MEMORANDUM

TO: Chad Cox

FROM: Hilburn, Calhoon, Harper, Pruniski & Calhoun, Ltd.
ATTN: Ken F. Calhoon

DATE: June 12, 2014

RE: Arkansas Recreational Use Statute – Backcountry Airstrips

It has been indicated that several of you as aviation enthusiasts are interested in developing a backcountry flying culture in Arkansas (and perhaps Missouri) and requested that we provide you with a discussion of limitations of liability to a landowner (including fee owner, tenant, lessee, etc.) under Arkansas's recreational use statute. NOTE: We are happy to provide this memorandum for general information purposes only, but this memorandum is only a brief summary and discussion of the Arkansas recreational use statute, and is presented for general information and discussion purposes. No person is in any way authorized to rely upon the following as a legal opinion or the rendering of legal advice by its author. Each individual is urged to consult and rely upon his or her own counsel concerning the effects of the laws discussed herein on his or her particular fact and circumstance. With this said, our comments on these subjects are as follows:

1. Arkansas Recreational Use Statute. As you are aware, Arkansas just this past year amended its recreational use statute to specifically include aviation ("taking off, flying, or landing an airplane or aircraft") as a recreational purpose and specifically included airstrips within the definition of "land." Note that Missouri has a recreational use statute but it has not yet been amended to include aviation. We were informed that the Missouri amendment is currently in process. For your convenience, a copy of the up-to-date Ark. Code Ann. §§18-11-301 through 18-11-307 constituting the Arkansas Recreational Use Statute is attached.

Every state has a statute that provides some degree of liability protection for landowners who allow members of the general public to enter upon or use the land for recreational purposes. We feel Arkansas has a good one. So far, about 20 states have added aviation as an activity covered by these statutes. The purpose of such statutes, including the Arkansas statute, is to encourage landowners to allow public use of their lands for recreation without charge therefor, and to protect the landowner against claims filed on behalf of the users for injury or damages. While the person using the land is specifically not relieved of any obligation or liability to the owner for his or her use of the land (Ark. Code Ann. §18-11-303), the landowner will "owe no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give any warning of a dangerous condition, use, structure, or activity on the premises to persons entering for recreational purposes" (Ark. Code Ann. §18-11-304). The statute further provides the landowner statutory immunity from liability. The applicable Section (Ark. Code Ann. §18-11-305) gives immunity to an owner who directly or indirectly invites or permits without

charge any person to use his or her property for recreational purposes. The owner is protected from not assuring that the lands or premises are safe, and the user does not have the legal status of an invitee or licensee (who could expect a duty of care owed) even if the recreational user is actually invited by the landowner. The landowner also is protected against one user injuring another person or another's property caused by the negligence of the recreational user, and the landowner has no liability for injury to person or property caused by any natural or artificial condition, structure or personal property on the land.

The exceptions to this immunity are contained in Ark. Code Ann. §18-11-307 which makes it clear that there is no limitation of liability (i) if the landowner's conduct is a malicious, but not merely negligent, failure to guard or warn against an ultra-hazardous condition, structure, personal property, use, or activity actually known to the owner to be dangerous (a recent case this year has interpreted malice to include not only actual malice – a desire to harm another, but acts with such a reckless disregard of the consequences that malice can be inferred – but always more than gross negligence); or (ii) when injury occurs and the landowner charges the injured person or persons for the recreational use thereof. This Section also provides that if the landowner leases the property to the state or a subdivision thereof, or burdens his or her land with a conservation easement), consideration received by the owner for the lease is not deemed a charge to the injured person or persons who enter the land for recreational use at the behest of the lessee. If the owner leases the land to a third party, that party has possession and control of the premises and would represent the person or entity who could charge fees or admission to those using the property for recreation. The fee owner would not be the one actually making a charge to the users. A lease or other arrangement between the owner and lessee based on a share of the charges made by the lessee to the user may produce a different result.

The statute defines the kind of "charge" which takes away the protection of the statute as an "admission fee for permission to go upon or use the land." The statute also defines "owner" as the possessor of a fee interest, a tenant, a lessee, a holder of a certain kind of conservation easement, an occupant, "or person in control of the premises" (Ark. Code Ann. § 18-11-302(4)). It would seem clear from the definition of "charge" and the definition of "owner," that payments an actual fee owner would receive under a lease or easement to a third person in possession and control of the property would not be treated as a "charge" for the public's recreational use. This would seem even more likely in the event no charge to the recreational users was made by the lessee or tenant.

It is important to note that the definition of "charge" also excludes "contributions in kind, services, or cash paid to reduce or offset costs and eliminate losses from recreational use." As broadly as this exception is written, it would seem that the intent is to permit incidental payments for directly related out-of-pocket costs strictly in a noncommercial manner. On the other hand, it also seems clear that if the owner contributed the use of the land in the form of a lease or easement for an airstrip, the recipient could maintain the airstrip.

Convincing the landowner as to his or her lack of liability because of the statute may not solve the only obstacle in his or her decision to donate, lease, or grant easements with respect to

a portion of his or her land for an airstrip. Economics, income tax, interference with current or future agricultural uses or plans for development of the property, activities of the pilots and passengers after they land on the property, etc., may well be legitimate concerns of the landowner. We would assume the backcountry strips would be selected where the users would have ground access from the airstrip to public lands, parks or other private lands open to the public. Using land for airstrips which abuts those properties may seem more reasonable to a concerned landowner.

Actually, no particular act of documentation would be required for an owner to permit persons to use the airstrip in order to be protected by the statute. However, some filing, at least a temporary or long-term easement dedicating the use of the airstrip would seem advisable. Easements or leases or covenants running with the land providing for reversions to the landowner when a certain number of years has elapsed or when the property is no longer used for airstrip purposes might be options, and these arrangements would be fine under the recreational statute. As indicated above, an acquisition of the airstrip property from the current landowner through his or her contribution to a charitable entity might be arranged. The nonprofit entity would be protected by this statute as well as potential charitable immunity and volunteer immunity provided elsewhere in the statutes. There may also be existing airstrip owners who are aviation enthusiasts that may be willing to subject their airstrip to a public recreational use, with or without maintenance, as aviation enthusiasts like yourselves, through a formal easement arrangement, or a mere revocable contract with a nonprofit; and other enthusiasts may allow the nonprofit to construct a new airstrip or rehabilitate one, to be followed by easement or commitment to the nonprofit for public recreational aviation use. These types of arrangements would also find the owner or tenant protected by the Arkansas Recreational Use Statute.

Finally, the fact that aviation liability, taking off and landing in the aircraft, etc., is so geared toward the pilot and the soundness of the aircraft itself, makes this recreational use much less likely to result in accidents or potential claims than cliffs, rugged terrain, floods, swimming holes, etc. (even though the statute protects for these as well). Having an airstrip is just not the highest-risk use of the land.