



PROTECT OREGON RECREATION

On January 9, 2025, President Biden signed the Explore Act, aimed at expanding access to outdoor recreation for all Americans. Section 319 of the Act allows recreation service providers to use liability waivers for ordinary (simple) negligence. However, liability waivers must be aligned with state law.

By February, The National Park Service announced it would allow commercial use service operators to ask customers to sign an acknowledgment of risk or waiver of liability for ordinary negligence. Because the liability waiver standard in Oregon is extreme and out of balance, Oregon recreation providers are prevented from taking full advantage of this recent Federal policy.

The memo states:

“Such agreements commonly ask customers to acknowledge the inherent risks of the activity, waive operator liability, and indemnify the operator for claims of bodily injury, death, or loss of personal property resulting from the inherent risks of the activity or the operator’s simple negligence, but not the operator’s gross negligence or intentional or reckless misconduct.”

It goes on to state:

“In states where exculpatory agreements are allowed, the strictness of their enforcement varies. **Such an agreement may be invalidated by a reviewing court if the court finds it to be unreasonable or in violation of state law or public policy.**” (*Emphasis added*)

This is precisely what HB 3140 would do. It would allow recreation and fitness providers to use a liability waiver for only simple negligence. A reviewing court can then uphold or invalidate the waiver if it violates state law, or if the facts suggest the case is beyond ordinary negligence.

Unfortunately, because of Oregon law, recreation providers in Oregon who operate on National Park land are not afforded the same protections as their peers in other western states.

Attachment: National Park Service Field Memo – Exculpatory Agreements for Commercial Use Authorizations, Concessions Contracts and Leases



United States Department of the Interior

NATIONAL PARK SERVICE

1849 C Street, NW

Washington, DC 20240

Memorandum

To: NPS Field Memos

From: Associate Director, Business Services

Subject: Exculpatory Agreements for Commercial Use Authorizations, Concession Contracts and Leases

PURPOSE:

This memorandum revises National Park Service (NPS) policy for commercial service operators providing recreational services to visitors to National Park System units (i.e., concessioners, commercial use authorization (CUA) holders, and commercial leaseholders) regarding their use of exculpatory agreements. This revised policy allows all CUA holders, regardless of the level of risk associated with the authorized service, and concessioners and commercial lessees providing high-risk recreation services (as determined by the NPS) to ask their customers to sign an exculpatory agreement in the form of a visitor acknowledgement (i.e., assumption) of risk (VAR), waiver of liability (WoL), and indemnification for injuries resulting from the commercial service operator's simple (i.e. ordinary) negligence. Commercial service operators in parks are currently allowed to ask their customers to sign a VAR but not a WoL or indemnification.

CUA holders, concessioners and lessees may be using exculpatory agreements in accordance with this revised policy as of the date of this memorandum.

This policy revises the NPS Commercial Services Guide, Section 6.9.5 and 11.9.4.

BACKGROUND:

Exculpatory agreements in the form of VARs, WoLs, and indemnification clauses are commonly used by commercial recreation service operators. Exculpatory agreements can make customers aware of the risks associated with the activity, protect the operator from financial liability if an accident occurs, and reduce financial risk to the operator by discouraging claims related to the activity and by reducing costs incurred by the operator in defending liability actions. Such agreements commonly ask customers to acknowledge the inherent risks of the activity, waive operator liability, and indemnify the operator for claims of bodily injury, death, or loss of personal property resulting from the inherent risks of the activity or the operator's simple negligence, but not the operator's gross negligence or intentional or reckless misconduct.

Operator use of exculpatory agreements is allowed by other Federal agencies, including another DOI bureau, that authorize operators to provide commercial recreation services to visitors on federal lands. Exculpatory agreements that meet certain conditions are allowed in most states. Exculpatory agreements are currently prohibited outright in a few states and are prohibited for certain recreational activities in several states. In states where exculpatory agreements are allowed, the strictness of their enforcement varies. Such an agreement may be invalidated by a

reviewing court if the court finds it to be unreasonable or in violation of state law or public policy.

The NPS Commercial Services Program assessed whether it should modify its policy prohibiting commercial services operator use of exculpatory agreements. Considerations included:

- **Common practice.** NPS policy prohibiting exculpatory agreements is inconsistent with industry practice and policies or practices of other Federal agencies that authorize similar commercial visitor services on federally managed lands. The public has become accustomed to being asked to sign exculpatory agreements in recreational settings.
- **Insurance.** NPS commercial service operators have indicated and NPS insurance consultants have validated that the NPS's prohibition on such agreements can impact liability insurance cost and availability. The unavailability of insurance creates additional risk and burden for customers to recover for accidents or injuries. The increased cost of insurance could result in increased rates and charges to customers to cover insurance costs such that participation in the activity could become unreasonably expensive.
- **Legislation.** Congress passed and the President signed into law, the EXPLORE Act (H.R. 6492), which requires Federal agencies to allow use of exculpatory agreements that meet certain conditions for activities authorized under CUAs and other federal permits.

Based on these considerations, the NPS concluded that it should revise its policy to allow use of exculpatory agreements in certain circumstances. This revised policy balances the NPS's interest in protecting visitors with fiscal realities in the insurance market and common practice for commercial recreation service operators, and it aligns the NPS's policy with other federal agency policies.

POLICY

NPS policy is that all CUA holders (regardless of the level of risk associated with the services being provided) and concessioners and commercial lessees providing high-risk recreation services (as determined by the NPS) will be permitted to ask visitors (i.e., their customers) to sign exculpatory agreements that include VARs, WoLs, and indemnification clauses.

High-risk recreation services are those that have a heightened risk of injury or death. In determining whether an activity is high risk and a concessioner or lessee should be authorized to use exculpatory agreements, the NPS will consider whether the use of exculpatory agreements is common industry practice for those services. Examples of commercial recreation services that the NPS may consider high risk include but are not limited to mountaineering, Nordic or alpine skiing, hiking, rafting, kayaking and canoeing, snowmobiling, off-road vehicle activities, indoor gyms and outdoor field sports and other outfitter and guide services. Examples of commercial recreation services that the NPS would not routinely consider high risk include but are not limited to lodging, food and beverage, retail, showers and laundries.

These exculpatory agreements are subject to the following conditions:

- Must comply with applicable State and Federal law and NPS policy;
- Must not waive liability or preclude claims against or require indemnifying the commercial service operator for gross negligence, recklessness, or willful misconduct; and
- Must waive liability against the United States by including the following language:
“The undersigned further waives liability of the United States and acknowledges and agrees that the United States and its officers and employees are fully released from any

liability for injuries, damages, or losses that the undersigned sustains as a result of or in connection with the undersigned's participation in this activity.”

Operators may consider consulting with their own counsel in the development of their exculpatory agreements to ensure it complies with NPS policy and applicable laws.

New concession contracts and commercial leases that the NPS determines require or authorize the provision of high-risk services to visitors and all new CUAs will include terms authorizing the operator to use exculpatory agreements in accordance with this revised policy. The NPS Commercial Services Program will provide regions standard contract language to include in concession contracts and commercial leases to authorize operator use of exculpatory agreements in accordance with this revised policy. Standard CUA terms and conditions in the on-line application and reporting system will also be updated reflect the updated policy.

Concessioners and commercial lessees whose existing authorization allows the use of a VAR and all current CUA holders may use exculpatory agreements that include a WoL and indemnification clause in accordance with this revised policy.

For existing CUA holders, the terms and conditions of their CUA can't be practically updated. This policy serves as notice that the existing terms and conditions are hereby modified and CUA holders may begin to use exculpatory agreements in accordance with this revised policy.

For existing concessioners and lessees that have been characterized as high risk (i.e., they are currently allowed to use a VAR), this policy also serves as notice that the contract or lease requirements are hereby modified, and these concessioners and lessees are authorized use to use exculpatory agreements in accordance with this revised policy. Parks with such concessioners or lessees must update the contract operating plan or lease term and conditions as soon as practical to reflect this change using the revised language provided in Attachment 1 to this policy.

Concessioners or commercial lessees that are not currently authorized to use a VAR but believe they provide high-risk services may submit a request to use exculpatory agreements to the park superintendent for consideration. Superintendents may consult with their Regional Commercial Services Program for guidance in considering such requests as needed. Concessioners or lessees may appeal the Superintendent's decision that service is not a high-risk to the Regional Director. Such an appeal must be in writing and provide clear information on why the concessioner or lessee believes the service meets the definition of a high-risk service.

The NPS reserves the right to review operators' exculpatory agreements and any modifications or replacements of the agreements at any time during the term of the applicable authorization and require any revisions to ensure all the requirements in this policy are met. The NPS also reserves the right to require changes to operator exculpatory agreements or, to the extent permitted by law, revoke the operator's allowance to use exculpatory agreements, if the NPS determines the agreements are not legally compliant. Any determination by the NPS that an operator's exculpatory agreement is policy-compliant does not convey the NPS's view that the agreement is valid, enforceable, or otherwise endorsed by the NPS for any purpose.

FOR FURTHER INFORMATION

For further information or questions on this policy, please contact Liz Tinker, WASO Senior Concessions Management Specialist at Liz_Tinker@nps.gov or Kurt Rausch, Chief, WASO Commercial Services at Kurt_Rausch@nps.gov.

Attachment 1
Concession Contract Operating Plan and Lease Terms and Conditions for Exculpatory Agreements

The following language regarding authorization to use exculpatory agreements is to be used for all new concession contracts or leases authorizing high-risk activities and to modify existing concession contracts or leases with those activities. Please remove any current sections of the Operating Plan (or any other applicable sections of the contract/lease and exhibits) referencing Visitor Acknowledgment of Risk (VAR). Typically, VAR language is in the Operating Plan under the Risk Management section although it may be present in the Public Notices or as a stand-alone section. Please replace any current contract or lease VAR language with the new exculpatory language below. (Updated language like this is added to the standard CUA terms and conditions in for all new CUAs in the on-line CUA application and reporting system.)

I. Exculpatory Agreements

- a. The Concessioner/Lessee may require clients (or their legal guardian if the client is under 18 years of age) participating in Area activities identified by as “higher risk” to sign exculpatory agreements that include a visitor Acknowledgment of Risk (VAR), Waiver of Liability (WoL) and indemnification clauses.
- b. Higher risk services under this Contract/Lease are the following: [*INSERT APPLICABLE SERVICES UNDER THE CONTRACT/LEASE*]
- c. Exculpatory agreements:
 - i. Must comply with applicable state and federal law and NPS policy;
 - ii. Must not waive liability or preclude claims against or require indemnifying the Concessioner/Lessee for gross negligence, recklessness, or willful misconduct; and
 - iii. Must waive liability against the United States by including the following language:

“The undersigned further waives liability of the United States and acknowledges and agrees that the United States and its officers and employees are fully released from any liability for injuries, damages, or losses that the undersigned sustains as a result of or in connection with the undersigned’s participation in this activity.”
- d. The Service will not as a matter of standard practice, collect, review or approve the Concessioner’s/Lessee’s exculpatory agreements. Concessioners may consider consulting with their own counsel in the development of its exculpatory agreements to ensure they comply with NPS policy and Applicable Law. However, the Service reserves the right to review the Concessioner’s/Lessee’s exculpatory agreements and any modifications or replacements of the agreements at any time during the term of the Contract/Lease and require any revisions to ensure all the requirements of NPS policy are met. The NPS also reserves the right to require changes to Concessioner’s/Lessee’s exculpatory agreements or, to the extent permitted by law, revoke the Concessioner’s/Lessee’s allowance to use exculpatory agreements, if the Service determines the agreements are not compliant. Any determination by the Service that a Concessioner’s/Lessee’s exculpatory agreement is policy-compliant does not convey the NPS’s view that the agreement is valid, enforceable, or otherwise endorsed by the NPS for any purpose.