SCHOOL OF LAW
TEXAS A&M UNIVERSITY

Texas A&M Journal of Property Law

Volume 10
Number 2 *Student Articles Edition*

Article 1

4-11-2024

A Tall Summit: Securing Lasting, Reliable Public Access For Recreational Use On Colorado's Privately Owned Fourteeners

Michael Betrus
michaelbetrus@tamu.edu

Follow this and additional works at: https://scholarship.law.tamu.edu/journal-of-property-law

Part of the Property Law and Real Estate Commons

Recommended Citation

Michael Betrus, *A Tall Summit: Securing Lasting, Reliable Public Access For Recreational Use On Colorado's Privately Owned Fourteeners*, 10 Tex. A&M J. Prop. L. 111 (2024).
Available at: https://doi.org/10.37419/JPL.V10.I2.1

This Student Article is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Texas A&M Journal of Property Law by an authorized editor of Texas A&M Law Scholarship. For more information, please contact aretteen@law.tamu.edu.

A Tall Summit: Securing Lasting, Reliable Public Access for Recreational Use on Colorado's Privately Owned Fourteeners

By: Michael Betrus†

Abstract

From the National Scenic Trails to mountains to other destinations in nature drawing the public's interest and time for recreational activities, privately owned land can cause difficulties in ensuring reliable and consistent public access. A specific example is the Decalibron Loop, a trail in Colorado linking together a few mountains; public access has wavered over the years, and a recent Tenth Circuit case, Nelson v. United States, greatly affected landowner dispositions—particularly with regard to liability—toward the privately owned property. Similar situations across the country provide a variety of potential approaches to helping provide public access and reducing landowner concerns.

With the goals of respecting private property ownership and addressing landowner concerns, this Comment explores and analyzes various potential solutions as applied to the Decalibron Loop. Actions such as creating new easements or utilizing the government's power of eminent domain have significant weaknesses. Creating a reliable partnership and updating the Colorado Recreational Use Statute are the two most viable options. These solutions take into account landowners' vocal concerns, local organizations' opinions and insight, and the uncertain future in this area of law following the Nelson case.

I. INTRODUCTION 112
II. RECREATIONAL USE STATUTES: HISTORY AND THE CURRENT COLORADO LAW 114
- *A. A Brief History of Recreational Use Statutes 115*
- *B. The Colorado Recreational Use Statute 116*

DOI: https://doi.org/10.37419/JPL.V10.I2.1

†J.D. Candidate, Texas A&M University School of Law, Spring 2024. I am indebted to Professor John Murphy, my faculty advisor, for his insights and suggestions and to my wife and parents for their encouragement and support. I would also like to thank the JPL team for their hard work and dedication to the Journal.

III. THE *NELSON* CASE AND LANDOWNER CONCERNS 117
A. Nelson v. United States *117*
B. Landowner and Legal Response *119*
C. Comparing and Contrasting Other Case Law *121*
IV. SHINING A LIGHT: SITUATIONS AND SOLUTIONS ACROSS THE NATION 123
A. Solutions on the Decalibron Loop *123*
B. A Local Parallel: The Ski Safety Act *126*
C. Purchases, Easements, and Eminent Domain on National Trails *127*
D. Maine's Tradition of Public Access *130*
V. SUGGESTIONS FOR LANDOWNER PROTECTION AND RELIABLE ACCESS TO THE PRIVATELY OWNED COLORADO FOURTEENERS 131
A. Easements, Purchases, and Eminent Domain *132*
B. Legislative Changes to the CRUS *133*
C. Partnerships *135*
D. The Role of Tradition *136*
VI. CONCLUSION 137

I. INTRODUCTION

Tens of millions of people engage in hiking activities each year in the United States, part of a widespread interest in being outdoors, exercising, traveling, finding time away from technology, and spending time with family and friends.[1] Lots of hiking and outdoor activities take place on public lands in state and national parks.[2]

But in some wilderness areas, people venture unintentionally and intentionally onto privately owned land, creating liability concerns.[3]

---

1. OUTDOOR FOUND., 2021 OUTDOOR PARTICIPATION TRENDS REPORT 6 (2021) [hereinafter 2021 OUTDOOR PARTICIPATION]; *cf.* OUTDOOR FOUND., 2020 OUTDOOR PARTICIPATION TRENDS REPORT 6 (2021) (showing that in 2019 pre-COVID-19 hiking participants still totaled nearly fifty million despite being lower than in 2020).

2. *See, e.g.,* Brian Maffly, *Lottery System in the Works for Hiking Zion's Angels Landing*, SALT LAKE TRIB. (Aug. 14, 2021, 7:00 AM), https://www.sltrib.com/news/environment/2021/08/14/lottery-system-works/#:~:text=More%20than%20300%2C000%20a%20year,23%2C%202020 [https://perma.cc/R38V-6Z5J] (referencing the fact that more than 300,000 park visitors hike up the famous Angels Landing trail annually in Zion National Park).

3. *E.g.,* Jason Blevins, *Landowners Shut Down Access to Three Colorado Fourteeners Citing Liability, Impacts*, COLO. SUN (Apr. 30, 2021, 5:03 PM), https://coloradosun.com/2021/04/30/colorado-fourteeners-14ers-closure-lincoln-democrat-bross/ [https://perma.cc/PNN6-QNJ5].

Some privately owned lands are now parts of easements;[4] an easement establishes a nonpossessory right to use another's land.[5] For example, approximately 10% of the famous Pacific Crest Trail (PCT) crosses private land.[6] In most of these spots, trail easements grant access to hikers and equestrians.[7] Additionally, as a result of the work of many parties, external funding, and a long effort, a partnership recently allowed the Pacific Crest Trail Association to conserve miles of the PCT.[8]

Recreational use statutes have become commonplace across the fifty states.[9] The goal of these laws is to relieve landowners of liability concerns and thus promote public recreational use of their land.[10] However, this immunity is not absolute, and many landowners still have various liability concerns. For example, in 2019, the Tenth Circuit held the United States Air Force Academy (USAFA) liable after a bicyclist fell into a sinkhole on a USAFA path; this case, which this Comment will explore in more depth below, has increased liability concerns for many landowners and therefore led to land closures.[11]

This Comment will explore avenues to create more public access to private lands for recreational use, using several mountains in Colorado over 14,000 feet in elevation ("fourteeners") as a case study. Hiker use days on fourteeners in Colorado totaled 303,000 in 2021—a 27% decline from the previous year.[12] Part of this decline is due to landowners closing off access to fourteeners or trails that lead to these mountains as a result of the Tenth Circuit case. There are partnerships, easements, and other solutions in place all over the United States to provide access for recreational activity on private lands. Many of these solutions are worth exploring and potentially applying to the Colorado fourteeners situation.

This past year in Colorado, a "unique partnership" between advocacy groups, the Forest Service, and the local town granted hikers

4. *E.g., Land Protection Q&A*, PAC. CREST TRAIL ASS'N, https://www.pcta.org/our-work/land-protection/land-protection-qa/ [https://perma.cc/PM76-J989] [hereinafter *PCTA Land Protection*].
5. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2(1) (AM. L. INST. 2000).
6. *PCTA Land Protection*, *supra* note 4.
7. *Id.*
8. *Id.*
9. Klepper v. City of Milford, 825 F.2d 1440, 1444 (10th Cir. 1987).
10. *Id.*
11. Nelson v. United States, 915 F.3d 1243, 1246 (10th Cir. 2019).
12. *2021 Hiking Use Estimates*, COLO. FOURTEENERS INITIATIVE, https://www.14ers.org/2021-hiking-use-estimates/ [https://perma.cc/NL92-BWF7].

access to Mount Lincoln and Mount Democrat, two of the 58 Colorado fourteeners, both privately owned.[13] This partnership came after landowner John Reiber had closed off access to the mountains in 2021 during peak hiking season (from May 1 to August 6), citing the aforementioned liability concerns.[14] Reiber also closed the property from 2004 to 2006.[15] Access to these peaks, other fourteeners, and other Colorado private lands is inconsistent—changes in access status are frequent. Legislative news in early March 2023 drew attention to this inconsistency: a legislative effort to update Colorado law on this issue and address landowner liability concerns failed, leading Reiber to announce his intention to close access to the mountains.[16]

Expanding liability protections for landowners is central to the mission of ensuring consistent access to privately owned land for recreational use—including, but not limited to, the affected Colorado fourteeners. However, legislation, partnerships, and easements are all viable options to consider for furthering access. Part II of this Comment will explore the history of recreational use statutes and the current Colorado statute, and Part III will explore the highly influential Tenth Circuit case *Nelson v. United States*, the potential weaknesses in the current Colorado recreational use statute, and remaining landowner concerns. Part IV will then highlight other cases of public access to private lands in the United States, such as on the PCT, and the solutions implemented. Lastly, Part V will provide suggestions for creating reliable, long-lasting recreational use access to the privately owned Colorado fourteeners and similarly affected areas.

II. RECREATIONAL USE STATUTES: HISTORY AND THE CURRENT

13. Jason Blevins, *Partnership Keeps Private Colorado 14ers Open to Hikers*, U.S. NEWS & WORLD REP. (July 23, 2022, 10:10 AM), https://www.usnews.com/news/best-states/colorado/articles/2022-07-23/partnership-keeps-private-colorado-14ers-open-to-hikers#:~:text=Landowners%20have%20closed%20public%20access,to%20some%20of%20the%20spots.&text=July%2023%2C%202022%2C%20at%2010%3A10%20a.m.&text=MOSQUITO%20RANGE%2C%20Colo [https://perma.cc/CNZ2-6UHU].

14. *2021 Hiking Use Estimates*, *supra* note 12.

15. Jason Blevins, *Landowner Will Close Access to Two Colorado 14ers After Lawmakers Rejected Legislation Limiting Liability*, COLO. SUN (Mar. 3, 2023, 3:50 AM), https://coloradosun.com/2023/03/03/landowner-closing-14ers-mount-lincoln-democrat/ [https://perma.cc/ZTA5-RRJ9].

16. *Id.*

A. A Brief History of Recreational Use Statutes

For over the past half-century, recreational use statutes have played an important role in shielding landowners from liability for injuries that occurred on their lands. The origin of these statutes is a Council of State Governments model act that was promulgated in 1965 and a subsequent 1979 model act created by several organizations that advocate for outdoor recreation.[17] The 1965 committee sought to follow Virginia, which in 1950 passed the first recreational use statute that limited landowner liability when owners allowed others on their land for recreational purposes.[18] The influence of the 1965 model act led to thirty-three states enacting recreational use statutes in the 1960s.[19]

These recreational use statutes deviated from the common law, in which the intent of one entering the property and the general use of the property were not decisive in determining the duty of care.[20] Instead, recovery in the common law depended on the categories of invitee, licensee, and trespasser.[21] Landowners had to warn licensees of hazards that were potentially dangerous, and landowners owed almost no duty to a trespasser (besides refraining from intentional or wanton conduct by which a trespasser is injured).[22] By contrast, landowners had been subject to liability if they did not exercise reasonable care in protecting an invitee against a danger if an injury occurred.[23] But these classifications caused problems. Michael Lunn explains that "owners of large tracts of land were put at a huge disadvantage from the start" because "damage control quickly becomes a full-time job when your acres hold several attractive

17. John C. Barrett, *Good Sports and Bad Lands: The Application of Washington's Recreational Use Statute Limiting Landowner Liability*, 53 WASH. L. REV. 1, 2–3 (1977); Michael J. Lunn, *Class Dismissed: Forty-Nine Years Later, Recreational Use Statutes Finally Align with Legislation's Original Intent*, 20 DRAKE J. AGRIC. L. 137, 145–46 (2015).

18. Michael S. Carroll et al., *Recreational User Statutes and Landowner Immunity: A Comparison Study of State Legislation*, 17 J. LEGAL ASPECTS SPORT 163, 164 (2007).

19. *Id.*

20. Barrett, *supra* note 17, at 3.

21. *Id.*

22. Lunn, *supra* note 17, at 143. Lunn also provides definitions for these three categories.

23. *Id.*

options for recreation seekers and trespassers are frequent."[24] Courts grew to dislike the classification system, and eventually the Council of State Governments proposed the model act.[25] Despite the model act being over fifty years old, its influence and language are still unmistakable.

B. The Colorado Recreational Use Statute

The Colorado Recreational Use Statute (CRUS) states its purpose as "encourag[ing] owners of land to make land and water areas available for recreational purposes by limiting their liability toward persons entering thereon for such purposes."[26] Following this goal, the statute provides a liability shield to "an owner of land who either directly or indirectly invites or permits, without charge, any person to use such property for recreational purposes."[27] This section states that the owner of land who extends this type of invitation does not (1) extend assurance that the land is safe, (2) confer a legal status of invitee or licensee to whom the owner owes a duty of care, or (3) incur liability or assume responsibility for an injury or death caused by such a person's act or omission.[28]

But there is a key exception: "Nothing in this article limits in any way any liability which would otherwise exist . . . [f]or willful or malicious failure to guard or warn against a known dangerous condition, use, structure, or activity likely to cause harm."[29] Much of the language of this exception goes back to the 1965 model act, which also was not absolute and did not provide a liability shield when there was "willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity."[30] The CRUS provides other exceptions as well, including for injuries suffered in cases in which the landowner charges for recreational use of the land and "for maintaining an attractive nuisance."[31] Potentially relevant to the

24. *Id.*
25. For an example of a court critiquing the classification system, *see* Mile High Fence Co. v. Radovich, 489 P.2d 308, 311 (Colo. 1971).
26. COLO. REV. STAT. ANN. § 33-41-101 (West, Westlaw through 1st Reg. Sess., 74th Gen. Assemb.).
27. § 33-41-103(1).
28. § 33-41-103(1)(a)–(c).
29. § 33-41-104(1)(a).
30. John C. Becker, *Landowner or Occupier Liability for Personal Injuries and Recreational Use Statutes: How Effective is the Protection?*, 24 IND. L. REV. 1587, 1591 (1991).
31. COLO. REV. STAT. ANN. § 33-41-104(1)(a)–(c) (West, Westlaw through 1st

privately owned fourteeners, abandoned mining operations on a property are not considered an attractive nuisance.[32] Lastly, as for remedies, the prevailing party in a recreational user's civil action against a landowner is to recover the costs of the action and reasonable attorney fees.[33]

As quoted above, central to the statute is that the CRUS clearly states that the landowner must invite or permit the user onto the land "without charge"; this exclusion of charging a fee is common among recreational use statutes.[34] However, donations, services, or money given to help with conservation measures do not typically create an exclusion to the liability shield.[35]

An "owner" under the Colorado statute "includes, but is not limited to, the possessor of a fee interest, a tenant, lessee, occupant, the possessor of any other interest in land, or any person having a right to grant permission to use the land, or any public entity" as defined in the state's governmental immunity act.[36] The statute also lists approximately 25 activities that are examples of recreational activity on the land, including hiking, camping, rock climbing, and cross country skiing.[37] A repetitive and broad umbrella category precedes and concludes this thorough list.[38]

III. THE *NELSON* CASE AND LANDOWNER CONCERNS

A. *Nelson v. United States*

Recent landowner action to protect against potential liability for injuries or deaths on private land has often been linked to the 2019 case *Nelson v. United States*.[39] On September 3, 2008, the plaintiff, James Nelson, struck a sinkhole while bicycling on an asphalt path on U.S. Air Force Academy (USAFA) land.[40] This accident resulted in permanent injuries, including vision loss, a brain injury, scarring and

Reg. Sess., 74th Gen. Assemb.).

32. § 33-41-104(1)(c).

33. § 33-41-105.5.

34. Carroll et al., *supra* note 18, at 168.

35. *Id.*

36. COLO. REV. STAT. ANN. § 33-41-102(3) (West, Westlaw through 1st Reg. Sess., 74th Gen. Assemb.).

37. § 33-41-102(5).

38. § 33-41-102(5) (e.g., "any sports or other recreational activity of whatever nature undertaken by a person while using the land").

39. *See* Nelson v. United States, 915 F.3d 1243 (10th Cir. 2019).

40. *Id.* at 1246.

disfigurement, and damage to his endocrine system; he spent one month in the hospital, needed facial orthopedic reconstructive surgery, and received continuing rehabilitative and medical treatment afterward.[41] The damages, impairment, and disfigurement totaled to an amount of nearly seven million dollars.[42]

The USAFA had not designated the path as one for recreational use, had signs on the path entrances prohibiting entry onto the property, and considered public users trespassers; however, the Academy did know that the public used the path.[43] The sinkhole covered the path's entire width and had been discovered the previous month by a Fish and Wildlife Service biologist who managed the land's natural resources and monitored erosion and sedimentation issues.[44] The biologist photographed and documented the issue but did not report it to anyone and did not attempt to fix or warn of the sinkhole.[45]

The Tenth Circuit quoted the CRUS exception to highlight that the "broad liability shield" is not absolute: "[n]othing in [the CRUS] limits in any way any liability which would otherwise exist . . . [f]or willful or malicious failure to guard or warn against a known dangerous condition, use, structure, or activity likely to cause harm."[46] The court, ruling out malicious intent, defined *willful* in accord with a past Colorado case: *willful* describes an action taken "voluntarily, purposefully, and with a conscious disregard for the consequences of [the] conduct."[47] In other words, here the CRUS exception meant that there would be no immunity if a landowner knew of a dangerous condition and showed willful failure to guard or warn visitors about the condition. Following this definition, the Tenth Circuit reasoned that the biologist willfully ignored what he knew to be a dangerous condition on the asphalt path, meeting the requirements for the CRUS exception.[48] Therefore, affirming the district court's ruling, the circuit court held that the USAFA was not shielded from liability under the

41. Nelson v. United States, 256 F. Supp. 3d 1136, 1141 (D. Colo. 2017), *aff'd*, 915 F.3d 1243 (10th Cir. 2019).
42. *Id.*
43. *Id.* at 1144–45.
44. *Id.* at 1143, 1146.
45. *Id.* at 1146–47.
46. COLO. REV. STAT. ANN. § 33-41-104(1)(a) (West, Westlaw through 1st Reg. Sess., 74th Gen. Assemb.).
47. Hohn v. Morrison, 870 P.2d 513, 517 (Colo. App. 1993); Nelson v. United States, 915 F.3d 1243, 1251 (10th Cir. 2019).
48. *Nelson*, 915 F.3d at 1256.

CRUS for the bicyclist's injuries on USAFA property.[49] The court awarded Nelson and his wife $7.3 million.[50]

B. Landowner and Legal Response

The *Nelson* decision increased liability concerns and caused the closure of three fourteeners that hikers often summit together on a loop—Mount Lincoln, Mount Democrat, and Mount Bross (the "Decalibron Loop" trail).[51] John Reiber has owned mining claims on the mountains for a long time and has publicly expressed his concerns:

> I've had enough damage to the doors we try to keep secure on the mines. I've had gates cut. I don't know if I've ever been up there without seeing people standing on top of Bross, walking right by the sign that says 'Private property. No trespassing,' I definitely have concerns over the willingness of people to not follow the rules. I think from a safety standpoint, I'm not sure there is any way to really make folks stay on the trail. But we're trying.[52]

He has also stated that he believes that this situation will require a legislative fix.[53] Reiber related this opinion to his conflicting thoughts: his worry of someone removing a warning sign to the public about the danger of mines on the land and his desire of "really want[ing] people to enjoy the 14ers."[54] He expressed a desire for common ground and asked, "how can we make it work for the recreating public and still provide landowners with a little better protection so we don't have to go out and buy all this additional, incredibly expensive insurance?"[55]

---

49. *Id.* at 1256–57.
50. Nelson v. United States, 40 F.4th 1105, 1106 (10th Cir. 2022).
51. Blevins, *supra* note 3.
52. *Id.*; Ian Wood, *Private Colorado Landowner Considering Banning Hikers from 14ers*, UNOFFICIAL NETWORKS (July 28, 2022, 2:59 PM), https://unofficialnetworks.com/2022/07/28/priavate-landowners-hikers-14ers/ [https://perma.cc/6ANN-8VEL].
53. Jason Blevins, *Partnership Sees Two Privately Owned 14ers Open*, MONTROSE DAILY PRESS (July 20, 2022), https://www.montrosepress.com/partnership-sees-two-privately-owned-14ers-open/article_f3239c04-0865-11ed-9e14-3b44ca6c317f.html [https://perma.cc/72RT-DNHQ].
54. Jason Blevins, *Colorado May Bolster Liability Protections for Private Landowners Who Let the Public Recreate on Their Lands*, COLO. SUN (Jan. 11, 2023, 3:50 AM), https://coloradosun.com/2023/01/11/legislation-landowner-liability-recreational-access/ [https://perma.cc/Z3UK-2E8Z].
55. *Id.*

Reiber is not the only one with concerns. Mount Lindsey is another fourteener, and the Trinchera Blanca Ranch owns the upper mountain. In September 2021, the ranch posted "No Trespassing" signs on the trail, also due to CRUS and liability concerns.[56] A Trinchera Branch spokesman said that the Tenth Circuit decision "limited the scope of the Colorado recreational use statute and increased landowner exposure."[57]

However, despite these concerns, multiple attorneys have voiced words of reassurance to landowners. David Hersh, the plaintiff's attorney in *Nelson*, wrote that "responsible landowners really should have no fear of the 10th Circuit's plain reading of CRUS and this 'willful' exception to the otherwise blanket immunity landowners enjoy. . . . Landowners have nearly complete immunity."[58] He also called the exception "really very narrow."[59] Hersh stated that there is a "whole bunch of case law" that provides landowners with guidance on the limits of the exception; in his opinion, the *Nelson* decision "fell pretty far out on that spectrum."[60]

Similarly, James Moss, a Denver attorney who specializes in outdoor recreation and adventure travel, stated that a landowner's liability is "absolutely zilch" when opening their land to recreational users.[61] He found the *Nelson* ruling to be quite narrow, arguing that the only circumstance in which it would apply to another case "would involve another mountain biker crashing at a federal military property."[62] This narrow reading stems from a contrast: the accident occurred on federal land, not during the usual recreational use of the outdoors that might invoke the CRUS.[63]

But even if this is the correct legal interpretation, landowners of multiple sorts might have fears to the contrary. Lloyd Athearn, Executive Director of the Colorado Fourteeners Initiative, suggested that landowners with bike trails, navigable rapids, or rock climbing

56. Jason Blevins, *Liability Concerns Lead to Shutdown of Some Colorado 14ers*, ASSOCIATED PRESS (Sept. 20, 2021), https://apnews.com/article/mountains-courts-lawsuits-colorado-denver-63f278383dadbd161b9ad8211d7977a8 [https://perma.cc/KLM8-K2XA].
57. *Id.*
58. *Id.*
59. Blevins, *supra* note 54.
60. *Id.*
61. Blevins, *supra* note 56.
62. *Id.*
63. E-mail from James Moss, Outdoor Recreation & Adventure Travel L. Att'y, to author (Jan. 6, 2023, 1:29 PM CST) (on file with author).

areas may close off access.[64] Athearn has also discussed other private landowners who might be affected, such as owners of ranches or farms, through which trails pass to reach public lands.[65]

The *Nelson* case was one of first impression; the Tenth Circuit described its responsibility as "predict[ing] how the Colorado Supreme Court would interpret it in the first instance."[66] Therefore, the Colorado Supreme Court could go in another direction—but until the state court limits *Nelson* to its facts or holds that it was an incorrect ruling, landowner fears about liability are to be expected.[67] While *Nelson* only strictly applies in federal court, diversity jurisdiction makes it likely that a liability lawsuit resulting from an incident on privately owned mountain terrain could end up in a federal court due to tourists and visitors hiking in the state.[68] What the federal district court in the state adopted from a magistrate opinion in 2018 remains true: "There is little to no Colorado case law interpreting and applying the CRUS," particularly including the important exception.[69] This reality adds to the influence of the *Nelson* case, even if it is not technically binding on Colorado landowners.[70]

C. Comparing and Contrasting Other Case Law

By contrast to *Nelson*, local or regional federal courts have previously ruled on the CRUS "willful or malicious" exception and not held the government and the Forest Service liable.[71] In *Marquez v. United States*, the federal district court in Colorado considered the government's potential liability as it pertained to knowledge of avalanche potential in an area.[72] The court held that there was "no evidence of willful or malicious conduct on the part of the Forest Service," thus barring the plaintiff's claims.[73] And in *Otteson v.*

64. Blevins, *supra* note 56.
65. E-mail from Lloyd Athearn, Exec. Dir., Colo. Fourteeners Initiative, to author (Oct. 11, 2022, 12:55 PM CST) (on file with author).
66. Nelson v. United States, 915 F.3d 1243, 1248 (10th Cir. 2019).
67. *E.g.,* Wood, *supra* note 52.
68. U.S. CONST. art. III, § 2.
69. Ball v. United States, No. 18-CV-01461, 2018 WL 6173754, at *9 (D. Colo. Nov. 26, 2018), *report and recommendation adopted*, No. 18-CV-01461, 2019 WL 2173783 (D. Colo. Mar. 6, 2019), *aff'd*, 967 F.3d 1072 (10th Cir. 2020).
70. *Nelson*, 915 F.3d at 1248.
71. Marquez v. United States, Civ. A. No. 95-S-346, 1996 WL 588918, *21-22 (D. Colo. Sept. 17, 1996); Otteson v. United States, 622 F.2d 516, 520 (10th Cir. 1980).
72. *Marquez*, 1996 WL 588918, at *7.
73. *Id.* at *22.

United States, the Tenth Circuit considered a wrongful death action brought against the federal government; a vehicle passenger died from the vehicle sliding on an ice patch and subsequently rolling down an embankment in a national forest.[74] The court reasoned that the government was entitled to protection under the Colorado statute and held that there was "no issue of willful or malicious government conduct."[75] These cases depict the little case law that exists on this exception—and it is no surprise that the *Nelson* case is significantly more influential on landowners given the case's recency and pro-plaintiff holding.

In the course of its *Nelson* argument, the United States cited *Marquez* and *Otteson* for support.[76] However, the court distinguished the facts of *Nelson* from the latter two cases, pointing out first that in *Marquez*, the plaintiff "presented only generalized knowledge of the avalanche danger," while in the *Nelson* facts, "there was actual knowledge of the sinkhole."[77] The court similarly analyzed *Otteson*, reasoning that the plaintiff there did not present evidence that the Forest Service was aware of the road conditions and did not adequately argue that there was "willful" conduct by the government.[78]

The CRUS's limitation on the liability shield is brief and begs for clarification: The statute does not limit liability that would otherwise exist for "willful or malicious failure to guard or warn against a known dangerous condition, use, structure, or activity likely to cause harm."[79] The district court in the *Nelson* case reasoned that the legislature used "willful" in contrast to "willful and wanton" and thus intended for "willful" to have its "plain and ordinary meaning."[80] The reasoning implies that the legislature or Colorado Supreme Court has not provided a clear standard or definition. By contrast, the Supreme Court of Utah provided a tripartite standard for the same exception in Utah's recreational use statute.[81] The Supreme Court of Arkansas has noted

74. *Otteson*, 622 F.2d at 517.
75. *Id.* at 519–20.
76. Nelson v. United States, 256 F. Supp. 3d 1136, 1168 n.7 (D. Colo. 2019), *aff'd*, 915 F.3d 1243 (10th Cir. 2019).
77. *Id.*
78. *Id.*
79. COLO. REV. STAT. ANN. § 33-41-104(1)(a) (West, Westlaw through the 1st Reg. Sess., 74th Gen. Assemb.).
80. *Nelson*, 256 F. Supp. 3d at 1159.
81. Golding v. Ashley Cent. Irrigation Co., 793 P.2d 897, 901 (Utah 1990) ("the elements of knowledge of the dangerous condition and of the fact that serious injury is a probable result, and inaction in the face of such knowledge"); *see also* Termini v. United States, 963 F.2d 1264, 1267 (9th Cir. 1992) (acknowledging that California

that "malicious" is not defined in the Arkansas Recreational Use Statute and that malicious conduct "includes conduct in reckless disregard of the consequences from which malice may be inferred."[82]

IV. Shining a Light: Situations and Solutions Across the Nation

A. Solutions on the Decalibron Loop

There has recently been a "unique partnership" between the landowner, advocacy groups, the Town of Alma, and the Forest Service that allows for public recreational use on the Decalibron Loop.[83] While this is a recent partnership, a similar setup has occurred before: In 2006, Alma leased the peaks from the owner, accepting liability for injuries.[84] The town leased all three peaks for only $1 per month.[85] Recently, in early 2023, the Colorado Mountain Club (CMC) had a fee-for-service contract with the Town of Alma, following a basic contract template.[86] In 2022, the town renewed its temporary lease agreement.[87] Part of the reason for this agreement is the CMC entering into a cooperative management agreement with the town to work on trail maintenance and signage.[88] Many groups (including not only those listed before but also groups such as the CMC, Colorado Fourteeners Initiative, and Mosquito Range Heritage Initiative) are providing expertise to help the public get access.[89] However, with the town of Alma having the lease, government immunity helps the landowner have legal protection.[90]

The "ultimate goal" for many of those looking to provide the public with consistent and reliable recreational use access is that private landowners are convinced to sell their land, allowing for public

courts generally apply a tripartite standard that is similar to the Utah standard).

82. Roeder v. United States, 432 S.W.3d 627, 635 (Ark. 2014).

83. Blevins, *supra* note 13.

84. *Colorado Town Leases High Peaks, Reopens Them to Hikers*, SUMMIT DAILY (Aug. 8, 2006), https://www.summitdaily.com/news/colorado-town-leases-high-peaks-reopens-them-to-hikers/ [https://perma.cc/KJ6J-HWQN].

85. *Id.*

86. E-mail from Kendall Chastain, Conservation Manager, Colo. Mountain Club, to author (Jan. 31, 2023, 11:01 AM CST) (on file with author).

87. E-mail from Julie Mach, former Chief Conservation Officer, Colo. Mountain Club, to author (Oct. 17, 2022, 10:32 AM CST) (on file with author).

88. *Id.*

89. Athearn, *supra* note 65.

90. *Id.*; COLO. REV. STAT. ANN. § 33-41-102(3) (West).

ownership.[91] In keeping with this goal, the Colorado Fourteeners Initiative purchased private land often used to reach the summit of Mount Shavano in 2016.[92] Additionally, those working toward the goal have sought a legislative fix. For example, in 2019, a proposed bill would have erased the "willful or malicious" exception, thus furthering protection for landowners and removing the present concern—but it was not a legislative success.[93]

Significant developments on the legislative front have also come in 2023.[94] Colorado Republican State Senator Mark Baisley sponsored a bill that would update laws concerning recreational access, with a specific focus on increasing landowner protections.[95] He expressed that he had a "high degree of confidence that this will enjoy widespread support from both chambers and both sides of the aisle."[96] Baisley has also met with concerned landowners, such as the previously mentioned John Reiber.[97] However, David Hersh (quoted above), the plaintiff's attorney in the *Nelson* case, has expressed his doubts—new legislation would remove the usefulness of the existing case law on the "willful or malicious" exception, creating a new waiting time for the law to be clarified and developed.[98]

One proposed change in the recreational use statute would provide landowners more flexibility in determining which types of recreation are permitted on their property.[99] This contrasts the current law, which instead places most types of activity with "recreational purpose" in one category, even if they are as distinct as gold panning and cross country skiing.[100] The legislation, Senate Bill (S.B.) 23-103, also would define "inherent dangers or risks" as conditions or dangers that are part of a recreational purpose, such as the terrain, changing weather conditions, and risks that arise from someone engaging in a

91. Athearn, *supra* note 65.

92. Jason Blevins, *How One El Paso County Bike Crash is Changing Access to 14ers in Rural Colorado*, COLO. SUN (Sept. 13, 2021), https://coloradosun.com/2021/09/13/colorado-recreational-use-statute-landowner-liablity-trinchera-fourteener/ [https://perma.cc/6XEM-3ZSD].

93. H.B. 19-1303, 72d Gen. Assemb., 1st Reg. Sess. (Colo. 2019).

94. Blevins, *supra* note 54.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. COLO. REV. STAT. ANN. § 33-41-102(5) (West, Westlaw through 1st Reg. Sess., 74th Gen. Assemb.); *Id.*

recreational activity beyond their abilities.[101] Additionally, while a landowner is allowed to post warning signs about dangers and risks, the bill would ensure that a decision not to post a warning, maintain a warning, or modify a risk could not on its own create any liability.[102] Rather significant to the discussion in this Comment, section 4 of the bill would limit the "willful or malicious" exception "to apply only to malicious failures and [would amend] the exception to apply to a known dangerous condition, use, structure, or activity likely to cause 'harm or death.'"[103]

In early March 2023, Democratic state legislators rejected the Republican-led effort to further restrict landowner liability.[104] John Reiber stated that his attorneys have told him that he is "rolling the dice by leaving [the three fourteeners] open" and that he planned to close access to the mountains.[105] As of June 2023, the Decalibron Loop is closed to the public. Reiber is clear that the failed legislative effort is behind his decision: "Without any regulatory support . . . I can no longer take on the level of risk in case someone gets hurt and wants to sue me."[106] Over 20 different organizations supported Baisley's legislation.[107] For example, the CMC posted an "action alert" to support the changes through which site visitors could send a letter to the governor or Colorado Senate Judiciary Committee.[108] Other organizations in support of S.B. 23-103 included the Boulder Climbing Community, Colorado Fourteeners Initiative, Access Fund, American Alpine Club, Trust for Public Land, and The Wilderness Society.[109]

---

101. *Colorado Mountain Club Supports Senate Bill 23-103*, COLO. MOUNTAIN CLUB 2–3, https://advocacyassets.congressplus.net/assets/BackgroundDocuments/3958BA51-BDCB-4B9D-374109ABC92BCA3A/SB%2023-103%20Talking%20Points.pdf [https://perma.cc/RPH8-5BSQ].

102. S.B. 23-103, 74th Gen. Assemb., 1st Reg. Sess. (Colo. 2023).

103. *Id.*

104. John Frank, *3 Popular Colorado 14ers May Close to Hikers Thanks to Failed Bill*, AXIOS DENVER (Mar. 3, 2023), https://www.axios.com/local/denver/2023/03/03/colorado-14ers-mount-democrat-bross-lincoln-could-close [https://perma.cc/6FSY-BUQY].

105. Blevins, *supra* note 15.

106. *Id.*

107. *Id.*

108. *Support Changes to the Colorado Recreation Use Statute*, COLO. MOUNTAIN CLUB, https://www.cmc.org/conservation/advocacy/action-alerts#/51 [https://perma.cc/S5R4-3DXU].

109. Alex Derr, *The Four Decalibron 14ers Will Close After the Senate Rejected SB 103, a Bill to Protect Public Access*, NEXT SUMMIT (Mar. 3, 2023),

By contrast, multiple attorneys testified against the legislation.[110] One argued that proof that the current CRUS works is that the *Nelson* case is a one-of-a-kind case in the last 26 years.[111] She also claimed that the update would "send a message to Coloradans and visitors alike that we don't do anything and we don't say anything when we know there are dangers that will harm you. Colorado is better than that."[112] Other attorneys argued in response that the CRUS has been tested in state court lawsuits that were resolved by settlements.[113] But the legislative fix failed, defeated by the three rejecting Democratic votes over the two Republican votes on the committee.[114]

B. A Local Parallel: The Ski Safety Act

The history of the Colorado Ski Safety Act parallels the current conversation on updating the CRUS.[115] Lawmakers originally passed the bill in the late 1970s, but it has undergone changes as new issues have emerged.[116] Historically, ski resorts were protected from negligence claims under the assumption of risk doctrine.[117] But a shift in attitude toward assumed protections occurred with the case of a Vermont skier whose injuries resulted in permanent quadriplegia.[118] The skier brought a negligence claim concerning the Vermont resort's maintenance of ski trails and hidden dangers (the skier here sustained injuries from brush hidden under loose snow).[119] The Supreme Court of Vermont ruled in favor of the plaintiff and affirmed the lower court's judgment of $1.5 million for the skier.[120] Ski resorts and insurers across the country reacted to the Vermont case, resulting in considerably higher costs for ski resort insurance and ski lift tickets.[121]

---

https://thenextsummit.org/four-more-colorado-14ers-will-close/ [https://perma.cc/GB58-GEWT].

110. Blevins, *supra* note 15.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* The partisan split contrasts the fact that the 2019 legislative attempt was proposed by Republican Perry Will and Democrat Donald Valdez.
115. Blevins, *supra* note 54.
116. *Id.*
117. Katherine Friedli, *Colorado Ski Safety Act: Skiers Beware of "Inherent Dangers and Risks"*, 27 SPORTS L.J. 75, 80 (2020).
118. Sunday v. Stratton Corp., 390 A.2d 398, 400, 402 (Vt. 1978).
119. *Id.* at 400–01.
120. *Id.* at 400, 407.
121. Friedli, *supra* note 117, at 80–81.

The result in Colorado was the Ski Safety Act of 1979.[122] The focus of this Comment does not permit a detailed analysis of the bill but should lead to considering the bill's changes. The state legislature further limited resort liability in 1990 after many pro-plaintiff decisions, including a skier's lawsuit that resulted in $5 million in damages from the Supreme Court of Colorado.[123] The legislature thus widened the assumption of risk doctrine in the statute and stated that "no skier may make any claim against or recover from any ski area operator for injury resulting from any of the inherent dangers and risks of skiing."[124] There is still considerable debate over the current legislation.[125] The amendments to the original bill raise the question of whether the state's recreational use statute can be similarly updated to address current liability concerns.[126] After this lengthy discussion of solutions on mountainous terrain and the potential parallel of ski resort liability, this Section will now turn to other scenarios across the country.

C. Purchases, Easements, and Eminent Domain on National Trails

West of Colorado, closer to the coast and over 2,600 miles in length, the Pacific Crest Trail (PCT) is primarily public land, but approximately 10% of the trail is still under private ownership.[127] Hikers and equestrians have access to pass through most of these privately owned areas due to trail easements.[128] However, in 2015, a landowner—a family trust—in Washington sought to sell the plot that included private land on the PCT; the biggest threat to public access was the trust's willingness to build a fence across part of the PCT.[129]

122. COLO. REV. STAT. ANN. § 33-44-102 (West, Westlaw through 1st Reg. Sess., 74th Gen. Assemb.).

123. Aspen Skiing Co. v. Peer, 804 P.2d 166, 171–75 (Colo. 1991) (another case based on injuries sustained as a result of alleged resort negligence); Eric A. Feldman & Alison Stein, *Assuming the Risk: Tort Law, Policy, and Politics on the Slippery Slopes*, 59 DEPAUL L. REV. 259, 286 (2010).

124. COLO. REV. STAT. ANN. § 33-44-112 (West, Westlaw through 1st Reg. Sess., 74th Gen. Assemb.) (also providing a definition, explanation, and examples of "inherent dangers and risks of skiing" in the Definitions portion of the statute).

125. Feldman & Stein, *supra* note 123, at 289–92.

126. Blevins, *supra* note 54.

127. *PCTA Land Protection*, *supra* note 4.

128. *Id.*

129. David Ferry, *A Private Landowner Almost Cut Off the PCT*, OUTSIDE (Nov. 29, 2017), https://www.outsideonline.com/outdoor-adventure/hiking-and-backpacking/private-landowner-almost-cut-pct/ [https://perma.cc/BAG4-8L9P].

To prevent the potential erection of this fence, which would have been 150 miles below the Canadian border, the Pacific Crest Trail Association (PCTA) met the $1.6 million purchase price with a $1.2 million loan from the Conservation Fund and $400,000 from donors.[130] Also on this trail, in an effort to protect areas immediately surrounding the PCT in the San Bernardino National Forest, the U.S. Forest Service and the Trust for Public Land purchased 808 acres in 2014.[131] Additionally, the Conservation Fund has provided loans for these types of efforts along various trails across the country, such as the Appalachian Trail; thus, these loans can be essential in various groups' work to ensure public access and environmental protection.[132]

A 2019 case study from the Partnership for the National Trails System (PNTS) further demonstrates the role of partnerships in preserving access to the PCT, at one point stating that "[p]artnerships are the [k]ey."[133] This land deal protected a 17-mile stretch of the PCT around the Trinity Divide, which is in northern California near Mount Shasta.[134] The acquisition cost $15 million, a sum met through a grant from the Wyss Foundation, private donations, and funding from the Land and Water Conversation Fund (LWCF) budget.[135] The effort to realize the purchase involved the timber company (who owned the land and looked to sell it for environmental and recreational reasons), the PCTA, the Forest Service, and local communities—making this a complex yet successful partnership.[136]

While approximately 10% of the PCT is privately owned land, approximately 20% of the 1,200-mile Pacific Northwest Trail (PNT) is under private ownership.[137] Voluntary agreements with landowners and easements have allowed hikers passage through some of these

130. *Id.*
131. *Id.*
132. *Id.*
133. P'SHIP FOR THE NAT'L TRAILS SYS., SAVING LAND ON THE TRINITY DIVIDE: A PACIFIC CREST TRAIL SUCCESS STORY 5 (2019) [hereinafter TRINITY DIVIDE PARTNERSHIP SUCCESS].
134. Megan Wargo, *Trinity Divide Deal Protects 17 Miles of the Pacific Crest Trail*, P'SHIP FOR THE NAT'L TRAILS SYS. (July 23, 2019), https://pnts.org/new/trinity-divide-deal-protects-17-miles-of-the-pacific-crest-trail/ [https://perma.cc/8WXB-UXVG].
135. *Id.*
136. *Id.*
137. *Pacific Crest Trail Land Protection Q&A*, PAC. CREST TRAIL ASS'N, https://www.pcta.org/our-work/land-protection/land-protection-qa/#trail-protected [https://perma.cc/Z3ML-J68R].

lands.[138] Elsewhere, near some agricultural and urban areas, there is no possible connection on public lands, and the trail continues along a public road.[139] Easements are a commonplace solution on other trails as well, including the Continental Divide Trail (which, at over 3,000 miles in length, runs from Canada to Mexico and crosses Montana, Idaho, Wyoming, Colorado, and New Mexico)[140] and the Ice Age Trail (a scenic trail in Wisconsin over 1,000 miles long).[141]

While not nearly as common for these hiking trails, eminent domain has also been an option in protecting the National Scenic Trails.[142] The U.S. Constitution allows for eminent domain, the power of the government to acquire private property for public use with "just compensation" for the taking.[143] However, out of the eleven National Scenic Trails, this power has only been invoked on the Appalachian Trail, and it has been used for a significant amount of the Trail—over 15,000 acres.[144] While there is some support for using this tactic nationwide, there is likely even more pushback, including among conservation groups.[145] This pushback includes arguments that there is not strong political support and that there are more purchasing opportunities than dollars available (from groups such as the LWCF).[146] When the government has sought to acquire land on the trail, many landowners become willing sellers; however, a minority have refused government offers, leading to eminent domain proceedings.[147] Pushback from landowners is often rooted in a lack of

138. *Id.*
139. *Id.*
140. *About the Trail: Frequently Asked Questions*, U.S. DEP'T OF AGRIC., https://www.fs.usda.gov/managing-land/trails/cdt/about-the-trail [https://perma.cc/7JUH-2HPE].
141. *Land Protection*, ICE AGE TRAIL ALL., https://www.iceagetrail.org/land-protection-iata/ [https://perma.cc/8CGG-PNVP].
142. Taylor Gee, *The Controversial Plan to Protect America's Trails*, OUTSIDE (Aug. 8, 2019), https://www.outsideonline.com/outdoor-adventure/hiking-and-backpacking/scenic-trails-eminent-domain-protection-drawbacks/ [https://perma.cc/V2FD-EKBB].
143. U.S. CONST. amend. V.
144. Gee, *supra* note 142.
145. *Id.*
146. *Id.*
147. Debbie M. Price, *Landowners Losing to Appalachian Trail Acquisition: If the National Park Service Needs Land, It Tries to Negotiate with the Owner. But if the Owner Refuses to Sell, the Government Can Condemn the Property.*, BALT. SUN (Jan. 28, 1997), https://www.baltimoresun.com/news/bs-xpm-1997-01-29-1997029103-story.html [https://perma.cc/R77A-S2LT].

desire to sell the land or in a belief that the government's offer does not meet the land's appraisal value.[148]

D. Maine's Tradition of Public Access

The purposes behind preserving or obtaining public access to private land are not limited to environmental protection and desirable land enjoyment for citizens—both of which are noble causes. James Acheson, analyzing how to preserve longstanding public access to privately owned land in Maine, discusses this public access as a "tradition" in the state: "the public uses large amounts of privately owned land as if it were a common property resource owned by everyone."[149] In doing so, Acheson provides many noteworthy solutions or suggestions in response to what he views as a changing local culture that is less open to members of the public having widespread access to privately owned land.[150] First, he highlights the significant role of tourism in the state economy, emphasizing the place of outdoor activities such as fishing, skiing, and hiking in that tourism (for example, a 2002 study found that snowmobiling was worth $160 million to the Maine economy).[151] Acheson then states the obvious: "These activities depend, in large measure, on tourists and sportsmen having access to other people's land."[152] This "open land" tradition goes back to a 17th-century Massachusetts law that became the basis for the "Great Ponds Law" (accepted as a law in 1820 when Maine became a state)—landowners with large ponds "do not have a clear-cut right to keep the public out of their property completely if that means cutting off access to a great pond."[153] Acheson argues that this law complicates the legal rights of landowners and that the Maine situation may be unique compared to other states, where landowners might have stronger legal claims to keep the public off their land.[154]

To promote public access to private land for recreational use, the Maine Department of Inland Fisheries and Wildlife created a landowner relations program to encourage landowners to permit such

148. *Id.*
149. James M. Acheson, *Public Access to Privately Owned Land in Maine*, 15 ME. POL'Y REV. 18, 19 (2006).
150. *Id.* at 22, 26–28.
151. *Id.* at 21.
152. *Id.* Acheson supports this statement with studies on the frequency at which tourists and sportsmen participate in these activities on private land.
153. *Id.* at 21–22.
154. Acheson, *supra* note 149, at 23.

recreational use.[155] Some of the goals of this program target concerns landowners might have by seeking to prevent land abuse by hunters and promote high levels of responsibility and respect among the anglers and hunters.[156] Other efforts in place include an organization of large forest landowners that allows public use for a fee, a state government program that funds the purchase of land for public recreation, an association of local snowmobile clubs that maintains snowmobile trails (a majority of which are on private land but are built with the landowners' permission), and land trusts.[157] As usual, easements now play a central role: a government program, the Forest Legacy Program, has preserved public access to over one million acres through easements.[158] Lastly, looking to the future, Acheson suggests the need for additional government enforcement in response to irresponsible behavior on land (such as with ATVs).[159]

Maine's state government plays a role in preserving this tradition with its landowner relations program Outdoor Partners.[160] This program accomplishes this work by "promoting responsible land use to the public, educating landowners about their rights, liabilities, and options; forming partnerships, and supporting landowners."[161]

Many of the solutions highlighted in this Section have been implemented in areas in which liability may not be a significant risk for private landowners—and therefore their concern about the applicability of a recreational use statute's liability shield may be low. However, these places and trails represent areas of significant traffic in which hikers and other users must pass through private land, and the solutions are worth exploring and potentially applying in the Colorado fourteeners case, as will be discussed in the next Section.

V. SUGGESTIONS FOR LANDOWNER PROTECTION AND RELIABLE

155. *Id.* at 22.
156. *Id.*
157. *Id.* at 26–27.
158. *Id.* at 26.
159. Acheson, *supra* note 149, at 28.
160. Outdoor Partners, *Opening Your Land to the Public*, ME. DEP'T INLAND FISHERIES & WILDLIFE, https://www.maine.gov/ifw/programs-resources/outdoor-partners-program/support.html [https://perma.cc/6GQD-Z7FC].
161. *Id.*

A. Easements, Purchases, and Eminent Domain

The CRUS in its current state led to the influential *Nelson* case that has scared landowners away from recreational use of private lands. Advocacy groups should continue seeking public ownership of the lands desired for public access, but private owners of course have the right to keep their land and open and close it as they choose. Therefore, while there have been legislative failures in the past, advocates and legislators should work together to improve the liability shield available to landowners under the CRUS to dispel landowner concerns.

After inconsistent and often unreliable partnerships that can allow for public access, one of the most obvious solutions is the creation of easements. However, the PCT provides an example of the potential weaknesses that characterize many easements.[162] On this trail, some of the trails to which the public has access due to easements are only ten feet wide; such a narrow trail means that development—whether it be residential, energy, or commercial—can take place all around the trail.[163] Further, easements are not a reliable solution for situations like the Decalibron Loop, where landowners would seek indemnification in return for the easement, which the state and federal governments cannot provide.[164]

Additionally, another potential solution that this Section will not explore in detail is the unified effort of trusts, nonprofit organizations, government agencies, and donors to purchase private land to preserve or expand public access to a particular area of land such as the Decalibron Loop. These purchases have certainly been successful in gaining and sustaining public access to multiple areas across the country; but the uncertainty of a potential future transaction turns us toward solutions that involve landowners, alleviate their concerns about potential liability, and work toward a sustainable solution that promotes both private property rights and sustainable public access.[165]

---

162. *Protecting the Path: How LWCF Preserves the Pacific Crest Trail*, CTR. FOR W. PRIORITIES (July 9, 2015), https://westernpriorities.org/2015/07/protecting-the-path-how-lwcf-preserves-the-pacific-crest-trail/ [https://perma.cc/3NPE-9WEX].

163. *Id.*

164. E-mail from James Moss, Outdoor Recreation & Adventure Travel Law Att'y, to author (Jan. 9, 2023, 4:12 PM CST) (on file with author).

165. For an example of a successful land purchase and the involved efforts, *see* Ferry, *supra* note 129.

As stated in the previous Section, the government has used eminent domain to secure land on the Appalachian Trail.[166] For various reasons, this is an ineffective solution for either the Decalibron Loop situation or for application in similar scenarios nationwide. Many landowners have entered into eminent domain proceedings in the past in response to government takings; in Colorado's mountainous areas, landowners are often rather wealthy, lessening the power of just compensation and the government in the courtroom.[167] Further, government offers would likely be lower than needed in the Decalibron Loop scenario, given the presence of mines; without knowing the worth of what is located on the private land, an offer would likely remain unsatisfactory.[168] However, here it is worth mentioning that on a purely legal basis, an eminent domain argument could be effective solely for the purpose of public recreational use. The eminent domain power must only be "rationally related to a conceivable public purpose."[169] In Colorado and other states where mountainous terrain is common, trail access presents more than a conceivable public purpose—for recreational use.[170]

B. Legislative Changes to the CRUS

Legislative action is one of the most discussed solutions to the present issues with recreational access.[171] It is difficult to ignore a legislative fix, such as an update to the CRUS, as a viable and potentially potent option, given landowner John Reiber's own words in favor of a legislative fix; a landowner's desires are of utmost importance, given that their concerns about potential liability for an injury on their property are behind the wavering status of public access.[172] Reiber has publicly pondered whether leaving his property closed for now would be a better catalyst in bringing about legislative action, comparing it to "Band-Aid fixes" such as putting up warning

166. Gee, *supra* note 142.
167. *See id.*
168. On the presence of mines in the area and the potential value, *see, e.g.,* Nikki Smith, *Moose Mine*, INTERMOUNTAIN HISTS. (Sept. 10, 2021), https://www.intermountainhistories.org/items/show/474 [https://perma.cc/KZP6-6SPX].
169. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984).
170. *See*, *e.g.*, 2021 OUTDOOR PARTICIPATION, *supra* note 1 (demonstrating the high level of recreational use of trails and mountainous areas).
171. *See, e.g.*, Blevins, *supra* note 54. This discussion received considerable attention in the previous section.
172. Blevins, *supra* note 53.

signs about dangers.[173] Other involved actors, such as those at the CMC, have stated that they too believe that a legislative change is one of the best options available.[174] The Ski Safety Act, discussed in the previous section, provides a comparison: The law that was passed nearly a half-century ago has been updated in response to action in the court and public responses.[175]

Another similarity with the Ski Safety Act exists in the catalyst: The adoption of an updated bill came in response to a Vermont case, which is not controlling in Colorado, where the statute was enacted.[176] Here, the Tenth Circuit case is also not binding on state courts, and its influence is instead found in the public reaction, not an immediate controlling authority that provides an automatic threat to landowners. As the lawyers quoted earlier stated, it is unlikely that the *Nelson* case, due to its entirely different set of facts, can be applied to a situation such as the Decalibron Loop.[177] The difficulty of interpreting the outcomes of future lawsuits due to the unclear breadth of *Nelson*'s scope highlights a weakness of a legislative fix. Colorado has had its recreational use statute for a considerable amount of time; therefore, there has been time for lawsuits and evolution in interpretation. But a new recreational use statute—or a significantly changed one that addresses the "willful or malicious" exception—would pose a season, likely lasting years, without legal clarity, until relevant lawsuits had gone through state and federal courts. Until this period passed, landowners and other involved actors might be uncertain regarding potential liability on private property.

A legislative change to the CRUS should address potential regulation of the types of recreation allowed on private property. As briefly mentioned above, the CRUS defines "recreational purpose" rather broadly and includes over 25 suggested activities before the umbrella category of "any other form of sports or other recreational activity."[178] But there is a need for the ability to regulate and narrow down the types of activities allowed on private land. For example, a landowner may rightly envision mountain biking posing a higher risk to a visitor than would hiking, changing the liability outlook. The

173. *Id.*
174. Chastain, *supra* note 86.
175. Blevins, *supra* note 54.
176. Friedli, *supra* note 117, at 80–81.
177. Blevins, *supra* note 56.
178. COLO. REV. STAT. ANN. § 33-41-102(5) (West, Westlaw through 1st Reg. Sess., 74th Gen. Assemb.).

CRUS should support landowners and partnerships in regulating the types of recreation allowed on private property. Additionally, legislators may consider providing the ability to regulate when the public can access private property, whether that be seasonal, weekend-only, or another time-sensitive regulation.[179] As noted above, the CRUS is unclear on the meaning of "willful and malicious" when it states the limitation on the liability shield; if removing or changing the limitation is unsuccessful, legislators also have the opportunity to provide clarification on the meaning of the words in the exception.[180] Alternatively, state legislation could remove the exception or restrict it. Some state legislators have been working on legislation that would change laws concerning recreational access, as mentioned above—only time will tell if these efforts prove fruitful in bringing about a change in the law.[181] The failed legislative effort, coupled with the closure of the fourteeners, in the early part of 2023 hopefully will inspire further efforts along these lines.[182]

C. Partnerships

Given that partnerships between many groups—such as the landowner, local nonprofits, and a local town—have been at least somewhat successful over the years in providing visitors with access to private lands and that multiple involved actors have pursued this option, the usefulness of a partnership cannot be ignored: The recent Decalibron Loop agreement was in writing; partnerships are a recurring solution amidst the cycles of wavering access over the last couple decades; and partnerships get other local actors, such as nonprofits and local towns, involved. Furthermore, as explored in the previous Section, partnerships have proven worthwhile in other outdoor access scenarios, such as on the PCT.[183] While outside involvement is not limited to the partnership conversation, it is a noteworthy quality of this solution because of how involved organizations can alleviate landowner concerns. For example, the Colorado Fourteeners Initiative and the CMC have worked on signage for hikers (such as about closed areas, dangers, and the switch from

179. I am indebted to Kendall Chastain, Conservation Manager of Colorado Mountain Club, for this regulation idea. Chastain, *supra* note 86.
180. COLO. REV. STAT. ANN. § 33-41-104(1)(a) (West, Westlaw through 1st Reg. Sess., 74th Gen. Assemb.).
181. Blevins, *supra* note 54.
182. *See* Derr, *supra* note 109.
183. TRINITY DIVIDE PARTNERSHIP SUCCESS, *supra* note 133, at 5.

public to private land) that comforts landowner fears about liability.[184] The Colorado Fourteeners Initiative has also done trail work.[185] Here, one can potentially observe a threefold purpose of work on the trails—avoiding environmental deterioration and damage, ensuring hikers do not cross into closed private property, and limiting the potential for injury and danger as the public accesses private land.

D. The Role of Tradition

The benefits of trail work provide a pointer to how Maine's traditions, discussed in the previous Section, may be applicable in the case of the Decalibron Loop or other privately owned mountains and areas. Trail work is not limited to official nonprofit organizations; everyone can play a role.[186] And making an effort to spread this to more community efforts on privately owned land is part of the solution. In addition to serving many tangible or more prominent needs—whether that be concerning the environment, landowner concerns, or hiker safety—trail work on private land that involves the public at large would raise awareness about hiker safety and apprehensions about particular areas of land. Further, it would create and strengthen a tradition of the everyday visitor caring and taking an interest in others' land. This could produce even more vocal support for a legislative update to the CRUS. Partnerships may offer an avenue through which community trail work on private property could occur.

Landowners likely possess too significant a liability concern (not unjustifiably so, given the recent jurisprudence regarding the CRUS and its uncertain future) for Maine's tradition or attitude to private land to be applied to a scenario such as the Decalibron Loop: "the public uses large amounts of privately owned land as if it were a common property resource owned by everyone."[187] Somewhat similar to Maine's landowner relations program, Colorado has various initiatives and programs that appear to address public access to private land—but nothing that appears to be central to the recreational use

184. Athearn, *supra* note 65.
185. *Id.*
186. *E.g.*, Alison Sylte, *Every Coloradan Should Do Trail Work at Least Once. Here's How to Volunteer.*, 9NEWS (June 27, 2019), https://www.9news.com/article/life/style/colorado-guide/hold-for-thursday-every-coloradan-should-do-trail-work-at-least-once-heres-how-to-volunteer/73-5d71b5d5-dce1-4585-9990-087675c0a331 [https://perma.cc/74US-EBCB].
187. Acheson, *supra* note 149, at 19 (2006).

issues discussed here.[188] The initiative of state-level government agencies may be another catalyst to stable, long-lasting partnerships, if partnerships are the goal; legislative action and political imagination can further this role of government agencies.

VI. CONCLUSION

Colorado residents and visitors enjoy access to over 90% of the fourteeners in the state. While the few exceptions (privately owned) have wavered over the decades, the 2019 *Nelson* case scared landowners with regard to potential liability for injuries on their property. It has even been suggested that these concerns could carry over to areas of less danger and have an even wider impact. Partnerships have been a frequent solution, and in similar scenarios across the country, government officials, nonprofits, and other involved actors have used easements, eminent domain, and other discussed solutions in the attempt to provide and stabilize public access to privately owned land.

A solution must consider the importance of private property rights, the voices of landowners, and the insight of other involved actors. Improved and lasting partnerships and legislative updates (such as those in S.B. 23-103) to the CRUS are the two most reliable and sustainable options for providing recreational access to the public while alleviating potential landowner concerns, particularly those resulting from the influential *Nelson* case. Involved voices and those taking a new interest in this issue should seek to achieve sustainable public access to privately owned mountain terrain for recreational use by promoting a broader liability shield that alleviates landowner concerns.

188. *E.g., Private Land Program*, COLO. PARKS & WILDLIFE, https://cpw.state.co.us/aboutus/pages/privateland.aspx [https://perma.cc/LAQ8-YPD8] (mainly focused on agricultural and hunting purposes).