance can ensure a project is planned efficiently and accomplished legally. The Information and Services Guide is a good place to look for help. Related index topics include: Conservation Easements, Contracts, Laws and Permits, Threatened, Endangered, and Rare Species, Water Rights, and Worker’s Compensation Insurance.



Ownership Issue:

Questions???

Responsibility:

Obtain more information

Action:

Contact

- Stewardship Advisor
- MSU Extension Forestry
- Natural Resource Professional
- Lawyer
- Insurance Agent