County Counsel
Marshall Rudolph

Assistants
Mark Magit
Stacey Simon
Allen Berrey

OFFICE OF THE
COUNTY COUNSEL
Mono County
South County Offices
P.O. BOX 2415
MAMMOTH LAKES, CALIFORNIA 93546

Telephone
760-924-1700
Facsimile
760-924-1701

Paralegal
Karen Serwatka

TO: Kelly Garcia, Assistant Director, Department of Public Works

FROM: Allen Berrey, Assistant County Counsel

DATE: October 27, 2006

RE: Liability of Owner of Land Burdened by a Conservation Easement

---

The following responds to your inquiry as to the potential liability of a landowner who creates a conservation easement on his/her property.

This question arises because the County is seeking to have a landowner create a conservation easement on her property along the Walker River, and the landowner is worried that such an easement might lead to public use of the property, resulting in injuries to, and lawsuits by, the public users of her land.

While not relieving her of all potential liability, Civil Code § 846 should greatly allay the landowner's concern. That statute, a copy of which is attached, was enacted to encourage private landowners to allow members of the public to come onto their land for recreational purposes and to assure owners that they will not be sued for their generosity.

The statute states that, with some exceptions discussed below, an owner of land "owes no duty" of care to keep his/her land safe for use by others for any recreational purpose or to warn those people of any hazards on the land.

Under the law of torts (i.e., civil wrongs), if person A owes no "duty" to person B, then person B generally cannot maintain a lawsuit against person A for something person A did or didn't do. Consequently, by saying that a landowner owes no "duty" to those who come onto his/her land for recreational purposes, Civil Code § 846 essentially "immunizes" a landowner from liability for injuries sustained by someone who has entered the land for a recreational purpose.

As mentioned, however, this immunity is not absolute; it would not apply in three situations: 1) when a member of the public is injured due to the landowner's willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity on the land; 2) when a member of the public is injured after paying a mandatory, landowner-imposed fee or charge to enter and use the land for a recreational purpose; and 3) when the injured person was expressly invited, as opposed to being merely permitted, to enter the land for a recreational purpose.

Thus, while § 846 would not apply in the above-described situations, it would apply to those whom the landowner in question most likely fears as potential litigants - persons who injure themselves after wandering onto her easement-burdened land to fish or explore.

Civil Code § 846 applies to the owner of "any estate or any other interest in property, whether possessory or nonpossessory." Thus, the protections of that law would extend to the landowner who creates a conservation easement over his/her land; in that case, the landowner would continue to have an "estate or other interest in real property" after the easement is created.

In fact, if the conservation easement were granted to a private person or organization, that easement holder would have an interest in real property, albeit a non-possessory one, and would therefore also enjoy the protections of § 846. This would not be the case were the easement to be granted to the County, since § 846 does not apply to local public entities.[1]

As a public entity, however, the County enjoys immunity from liability due to several other statutes in the Government Code (e.g., Government Code § 831.4, immunizing public entities from liability for injuries sustained by a person using an unpaved road or a trail for access to recreational lands.)

It is hoped the above adequately answers your question. If not, or if you have any additional comments, please do not hesitate to call or come by.

Enc.
ARB/arb

[1] *Delta Farms Reclamation District No. 2028 v. Superior Court of San Joaquin County* (1983) 33 Cal 3d. 699.