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**Negotiated access to privately owned mountain areas:  
a study of the Western Cape mountains, South Africa**

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**Presented in partial fulfilment of the requirements of the  
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Department of Environmental and Geographical Science  
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## Abstract

Around South Africa, and particularly in the Western Cape, many of the natural mountain areas are located either on or ring-fenced by privately owned land. Recreational users such as hikers and climbers wishing to access the limited mountain terrain available must obtain permission from landowners. South African landowners have little or no obligation to agree to allow access to their land save out of goodwill and doing so typically goes hand in hand with a greater burden of ownership and custodianship. Landowner's concerns can include concerns about environmental impact, liability, privacy and the administrative burden of accommodating mountain users on their land. Equally as important as the substantive elements of an access agreement, are the personal relationships that are built and the process that is gone through in defining such an access agreement - what Ribot and Peluso (2003) call structural and relational access mechanisms.

Landowners of fifteen selected case-sites in the Western Cape were interviewed. At all of these sites, access is or may be granted to privately owned mountain areas under a particular set of conditions. Landowners were asked about their views on access to privately owned mountain areas for recreational purposes, and particularly about their motivations for granting access to their properties.

These interviews followed an interview guideline, which was informed by the literature on negotiation theory and facilitation, as well as interviews with four mountain user experts.

The research also reviewed the approach to accessing natural areas for recreational use in other countries such as the British 'right to roam' and the Swedish '*allemansrätten*'. It also reviewed the South African policy and legal framework regarding access to privately owned natural mountain areas.

The research found that landowners' motivations for granting access are largely normative (goodwill or value-based), and that any motivations along strictly rational lines such as economic incentive or legal obligation are not only unlikely to be successful, but may compete with any more compelling normative motivators.

A key finding from this research was that landowners are willing to share their mountain properties with people who will reciprocate with an appropriate ethic, and this ethic was found to have two separate components: Firstly, respect for the environment and particularly for not littering, and secondly, respect for the landowner and the rules governing access to his/her property.

Landowners may employ a variety of access control mechanisms such as charging for access, limiting user numbers or tailoring the experience that their land provides, and their implications of these are discussed.

The parties in an access negotiation or agreement include the landowners, a club or NGO, an individual representing the user-group, or the individual users themselves. While this make-up varies from case to case, it was found that most landowners prefer having contact with at least two of these three types of counterparties.

Summary guidelines to assist interested parties develop access agreements are provided in the appendices and include summary tables of selected findings, negotiation checklists, and the full scope of substantive issues for consideration in negotiating such access agreements.

## Chapter One     Introduction

### **1.1     Background and rationale for the study**

Around South Africa, and particularly in the Western Cape, many natural mountain areas are located either on or ring-fenced by privately owned land. Recreational users such as hikers and climbers wishing to access the limited mountain terrain available must obtain permission from landowners (typically farmers) and then overcome the logistics of traversing the operational section of such lands during weekends or after-hours. For landowners, facilitating access to their lands often goes hand in hand with a greater burden of ownership and custodianship. The concerns that landowners may have when contemplating agreeing to allow access can include concerns about environmental impacts, concerns about legal liability to users or for fire, concerns about privacy, concerns about the burden of administering the agreement, concerns about security and concerns about the profile of users that may have access to their properties. Landowners may also be concerned about retaining the respect of users, and be weary of setting any precedent that may weaken their ability to control what should take place on the property. Many countries including South Africa afford landowners absolute property rights, while others such as Sweden and England provide more liberal roaming laws. Laws in various countries often reflect the relative nature and extent of public mountain areas that are available to users.

While in some instances in South Africa there are legal means to enforce access to private lands, more often than not such access is dependent on the goodwill of landowners. Although such goodwill is often forthcoming, the exact nature of the access agreement will often determine the feasibility and the sustainability of access. Such access agreements are typically made between individual landowners and the individuals, groups of individuals, or Non Governmental Organisations (NGOs) such as the Mountain Club of South Africa (MCSA) who wish to access the land. These parties may or may not be familiar with the full range of landowner concerns, and the methods that may have been employed to overcome these concerns in similar circumstances.

The basic premise of this research is that landowners in South Africa have little or no obligation to enter into access agreements. The research seeks to test the assumption that access agreements to privately owned mountain areas are reliant on goodwill, and that mountain access will best be realised through investing in relationships and productive dialogue with these landowners.

The research deals with access for the purposes of recreation, spiritual enjoyment, appreciation or any other relation that is not concerned with livelihood, commercial activity or the utilisation / consumption of resources. In order to ensure a comparable sample, the research focuses on sites used for recreational mountaineering and rock climbing.

## **1.2 Aims and objectives**

The main aim of this research is to gain an understanding of the views and in particular the motivations of landowners with respect to granting recreational access to privately-owned natural areas in the mountains of the Western Cape. A secondary aim is to determine the issues and procedures that influence how access agreements are negotiated and maintained.

The specific objectives of this research are:

- To review relevant literature on the theory of access, as well as appropriate theory on negotiation and the practice of negotiation facilitation;
- to review models of access internationally and to review and discuss South Africa's approach in this regard;
- to outline legal tools that can be employed to gain access to natural mountain areas;
- To identify views and motivations of landowners with respect to granting access to natural mountain areas;
- to identify and discuss both the procedural and substantive elements of access agreements; and
- to present recommendations and guidelines for negotiating access to privately owned land

## **1.3 Methodology**

### **1.3.1 Literature review**

Many of the ideas behind access to a resource can be rooted in existing theory and a variety of academic and non-academic articles, both general and mountain-related, are reviewed in order to contextualise this research. The literature on negotiation is also reviewed in order to guide the analysis, inform the interview discussions during the research, as well as to provide some succinct guidelines for both users and landowners engaged in negotiations for access. The literature on negotiation presents itself in two broad streams, namely facilitation of negotiations and success in negotiations. The section on negotiation presents a summary of each. The policy and legal framework regarding access in South Africa is also reviewed, particularly of the legislation which may facilitate or constrain access. The need for recreational access to mountainous areas which manifests internationally was also reviewed.

### **1.3.2 Empirical research**

The field research of this study aims to review and analyse both the procedural and substantive dimensions of successful access agreements. It also looks at factors that present obstacles to reaching access agreement with landowners of selected case-sites in the Western Cape mountains. As landowners have sovereignty in the matter of access, the research presumes that issues or barriers to formulating an access agreement perceived by landowners need to be addressed irrespective of the merit perceived by users or anyone else.

To guide the discussions with landowners, an interview guideline was compiled (see Appendix 1). This guideline was informed by two principle sets of questions, the first focusing on substantive issues (which concern the contents of the agreement and the conditions under which access is granted), and the second on procedural issues (which concern the negotiation process that is followed in the creation and maintenance of a successful access relationship).

### **Interviews with key informants**

Four expert members (see References – personal communication) of the mountain-user fraternity were identified and consulted. The researcher selected these mountain user experts from a range of social groups and based on their experience of access negotiation at multiple case-sites (not limited to those studied in the research). Each was asked to list the full set of issues that they believe have been relevant in landowner negotiations in the past, as well as for insights about each issue. They were asked about the solutions that may have worked with varying measures of success. These consultations informed the research questions that were put to landowners.

### **Development of interview schedule**

The development of the interview schedule was informed by a review of six seminal publications on negotiation and negotiation facilitation (Anstey (1993), Fisher (1981), Furlong (2005), Kennedy (2001), Lewicki et al (2003) and Susskind (1999)).

A summary checklist for facilitators (included in Appendix 2.1) was formulated, and also contributed to the research questions put to landowners.

The draft interview guideline was pilot tested (see Chapter 5.10) and modified to ensure suitable context, relevance and interview progression.

### **Case-site interviews**

Twenty-six popular hiking and climbing areas on privately owned mountain land were identified as suitable/relevant for this study. These sites were selected based on discussions with mountain user experts as well as the researcher's own hiking and climbing experience in the Cape mountains for the past 16 years. Contact details of the relevant landowners were obtained from either the MCSA or mountain users regularly visiting these sites. The researcher approached each landowner directly by telephone to outline the purpose of the research and to request an interview. The landowners of 15 of these sites could be contacted and indicated a willingness to participate in the study. The chosen case-sites cover a wide geographical area in the Western Cape including Montague, Rawsonville, Tulbach, Clanwilliam and Cape Town. Each presently, or in the past, has had some form of access agreement for hiking or rock-climbing. The chosen case-sites also reflect a range of circumstances with respect to the interview discussion topics. Because each case-site is

unique, the discussion topics were appropriately modified to suit each circumstance or to probe any interesting points of discussion that might have arisen.

The specific aim of the research was to explore and understand the landowners' views and motivations towards granting access. No attempt was made to adjudicate or influence any outstanding debates between landowners and user groups.

Interviews were conducted in person, usually on-site, between March and April 2010. Interviews typically lasted between 40 minutes to an hour. Each interview was minuted. Considering the delicate nature of relationships in these cases, meetings were not voice-recorded. Meetings were conducted in English or in Afrikaans at the landowner's request.

The minutes of the interviews (see Appendix 1 for the interview questions) were reproduced in an A1-size table in order to facilitate the effective analysis of the collected data, the identification of themes, and the comparisons of the case-sites. Issues raised by landowners were ranked, by the interviewer to reflect both the order, and the relative intensity placed on each issue by each landowner. A database was maintained recording interviewees contact details and appointment times as well as notes of other correspondence.

Figure 1.1 provides a conceptual framework for this research as well as an overview of the research process.

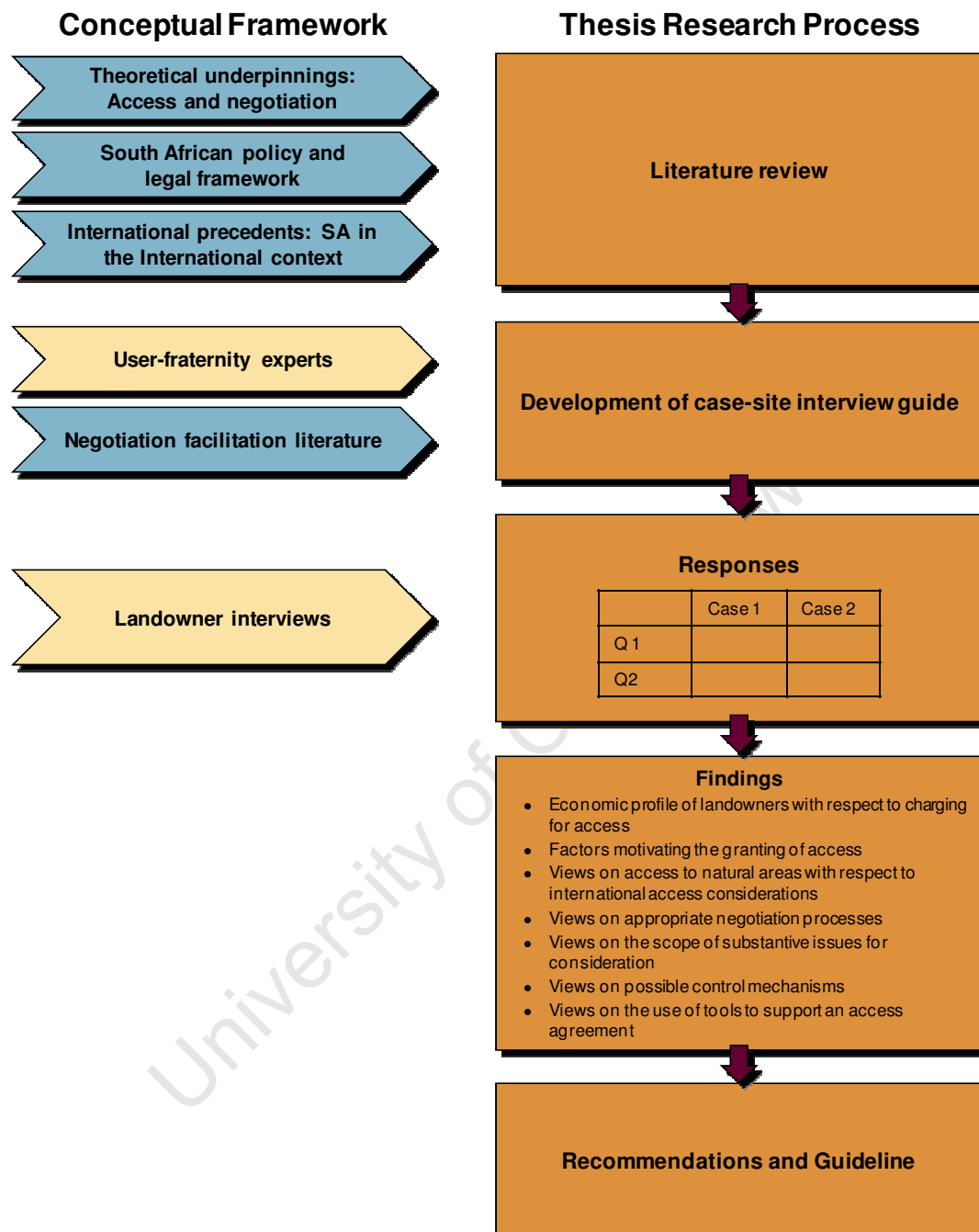


Figure 1.1 Conceptual framework and thesis research process

## **1.4 Limitations**

The chosen case-sites were mostly limited to instances of successful access agreements, owing to the relative availability of case-sites with suitable history.

The research makes reference to legislation and case law to frame considerations around negotiation. No legal information with respect to mountain access is presented in this paper and any interpretations offered should not be construed as legal counsel. In some cases, landowners or user-groups might be advised to seek such qualified legal counsel.

## **1.5 Research ethics**

This research dealt principally with people and their personal views, giving rise to the need for appropriate research ethics. All interviews were conducted on the basis that the research sought thematic findings, and would not adjudicate the merits of individual cases in a public forum. For this reason, the chapter on research findings does not link the supporting quotes to specific case-sites.

Most respondents expressed an interest in the research findings, and a member of the Cederberg Conservancy asked that the findings be presented to one of their quarterly meetings. All parties interviewed in this study consented to their participation.

## 1.6 Structure of dissertation

**Chapter One** presents an introduction to and the rationale for the study, as well as the principle aims and objectives and an outline of the methodology used.

**Chapter Two** discusses the theory of access beyond the scope of strict legal property considerations, particularly the contrasting concepts of access as property and access as a function of structural and relational attributes. It examines the issue of recreational access as opposed to access to a resource for economic or consumptive purposes.

**Chapter Three** discusses the international contexts and offers some insights from Sweden, Britain, Europe and the USA.

**Chapter Four** reviews the South African policy and legal framework and establishes the premise that, by and large, landowners in South Africa have zero obligation to enter into access agreements save out of their own goodwill, and that efforts for the cause of mountain access are best spent investing in relationships and in realising productive dialogue.

**Chapter Five** gives an overview and description of the fifteen case-sites.

**Chapter Six** presents the findings of the research and discusses them in relation to the theoretical ideas examined in Chapter Two.

**Chapter Seven** offers a conclusion, a set of recommendations for NGOs, institutions or individuals undertaking access negotiations, as well as a set of guidelines that summarise many of the ideas in the research.

## **Chapter Two    Theoretical ideas underpinning the research**

### **2.1    Perspectives on access**

Ownership of natural mountain land is a curious thing. While it is founded in tight legal construct, it reflects a complex web of relationships and processes between actors that share overlapping interests (Ribot & Peluso 2003). Land is an economic resource in the classical sense. It is a vehicle for investment and growth; or may be stripped of its commodities. The risks and rewards associated with land ownership and access are vast. Land provides shelter and homes to its residents.

Land is a source of varied personal identity. Buijs et al. (2009) showed that not only do people attach different degrees of value to nature but also that they place contrasting values on different types of landscapes. A savage and rugged landscape may be perceived as beautiful by some and as representing hardship by others. Land is a source of national identity. All people carry elements of national traditions in their conceptions of and assumptions about nature (Schnack 2009). Carruthers (1989) outlines the entrenchment of a sentimental, romantic and aesthetic view of nature evident in the formation of the Kruger National Park in 1926, which ultimately played no lesser role in national identity than the move to democracy and the rugby world cup in the mid 90s.

Land is the subject of political dynamics. In Carruthers' words, 'The creation of the Kruger National Park was thus not the result of a moral victory of the forces of enlightenment, but a combination of the political, social and economic circumstances of the time' (Carruthers 1989).

### **2.2    Land, property and access**

MacPherson (1978) characterises property as '... a right in the sense of an enforceable claim to some use or benefit of something' and that an 'enforceable claim' is one that is acknowledged and supported by society through law, custom or convention. Land rights typically include the 'right to use the land, the right to transfer or manage the land, the right of enforcement of legal arrangements over the land and the right to exclude people from the land' (Grove-Hills et al., as cited by Curry, 2001).

Access considers not only the 'right to things', but 'the ability to derive benefit from things' (Ribot & Peluso 2003) – an ambit that is clearly broader than just legal property rights.

Ribot & Peluso (2003) argue that property represents just one aspect in the 'bundle of powers' of which access is comprised. The processes of access include separately gaining, maintaining and controlling access.

Access therefore is not just about property, but rather is about all possible means by which a person is enabled to benefit from things, and can include a wide variety of structural and relational access mechanisms. Particularly, an individual's or group's ability to benefit from a resource could be related to the social relationship which exists between the right-holder and those wanting to gain access. It is the imperative of this social relationship which gives rise to the review on negotiations theory later in this chapter. Figure 2.1 illustrates the divide between the limited 'rights-based' approach, and the broader set of access mechanisms that may provide for mountains access - which landowners may call privileges. According to the literature on access, structural and relational access mechanisms include access to technology, access to markets, access to labour, access to capital, access to authority, access to identity, access to social relations, and access to knowledge (Ribot and Peluso 2003).

### **2.2.1 Access to technology**

Access to technology enables the better use of a resource than would have been otherwise possible. Examples include access to maps, pumps and electricity, agricultural or mining technologies and roads. A fence is the ultimate symbol of property or resource control because it both physically restricts access to a resource and it symbolises or communicates an intention to restrict access (Ribot & Peluso 2001). The fence-culture that is evidenced today and the power relationships this culture expresses, has its roots in early survey. In his paper 'Law, Property, and Violence: the Frontier, the Survey and the Grid', Bromley (2003) describes the evolution of land regimes in England, noting that surveys were traditionally conducted 'based on the testimony of true and sworn men', whereas by the end of the sixteenth century, the surveyor had been redefined as a technical expert who measured the land itself. Bromley notes that formal estate mapping became increasingly common from the 1570s to the 1580s onwards, serving not only a functional purposes, but also as 'a

statement of ownership, a symbol of possession such as no written survey could equal' (Bromley 2003).

### **2.2.2 Access to markets**

Market access concerns the relationships that users of a resource may have with the other actors in the distribution chain associated with the resource. The agricultural benefit from land may be determined by access to markets for agricultural produce and the margin of profits thereof. Actors benefiting from the tourism industry are dependent on access to holidaymakers in order to gain maximum benefit from a land resource.

### **2.2.3 Access to labour**

Access to labour and the skills associated with it is often one of the principle supply constraints to benefiting from resources. Those without the legal or capital means to gain access to a resource may in effect do so by entering into a working relationship with the resource owner.

### **2.2.4 Access to capital**

Those with access to capital or wealth will also have access to resources like equipment or raw materials that will facilitate better use of the land resource. In the context of natural mountain areas, for example, access to capital would provide either landowners or users with access to the necessary equipment like motor vehicles or specialised equipment. Access to capital also affects other types of access since with wealth typically comes privileged access to social identity, knowledge, authority and so on.

### **2.2.5 Access to authority**

Privileged access to the individuals or institutions that control resources or make the laws pertaining to them, can strongly influence who benefits from the resource in question. Individuals or groups that have access to other influential authority (social status, or perhaps the landowner's social peers) may be afforded greater access to resources.

### **2.2.6 Access through identity and membership**

Access is often mediated by attributes that constitute social identity including age, gender, ethnicity, profession, living locale, or association with groups thereof. Within a particular user group, individuals with high status can put pressure on resource owners to provide access to others, or gain privileged access through selective exemption from the conventions that preclude the access of most other people (Ribot & Peluso 2003).

### **2.2.7 Access through direct social relations**

Direct social relations such as friendship, trust reciprocity, patronage, dependence and obligation may be crucial to gaining and maintaining the benefits from resources (Ribot & Peluso 2003). For example, where potential users have extended family networks linked to the private landowner, access is likely to be facilitated.

### **2.2.8 Access through access to knowledge**

Access to information plays a crucial role in securing access (Ribot & Peluso 2003). Only users with the requisite information about a mountain area are in the position to make use of it. Landowners who are furnished with better information about the proposed recreational practices on their property will be in a better position to grant access. Individuals who may have access to privileged information about the availability of land and the types of activities that could take place there (i.e. information about the climbing and hiking routes) can be said to have privileged access by virtue of their access to appropriate information.

Ribot and Peluso (2003) offer the example whereby an 'ethic of access' may affect the way access to a resource is talked about, legitimated, contested and changed. Because access relationships are always changing, they must be understood as processes rather than as static convention (Bromley 2003). In addition, those who have access to a resource must proactively maintain their access relationships through the passage of time.

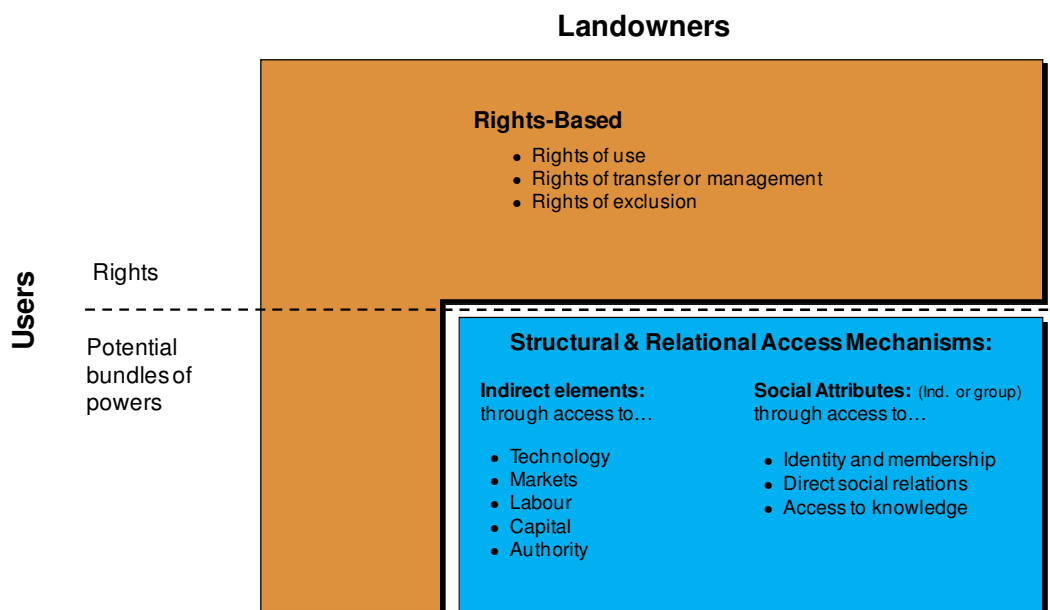


Figure 2.1 Limited property rights approach vs. a broader set of access mechanisms

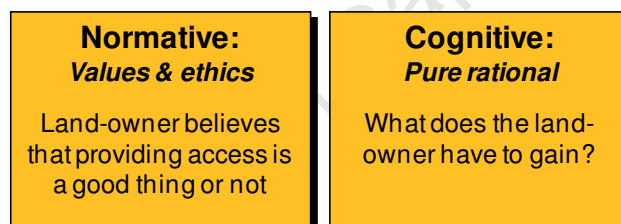
Commercial access to land has long been regulated and subject to appropriate laws and protocols. However regulating access for recreational use is a relatively new problem - what Price (1987) refers to as the *Alpine democratisation* of the 19<sup>th</sup> century. Since the end of the Second World War, populations, leisure time and mobility have increased. Consequently, there has been a massive growth in the number of visitors to mountainous regions for hiking, climbing and an assortment of other recreational activities. Talking about the Canadian Rockies and the European Alps, Price (1987) says that the principle benefit of this *Alpine democratisation* is that many more people with the time and money can experience these harsh, beautiful mountain environments. However, unless their activities are constrained, the landscape that people come to experience will inevitably be altered. The alpine zone has become an extension of the cultural landscape of lower altitudes (Price (1987)).

The challenge for both public and private land managers will be to identify an appropriate means to strike the balance between access to natural mountain areas on the one hand, and the preservation of these areas on the other. In the context of this thesis, the concept of access defined above focuses principally on access to natural, mountainous areas in the Western Cape for recreational use only.

## 2.3 Negotiation

While negotiation is often thought of in the context of either conflict or business, it applies to many facets of our lives. Negotiation is the voluntary process whereby two or often more parties search for a better deal than the status quo currently affords them. Parties take part in negotiation because they believe they can influence the outcome (Lewicki et al. 2003). Successful negotiation involves the management of *tangibles*, typically the substantive issues at stake, as well as *intangible* factors – the underlying psychological motivation that may directly or indirectly influence the parties during the negotiation (Lewicki et al. 2003). Negotiation concerns what Ribot & Peluso (2003) call the ‘structural and relational access mechanisms’, in other words, the social relationship which exists between the right-holder and those wanting to gain access.

According to Dr Laurie Nathan (2009, pers. comm.) parties in a negotiation will tend to perceive a proposal in one of two fundamental ways: normative or cognitive.



Normative motivators are value or ethics-driven. Landowners with normative reasons for allowing access to their properties would allow access because of their value system. They believe that sharing their properties and the outdoor experience with others is a good thing. Normative motivators are what some economists would call non-rational motivations (but not necessarily irrational).

Cognitive motivators are typically those of a purely rational nature. Landowners that allow access for cognitive/rational reasons might do so for economic gain, because they perceive some other rational benefit to accommodating users, or perhaps because they feel they are legally obliged in a particular situation. Such motivators are often at odds with the goodwill upon which working access arrangements rely.

Because this research focuses on the negotiation aspect of mountain access, a review of some of the literature on negotiation theory and on negotiation facilitation is essential. The negotiation literature informs two separate aspects of the research:

- the discussion guideline used when interviewing landowners
- guidelines for users and landowners who may partake in access negotiations

Broadly, the literature on negotiation contributes either to the art of facilitation or to the art of success in negotiations, although the skills in each have a lot in common. As one landowner responding to this research suggested, this thesis is not about how to get in, or how to keep them out, but how to get along (Landowner 5).

Facilitation skills are used either by an intermediary or by players themselves to ensure that a healthy process is followed in the course of negotiations, somewhat irrespective of the result. At worst, negotiations should be an exercise in relationship-building and perhaps allow for negotiations to be resumed at some time in the future. Susskind (1999) believes that '[t]he core tasks of consensus building practitioners, is to promote the legitimacy of the process...'. To this end, his work, *The Consensus Building Handbook*, provides a toolkit for negotiation facilitators, some of which is summarised in Figure 2.2 below. Considering the above, process followed in a negotiation is often equally important and a consideration quite separate from the substantive issues or content of such a negotiation.

| <b>Before</b><br>Setting up for success                                                                                                                                                                                                                                                                                                     | <b>During</b><br>Ensure legitimacy by taking steps to:                                                                                                                                                                                                                                                                                                                                                                                                       | <b>After</b>                                                                                                                                                                                                                                                                                                                                                                                                                                            |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"> <li>• The purpose of the meeting</li> <li>• Who should be involved</li> <li>• The desired outcome</li> <li>• The agenda</li> <li>• The roles and responsibilities of participants and organisations</li> <li>• What ground rules will guide discussions</li> <li>• Where meeting will be held</li> </ul> | <ul style="list-style-type: none"> <li>• Ensure representation and effective participation of key stakeholders</li> <li>• Refrain from advocating for any particular perspective on substantive issues</li> <li>• Develop and enforce ground rules that are acceptable to the participants</li> <li>• Clarify how decisions will be made and by whom within the process</li> <li>• Structure and implement a process that is accountable and fair</li> </ul> | <ul style="list-style-type: none"> <li>• Meetings can be evaluated on: <ul style="list-style-type: none"> <li>– The results achieved</li> <li>– The process used</li> <li>– The relationships built</li> </ul> </li> <li>• Implementation: Objectives must be S.M.A.R.T. <ul style="list-style-type: none"> <li>– S: Specific</li> <li>– M: Measurable</li> <li>– A: Attainable</li> <li>– R: Realistic</li> <li>– T: Time-based</li> </ul> </li> </ul> |

Figure 2.2 A toolkit for negotiation facilitators  
Source: Susskind, L. et al. 1999. *The Consensus Building Handbook*

### 2.3.1 Cognitive biases in negotiation

In *Essentials of Negotiation*, Lewicki et al. (2003) offer a succinct list of cognitive biases, as well as what they refer to as intangible motivators (see Section 2.3.2) that both negotiators and facilitators should recognise and account for in their negotiation approaches. These are summarised below. A summary guideline of these cognitive biases as well as intangible motivators in negotiation is reproduced in Appendix 2.2.

#### **Irrational escalation of commitment**

Irrational escalation of commitment occurs when participants of a negotiation maintain commitment to a course of action even when that commitment constitutes irrational behaviour. They will often seek supporting evidence for their stance and ignore disconfirming evidence. This desire for consistency is often exacerbated by a desire to save face and to maintain an impression of expertise or control in front of others. For example, a landowner or user may express a particular view or stance in the presence of friends or family, and perhaps later feel disinclined to change their view even in the face of a more 'rational' course of action.

**Mythical 'fixed-pie' beliefs**

This is the belief that the amount of benefit available to be shared is constant, and that for everything gained by one party, exactly the same is lost by the other. It disregards the potential for mutually beneficial trade-offs.

**Anchoring and adjustment**

This cognitive bias is related to the effect of the initial standard, anchor or benchmark that forms the basis upon which gains or losses are subsequently measured, irrespective of the merit of such an initial position. While this might typically manifest in pricing negotiations, an example might be the case where a user negotiates access as an incremental improvement on the access (or lack thereof) already granted, rather than on the merits of what may or may not make sense for both users and landowners.

**Framing**

Framing refers to the perception that the parties hold about the subject of a negotiation. Different parties may place different values on different aspects. Positive framing frames the proposal as a gain, while negative framing frames the proposal as a loss. Negotiations in which the outcomes are negatively framed tend to produce fewer concessions, reach fewer agreements and perceive outcomes as less fair than negotiations in which the outcomes are positively framed. An example of different framing of the same outcome might be: "Landowner allows others to enjoy the mountain area" vs. "Landowner concedes access rights" or "Rules and expectations of users are clarified and communicated" vs. "restrictions are placed on access."

**Availability of information**

Parties in a negotiation may make judgements based on information that is accessible and readily available to them. One salient data-point can outweigh many that are recalled less readily.

**The winner's curse**

This is the discomfort created by a settlement in a negotiation that comes too easily. The proposer whose proposal is accepted too readily might believe that the accepting party knows something that they don't.

**Overconfidence**

This is a negotiator's belief that their ability to be correct is better than is really is. (90% of drivers believe that they are better than average.) It can lead to negotiators supporting

positions that are inappropriate, or lead them to discount the validity of the judgment of others. Neither is healthy for a negotiation scenario.

#### **The law of small numbers**

This is the tendency to draw conclusions from small sample sizes. If a party's experience is limited in either time or scope, the tendency is to extrapolate prior experience onto future negotiations.

#### **Self-serving biases**

People often seek to explain another person's behaviour, typically over-estimating the role of internal factors (the here and now associated with the negotiation) and to underestimate the role of external factors (outside the realm of the negotiation) on that person's behaviour.

#### **Endowment effect**

This is the tendency of negotiators to overvalue something they own or can offer in a negotiation.

#### **Ignoring cognitions**

When negotiators ignore another party's perceptions, they are likely to formulate solutions and propositions that won't be accepted, or which will have to be reiterated further before resolution.

#### **Reactive devaluation**

This is the emotively driven tendency to dislike a proposal by virtue that another party made it. Allowing another party to believe that it formulated a particular solution may make it all the more attractive to them.

It can be seen that such cognitive biases can be strong impediments to effective negotiation, and that successful facilitators and negotiators will give adequate attention to them.

### 2.3.2 Intangible motivators in negotiation and principled negotiation

Lewicki et al. (2003) warn about several intangible motivators including:

- the need to look good to the people one is representing
- the fear of setting precedents in the negotiation
- defending a principle or a set of beliefs

These pitfalls can be avoided by being aware of them and learning to recognise them. They can also be avoided by following what Kennedy (2001) calls principled negotiation. In his book, *Pocket negotiator*, Kennedy outlines three principle forms of negotiation and traces their development from the 1970s through the late 1990s. The first is what he calls streetwise tactics – bargaining or haggling ploys typical of the 1970s. These ploys are strictly rational in their approach and are typically applicable in the business context over sales prices and contracts. Such approaches involve ploys like withholding information about one's own position, reasoning that the other should compromise more, or simply choosing to fall short of one's obligations in an agreement on the premise that the other party will not be bothered to take one to task.

The second is principled negotiation, and was first described by the work of Fisher and Ury in 1981. Principled negotiation suggests that decisions and solutions are based on the merits of each case, rather than through a haggling process focused on what each side says it will and won't do. Principled negotiation has four prescriptions outlined below.

#### **Separate the people from the problem**

All negotiations involve people, and people are not perfect. Every person has emotions, their own interests and their own point of view. Not all people are good communicators or good listeners. Fisher and Ury (1981) encourage negotiators to focus on the problem at hand, or issues which are in dispute, and not on the people engaged in the problem. This is quite the opposite of the streetwise ploys where negotiators personally attack each other during the course of the negotiation.

#### **Focus on interests, not positions**

Although it might not be obvious, the interests of various parties are often very similar. Not many people deliberately try to prevent others from accomplishing something. Few people get out of bed in the morning with the intention of thwarting another. Fisher and Ury (1981) give the example of two men in a library – one want the window open for fresh air,

the other wants it closed because it is causing a draft. After witnessing the argument, the librarian opens the window in the adjacent room, providing both with what they want. The window is the position, the result - fresh air and the lack of draught are the interests. Different parties invariably have different interests, but need not thwart each other by the positions, or manifestations that these take. Fisher and Ury (1981) encourage negotiators to communicate their interests to each other as it is often possible for both parties' interests to be met.

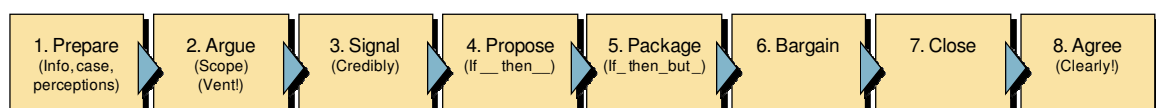
### **Invent options for mutual gain**

Although there may be numerous arrangements that are suitable or even beneficial to all parties, more often than not too little time is spent developing these options. Brainstorming in a non-judgmental atmosphere can help increase the range of solutions that negotiators can select from.

### **Insist on using objective criteria**

Principled negotiations are not battles of will, rather they focus on "the merits of the problem and not the merits of the people" (Fisher and Ury, 1981: p86). The use of objective criteria is to negotiate on some basis that is independent of the will of either side in a negotiation, or to use a method of evaluation that seems fair to both parties. The use of objective criteria avoids the practice of posturing and positional bargaining, but rather seeks solutions that are based on principles, not pressure. It should be noted here though that the use of objective criteria should not focus on pure-rational motivators at the expense of the 'normative' motivators discussed above.

The third style outlined by Kennedy is negotiation as a phased trading process. This is largely a mixture between bargaining ploys and principled negotiation, and aims to progress the relationship from inception to closure along defined lines. Using this technique one can try to avoid impasses, or getting stuck on one particular step of the phased process. There are many such frameworks and a detailed discussion of this literature is beyond the scope of this thesis. The framework provided in Figure 2.3 is a good example of the phased trading process.



**Figure 2.3** Negotiation as a phased trading process  
Source: Kennedy, G. 2001. *Pocket Negotiator*

### **2.3.3 BATNA**

The last aspect of negotiation tactics that warrants attention here is the Best Alternative to Negotiated Agreement or BATNA. “The reason you negotiate is to produce something better than the results you can obtain without negotiating” (Fisher and Ury, 1981: pp 104). The acronym BATNA refers to results obtained without negotiating. In the context of mountain access, this might be the status quo, but it is important to establish exactly what that status quo is, and to be creative about the options. BATNA is an indicator of bargaining power, or at least a benchmark from which to start negotiations.

### **2.3.4 The interests-rights-power model**

Figure 2.4 provides an illustration of the three manifestations of conflict, as described by both Anstey (1993) and Furlong (2005). An interests manifestation is one characterised by negotiation, mutual adjustment and joint problem-solving.

A rights manifestation is one characterised by adjudication whether inside or outside the scope of the law. It can include arbitration or even litigation. A power manifestation is one characterised by coercion. Parties force each other's hands by exerting power – usually in some physical form (not necessarily violence) – and can include physically barring access, moving property, disruption, civil disobedience or even violence. The approach to resolve conflict chosen by any party will reflect the tactics that it believes will yield the best result with respect to its interests.

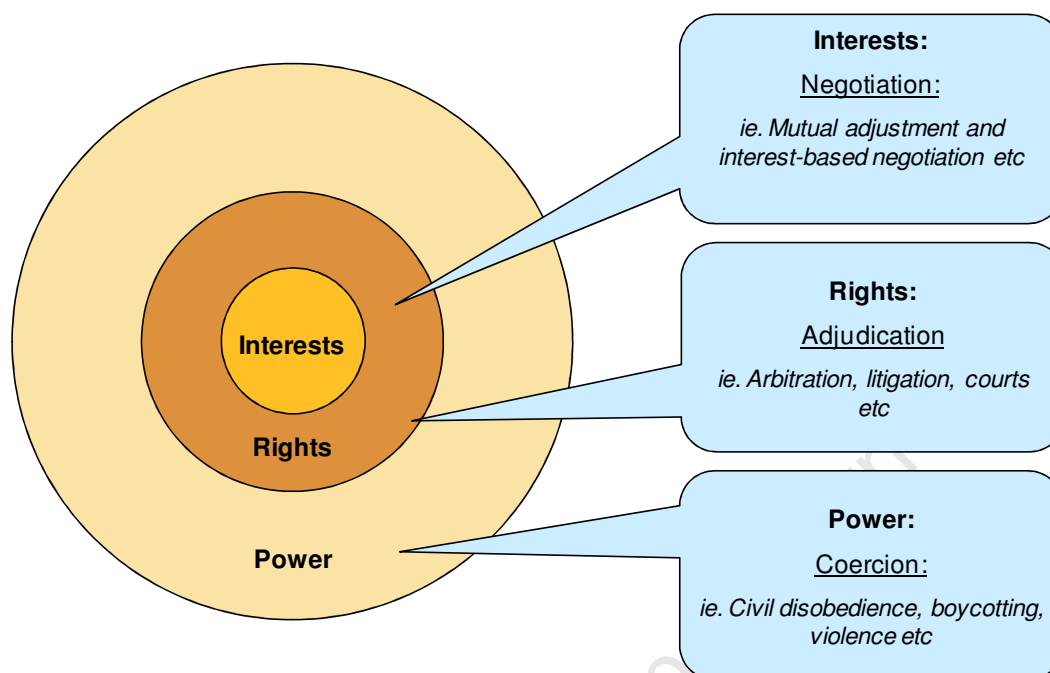


Figure 2.4 The interests-rights-power model  
Source: Furlong, G. 2005 *The Conflict Resolution Toolbox*

### 2.3.5 Negotiation facilitation and questions to ask

There are a myriad of concerns to keep in mind when facilitating a good negotiation and various sources offer process-maps or checklists of issues to cover. Table 2.1 draws from the literature on negotiation theory, and offers a summary checklist of questions that facilitator's should typically address in a negotiation or conflict situation. This facilitator's checklist was used in the creation of the interview guideline for landowners reproduced in Appendix 1.

A copy of this facilitator's checklist including comments and discussions with respect to the mountain access context is reproduced in Appendix 2.1b.

Table 2.1 Negotiation facilitator's checklist

| Theme                                                                           | Questions                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
|---------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Who are the parties involved?</b>                                            | <ul style="list-style-type: none"> <li>• Who are the parties involved?</li> <li>• Are they <u>all</u> at the table?</li> <li>• Who represents them?</li> <li>• Do the representatives have an appropriate mandate to represent the parties?</li> <li>• Do they have or need a 3<sup>rd</sup> party mediator / facilitator?</li> <li>• Who initiates the negotiation?</li> <li>• How is the negotiation initiated?</li> <li>• With what stated goals is the negotiation initiated?</li> </ul>                                                                                                |
| <b>What are the issues over which they are negotiating?</b>                     | <ul style="list-style-type: none"> <li>• In what context is the negotiation seated?</li> <li>• What are the substantive issues over which they are negotiating?</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                  |
| <b>What is the nature of these issues?</b>                                      | <ul style="list-style-type: none"> <li>• What is the nature of these issues?</li> <li>• What are the underlying needs and interests which may inform the positions of the parties?</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                               |
| <b>What perceptions do the parties hold of the negotiation and each other?</b>  | <ul style="list-style-type: none"> <li>• What perceptions do the parties hold about each other?</li> <li>• What perceptions do the parties hold about power relatives in the relationship?</li> <li>• What perceptions do the parties hold about existing mechanisms to handle conflict in negotiation?</li> </ul>                                                                                                                                                                                                                                                                          |
| <b>What preparations are made prior to the commencement of the negotiation?</b> | <ul style="list-style-type: none"> <li>• Do any of the parties need support?<br/>Access to information, language, transport etc?</li> <li>• Are there any timeframes relevant to the negotiation?</li> <li>• What is the substantive history of the negotiation?</li> <li>• What is the history of relations between the parties?</li> </ul>                                                                                                                                                                                                                                                |
| <b>In what manner is the conflict being expressed?</b>                          | <ul style="list-style-type: none"> <li>• What is the style of the negotiation?<br/><i>Word-of-mouth? Institutional knowledge? Writing?</i></li> <li>• Are there any established behavioral ground-rules?<br/><i>Acting with integrity? Transparency of information? Compliance? Respect? Civility?</i></li> <li>• In what manner is the conflict being expressed?<br/><i>Negotiation? Adjudication? Coercion?</i><br/><i>Note: The approach chosen by any of the parties reflects the tactics which it believes will produce the best returns with respect to it's interests</i></li> </ul> |
| <b>If the negotiation were to break down, why could it?</b>                     | <ul style="list-style-type: none"> <li>• Is there any history of a breakdown in negotiations?</li> <li>• If the negotiation were to break down, why could it?</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                    |
| <b>Outcome:</b>                                                                 | <ul style="list-style-type: none"> <li>• How is the agreement recorded?<br/><i>Word-of-mouth? Institutional knowledge? Writing?</i></li> <li>• Where is it housed? Or who is the custodian?</li> <li>• Does the agreement contain provisions on implementation?</li> <li>• Does the agreement contain provisions on monitoring, feedback or periods of review?</li> <li>• Does the agreement contain provisions on dispute resolution?</li> </ul>                                                                                                                                           |

Source: Summary of Anstey, 1993; Lewicki et al., 2003; Kennedy, 2001 as well as the advice of Dr Laurie Nathan and David Schandler (see personal communications),

## Chapter Three Mountain access: The international and national contexts

Internationally, the discussion around access to mountain and other natural areas is not new (Price 1897). Various countries around the world have responded to this issue over a significant period of time in a variety of different ways. While there are some unique circumstances that affect how issues of access are addressed in South Africa, it is nevertheless worthwhile examining the circumstances surrounding responses to access issues elsewhere. Lessons learned from international precedents can help to identify both working models that can be adopted as well as responses that have proved to be ineffective.

### **3.1 Sweden**

Sandell & Fredman (2010) note the comparison between the Germanic legal tradition with its emphasis on the landowner's right to different functions in the landscape, and "the stronger emphasis of the Roman legal tradition of unrestrictive ownership with a greater freedom for the landowners to use their land as they see fit" (Sandell & Fredman, 2010).

Sweden offers the case of liberal roaming laws in the form of the *Allemansratt* - literally 'Everyman's right'. The *Allemansratt* provides that the public may access private lands, pick berries, mushrooms and flowers and even camp overnight for one or two nights without necessarily obtaining the landowner's permission (Hultkrantz & Mortazavi, 1993).

A comparison with most industrialized countries shows that this common right is unique (Hultkrantz & Mortazavi, 1993). The *Allemansratt* however, not only provides rights, but also demands that everyone making use of the *Allemansratt* should show consideration, care and prudence (Aslund, 2008) or what Hultkrantz and Mortazavi (1993) describe as a set of 'land ethic rules' that should be followed.

The *Allemansratt* is guaranteed by the Swedish Constitution (Swedish Environmental Protection Agency, 2007), but further than that it's regulations or limits fall under the ambit of customary law. The interpretation of the rules takes as its point of departure the notion that a landowner, does not need to tolerate damage or trespassing of a certain nature (Aslund, 2008). Because it is unreasonable to expect landowners to have to

pay for the repair and maintenance to private roads caused by the public, landowners have the right to ban motor vehicle traffic on their private roads. Walking, cycling and horse riding, however, are deemed to have negligible impact and landowners are not allowed to prohibit these activities (Swedish Environmental Protection Agency, 2007).

While the courts have the power to interpret the right of public access, not many cases have actually come before a court. Aslund (2008) suggests that in the event of solving a conflict, the courts would look for a solution where the land can be used for a variety of activities simultaneously.

Ostrom (2000) cautions with regard to the risk of erosion of common understanding (good manners or common decency) when large numbers of people are concerned. Hultkrantz & Mortazavi (1993) note three broad challenges concerning the *Allemansratt* in the modern context. Firstly, while landowners are not expected to tolerate damage, in the urban and near-urban contexts landowners are witnessing an increasing cost associated with the public right to access private land. Secondly, that with increasing numbers of recreational and tourism users, increased nuisance (particularly noise and privacy) is sometimes witnessed. Lastly, that the *Allemansratt* provides in certain instances, loopholes in immigration and labour market regulations, allowing for 'illegal' immigrants to access land and to make consumptive, economic-scale use of the natural resources such as berries and firewood (Hultkrantz & Mortazavi, 1993).

Adams (2005) suggests that the *Allemansratten's* wide distribution of impacts across Sweden, and the involvement of more localized organisations in providing visitor facilities might be the reason for the lack of a National Parks agency in Sweden. Sandell & Fredman (2010) concur, and conversely also suggest that in regions with different land use structures such as in southern Europe or North America, where free access to land is more prohibited, there is a higher demand for designated recreation areas such as land provided by local and National Parks.

In the face of the seemingly liberal Swedish *Allemansratt*, it would seem that great significance should be placed on the responsibilities of users, or 'land ethic rules' associated with this system. For the purposes of maintaining access to land contemplated in the *Allemansratt*, it would be important to consider recommendations regarding the transmission of common understandings, monitoring behaviour and sanctioning of bad behaviour (Sandell & Fredman, 2010).

### 3.2 Britain

Traditionally, British common law has allowed for a right to roam. This common law principle has been useful in establishing a degree of public access in some areas, but its application has been limited. Historically, the public have been allowed to walk on limited designated public footpaths and bridleways, which were established in order to allow suitable public access to natural areas. Straying from these designated paths for the purposes of exploration or access to rock-climbing sites was typically not permitted. Access to the British countryside underwent significant change following the mass trespassing of 1932 (Rothman, 1982). Citing weakness in the law and growing discontent at the public's inability to access vast areas of countryside, several hundred walkers staged a wilful mass trespassing at Kinder Scout, a peak in Britain's Peak District, as described in Rothman's account. Several were arrested on account of their ensuing scuffles with private gamekeepers. The effects of this event were wide-reaching. Interpretation of the 'right to roam' relaxed and the designation of public footpaths and bridleways became more widespread.

The *Countryside and Rights of Way Act of 2000* (CRoW) codified in statute the right to roam on identified common land, without having to stick to paths. Some 865 000 Ha have been identified under the Act (British Mountaineering Council 2010.) This represents some 6% of the UK's land-mass and excludes many areas where the countryside roaming ethic is already an accepted norm. Under the CRoW Act, landowners enjoy a more limited occupier liability towards users.

A study on access by Hanemann (2000) revealed several lessons with respect to climbing in the European and British mountains. Firstly, restrictions on climbing areas, for whatever reason, are largely obeyed. This international example demonstrates a good precedent for areas with developing access considerations. Secondly, cooperation rather than confrontation with nature conservation organisations, landowners and national park authorities leads to better solutions. Thirdly, the British Mountaineering Council's (BMC) relationship with the National Trust (a significant landowner) and English Nature (the largest conservation agency) is generally very good, and that landowners often obtain information from these organisations before they deal with the BMC. This again demonstrates the necessity for users to foster relationships with a wide range of

landowners and that credibility earned with these will assist in negotiating access elsewhere. Finally, landowners who simply don't want strangers on their property use nature conservation as a pretext for refusing access. This phenomenon is not limited to the South African situation, a point worth recognising and dealing with productively during a negotiation. (*Focus on interests, not positions* - see Section 2.3.2)

### 3.3 Europe

Adams (2005) notes that the criteria for designation of National Parks land is often the inverse of land-use potential, a fact which is clearly illustrated in the European case. In Europe, access for climbing in particular is most often restricted by the need for nature conservation (usually state-imposed.) Conflict with landowners is cited a poor second to nature conservation along with many other factors at restrict climbing sport (Hanemann 2000; Goss, 2010, pers. comm.) (See Figure 3.1).

A study by the European Commission in 2004 (EC 2004) which defined mountainous territory based on elevation and slope criteria, found that 41% of the total landmass of the EU was indeed mountainous. The mountainous areas of Switzerland, Austria, Italy and Spain were found to account for 91%, 73%, 60% and 56% of their total landmasses respectively. This compared to an average of somewhere between 20% and 36% for the whole world (Price et al. 2004). Many of these European countries historically retained federal ownership of the mountainous land, as well as the forested land at its foot (Price 1988).

In Europe, mountains as a geological feature are recognised in law and policy, as witnessed by policy and legislation including the Alpine Convention of 1991 among others (Hanemann 2000; CIPRA 2009). The lesson here is that while Europe would seem to have a similar legal system to South Africa with respect to absolute rights of property ownership, significantly greater mountain area remains under state control as opposed to private ownership, and access issues with private landowners might be of lesser concern.

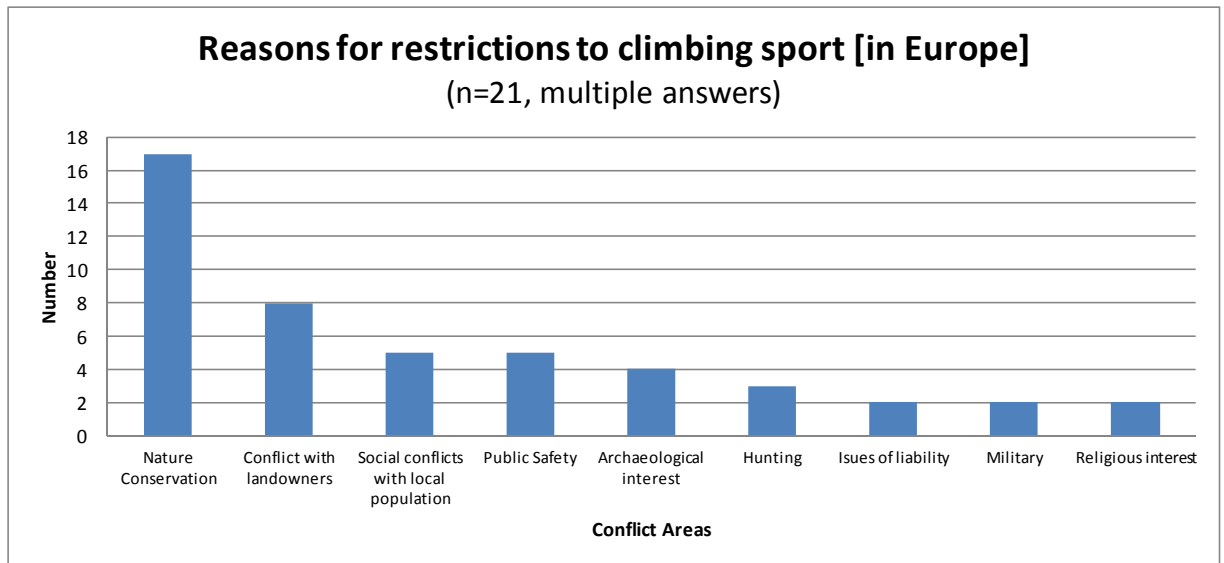


Figure 3.1 Reasons for restrictions to climbing sport  
Source: Hanemann, B. 2000. *Cooperation in the European Mountains*

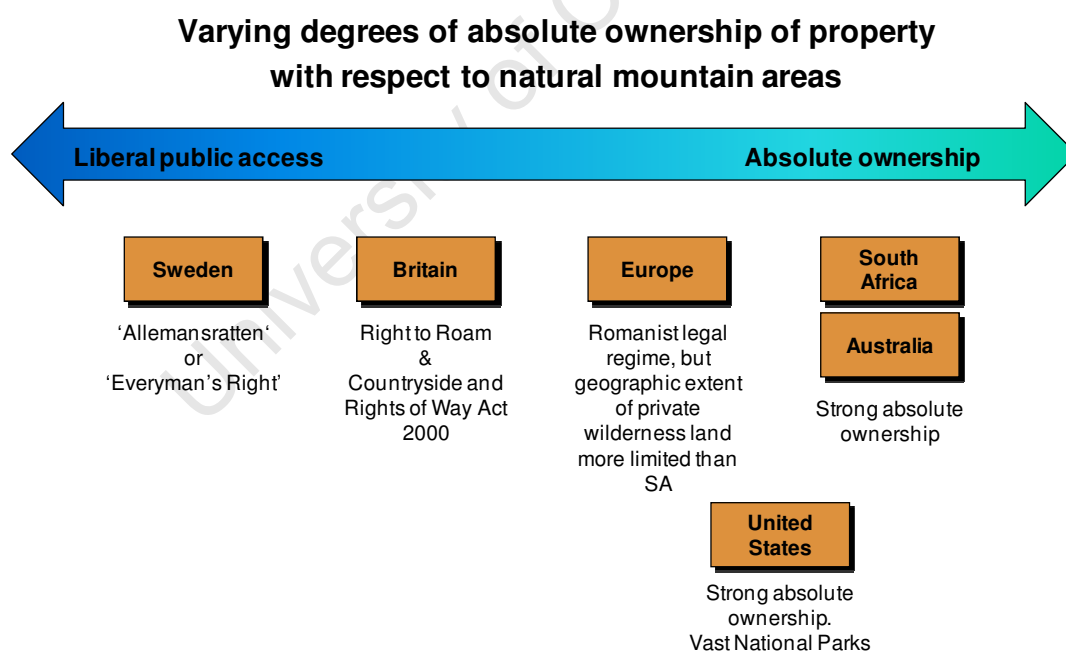
Hanemann (2000) notes several other lessons with respect to the negotiation of access in Europe. Firstly, a large number of climbers does not automatically create conflicts with nature conservation bodies. Secondly, experts in Europe agree that the large increase in climbing seen in most European climbing nations in recent years is tailing off. Increases in the level of interest in particular climbing and hiking areas may not always be associated with continued growth in interest. Lastly, while the level of organization among climbers in Europe is relatively low compared to other sports, this is not an indicator of the effectiveness of climbing rules. Rather, major influences on the effectiveness of climbing rules are the prevalent attitude, the presence or absence of a tradition, and the effect of climbers coming from other areas or countries.

### 3.4 United States of America

The United States is characterised by a strong private property regime similar to South Africa and Australia (Adams 2005; Access Fund 2006). However, a very large proportion of the most valuable wilderness and natural areas fall under state-controlled National Parks - some 34 million hectares (US NPS 2010), 3.5% of the total landmass of America. Like in the European case, this arguably eases some, but not all of the pressure for access to private land.

While each state in the USA sets its own laws, most states have recreational use statutes which are meant to encourage recreation on private lands by shielding the property owner from liability. Across the states, these laws vary both in their protection and the types of recreation that they cover, and the ways that landowners or their lawyers interpret them vary even more. In most states, landowners are only protected if they do not charge a fee (Snider 2009).

An NGO called the Access Fund often acts as an intermediary in those cases concerning private land, and often collects money for purchase of land or servitude to land in order to guarantee access from a legal standpoint. The Access Fund also maintains a database of access agreements, management plans, and a 'toolbox' including decision trees, synopsis of available actions, media tools and so on ([www.accessfund.org](http://www.accessfund.org) - accessed 5 Feb 2010). Figure 3.2 gives a graphic illustration of the varying degrees of absolute ownership in various countries, and the comparative pressure for access to privately owned natural areas.



**Figure 3.2** Varying degrees of absolute ownership of property with respect to natural mountain areas

### 3.5 South African

South Africa has a particularly strong and sovereign land tenure system (Badenhorst 2003). Access to mountains in South Africa is dependent on the ownership of the area, and there is no legal right to access such areas to climb or mountaineer. There is no 'right to ramble'. Ten per cent of South Africa comprises mountainous terrain, with the Cape Fold Mountains accounting for 21 000km<sup>2</sup> or 2% of the landmass.

Natural mountain areas are limited, and in the Western Cape in particular, a significant proportion lies on private property (Shroyer 2001) (Mosely, 2009, pers. comm.). Because of this, there may be greater pressure for access here than in the seemingly more liberal international cases. Further, the call for a legal right to roam in South Africa is a noble one but faces a multitude of obstacles. Law, notes Cowen (1984), is a function of an evolving process to reflect the values by which society wishes to live by. In the more developed world, the common law and legislation that governs public access to natural mountain areas has taken many years to evolve, and South Africa's progress to such an eventuality is very young indeed. The closest modern comparison would be the British *Countryside and Rights of Way Act of 2000*, the beginnings of which can perhaps be traced back to the mass-trespassing of the 1930s. Considering the length of time this legal development has taken and considering the protection of property rights afforded by the South African Constitution, it is likely that a shift to allow greater public access to natural mountain areas by legal means will take considerable time and that alternative mechanisms for gaining public access will be more fruitful.

Chapter 4 now specifically addresses the South African policy and legal framework.

## Chapter Four    Policy and legal framework relevant to access of natural mountain areas in South Africa

### **4.1    Absolute ownership of property**

According to Cowen (1984), it is an axiom of free societies that private ownership of land is the basis of a sound economy. Indeed in the transition from apartheid to democratic rule in South Africa in 1994, guarantee of land tenure and the continuation of private ownership of land was a crucial factor.

In South Africa, land tenure is characterised by the notion of absolute ownership of property, which might otherwise be understood as absolute sovereignty on the part of the landowner to control the use of, access to and enjoyment of their property, save to the extent that this power is restricted by law (Cowen 1984). Rights of ownership include the right to possess exclusively (and hence the right to privacy); the right to use; the right to take the fruits; and the right to alienate (Fisher 1983).

Cowen (1984) however also argues that the concept of ownership may involve a duty, on occasion, to act positively in the public interest. Ownership of land is restricted by private law in that the rights may be exercised only to the extent that the rights of others are not infringed, and also by provisions of public law such as laws relating to environmental protection or urban development (Fisher 1983).

Considering the complex legal definitions of ownership, Cowen (1984) argues that ownership of something like a piece of firewood or a leg of mutton is quite different to the notion of ownership of land: “we must never lose sight of the fact that legal rules themselves seek to embody the values which a society ultimately lives by”. While mineral rights have typically always been separated from landowner’s rights which are confined to the surface of the land, more recently many rights of environmental practice have been constrained. Particularly, landowners are prevented from harvesting protected plant species on their property<sup>1</sup>, they are prevented from transforming virgin veld without first obtaining a license<sup>2</sup>, they are obliged to clear their land of alien plants<sup>3</sup> and the National Water Act<sup>4</sup>

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<sup>1</sup> National Environmental Management: Protected Areas Act 57 of 2003

<sup>2</sup> National Environmental Management Act 107 of 1998

<sup>3</sup> Conservation of Agricultural Resources Act 43 of 1983

<sup>4</sup> National Water Act 36 of 1998

governs their extraction of water. The South African legal environment could be said to be evolving in favour of social needs, as delamination from landowner's absolute title increases.

This notion of absolute ownership is therefore not in fact absolute as its name implies, but rather the extent to which this applies will be influenced by the legal environment of a particular country. The rigidity with which this notion is evidenced in South Africa is perhaps a function of South Africa's economic history, or of a more conservative society. While South Africa features progressive legislation on the protection and sustainable use of the environment, there is, to date, no legislation dealing with the right to access nature and the environment thereof. The law provides no 'right to roam.'

## **4.2 Legal tools**

There are several legal tools that can affect access agreements. While the focus of this research rests squarely on negotiated access mechanisms rather than strict legal rights, these tools nevertheless complete the landscape of elements of which a negotiation for access to mountain areas may be comprised.

### **4.2.1 Privately owned natural areas and the South African Constitution**

The Constitution is the supreme law in South Africa, and provides guiding principles to which all legislation and other laws should apply. Section 24 of the South African Constitution provides that 'everyone has the right...to have the environment protected, for the benefit of present and future generation...' While the Constitution makes provision for rights of freedom of movement, protection of the environment, human rights, rights of equality and of justice in Sections 21, 27, 32 and 38 respectively, it is however silent on the subject of rights of access to the environment including natural areas, particularly when such access does not pertain to livelihood or residence. Section 25, concerning the rights of property says that 'no one may be deprived of property...except in terms of law of general application.' Property rights would presumably constitute the right of enjoyment, use and of course rights of exclusion.

#### 4.2.2 Landowner's rights: Common law and the Law of Trespass

The basic premise is that, except where otherwise proven, landowners have no legal mandate to provide access to their properties. Inversely, that users have no legal basis to insist on being allowed access. The common law of trespass provides that '*any person who without permission ... of the lawful occupier or owner ... of any land ... enters upon such land ... shall be guilty of an offense.*'<sup>1</sup> The well established sentiment of this is borne out in the common law of property, as well as by case law.

#### 4.2.3 Servitudes

A servitude is a limited real right ... which entitles its holder to the use and enjoyment of another person's property (Badenhorst, 2003). In the context of access to mountain areas, servitude is the enforceable right of users to either access a particular landowner's property, or to access it for the purpose of accessing a property beyond that of the landowner. Servitudes are registered by way of notarial deeds at the Deeds office and will always be noted on the title deed of the land in question (Fisher 1983). Servitudes come in two legal forms, praedial and personal. A praedial servitude relates to at least two pieces of land, and is constituted in favour of one piece of land over another. The right is vested in and against the owners of these particular pieces of land, irrespective of who they are, and are transferred to any new owner in the future. Praedial servitudes typically come in two forms in the rural context – a 'Right of Way' and a 'Way of Necessity' (*via necessitates*) (Badenhorst 2003; see Figure 4.1).

The 'Right of Way' typically takes the form of a right to either walk or drive vehicles across another person's land, the constraints and conditions of which are specified according to the intention of the parties involved in the creation of the servitude. A 'Right of Way' is voluntary and typically entered into by the servient landowner in exchange for money or other benefit. Conversely a 'Way of Necessity' or *via necessitates* does not require the consent of the servient landowner and will be granted in favour of a landowner who does not otherwise have access to a public road. However this is not a rigid rule and caveats of practicality and reasonableness will be considered by the court before setting the exact conditions and granting such a servitude (Badenhorst 2003).

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<sup>1</sup> Common Law of Trespass, as described by the Trespass Act 6 of 1959

A personal servitude is a servitude constituted in favour of a particular individual (or organisation) and confers the right to use and enjoy another's property. A personal servitude is, on the face of it, not transferable by its holder, but like a praedial servitude, is always enforceable against the owner of the property burdened with it, whoever that may be. Figure 4.1 provides an overview of the types and uses of servitudes available under South African law, as above.

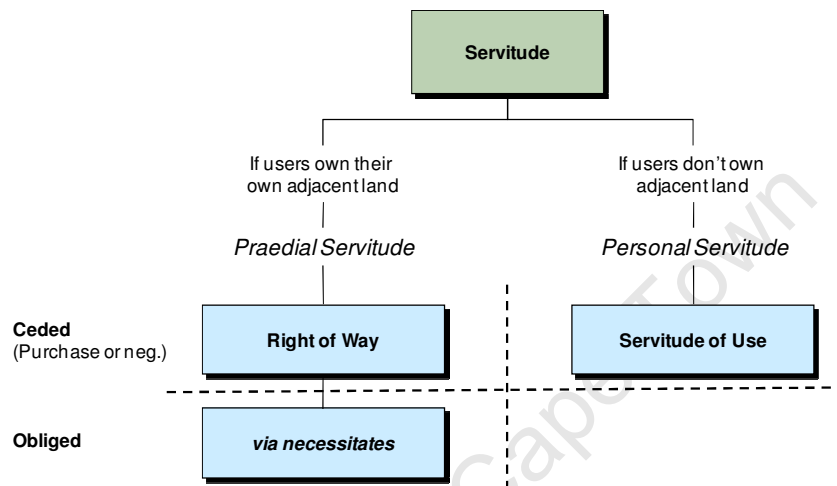


Figure 4.1 Overview of servitudes

### 4.3 Precedent of legal leverage

It would seem that legal tools such as servitudes have rarely been employed in cases concerning recreational access to mountain areas in the Western Cape (Pearson, 2010, pers. comm.). They have been used with little success because legal coercion would often seem to be at odds with the goodwill espoused in negotiated access agreements, and might do more harm than good.

The precedent use of any legal tools can give a good idea of the effectiveness of such tools in the context of access to private mountain areas. During the review-phase of the study, expert members of the mountain-user fraternity were consulted about this and the following few instances reflect the relevance of such tools, particularly the use of servitude. The descriptions below relate only to precedent of legal leverage, and refer to cases included in the study, as well as some that were not. Descriptions of the case-sites

and discussion on implications in each case can be found in chapters five and six respectively.

#### **4.3.1 Steenboksberg** *(not included in the study)*

Steenboksberg is a mountain property in the Bainskloof area, owned by the MCSA. Apparently out of goodwill alone, the owners of an adjacent property entered into a Right of Way agreement with the MCSA in order to assure future access.

#### **4.3.2 Waaihoeksberg** *(not included in the study)*

Both the Waaihoeksberg and Waaihoek properties have very limited access points to the rugged Hex River Mountains between Worcester and Ceres. The MCSA owns a portion of this land and secured the registration of a servitude *via necessitates* in order to secure their access to their property deeper in the mountains.

#### **4.3.3 Brekrantzberg, Cederberg**

Like the Waaihoeksberg property, the Brekrantzberg is an area of remote wilderness in the Cederberg range of mountains that stretches from Citrusdal to Clanwilliam. A servitude providing foot access over the neighbouring Kromrivier farm is registered. By virtue of goodwill, however, there is additional vehicular access allowed.

#### **4.3.4 Agtertafelberg**

The original owner of Agtertafelberg ceded a small portion of land in the Du Toits Kloof mountains to the MCSA before her death, without specifications on legal access. No registered servitude exists, although the potential for enforcement of access *via necessitates* has had a role to play in negotiations with the landowner.

#### **4.3.5 Waaihoek**

Adjacent to Waaihoeksberg, Waaihoek is owned by the University of Cape Town, whose Mountain and Ski Club has close ties with the MCSA. Firstly, a servitude of use is registered against the UCT property in favour of MCSA members. UCT has had varying relationships with the owners of land over which they must travel to reach the Waaihoek property. No

servitudes are registered but arguments of *via necessitates* may have permeated negotiations with these landowners.

#### 4.3.6 Bergplaas, Klein Winterhoek

Several years ago, the MCSA negotiated to purchase a servitude of access through the Bergplaas farm to state-owned mountain area behind it. The negotiations never concluded and the registration did not take place.

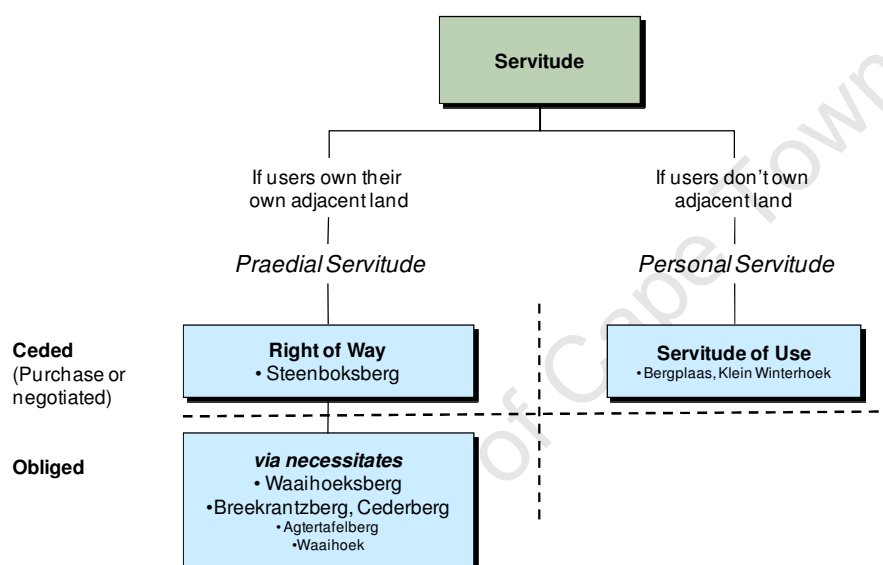


Figure 4.2 Precedent of servitude use in the Western Cape (registered legal cases in large font, cases where legal considerations are believed to have permeated a negotiation in small font)

#### 4.4 Legislation on access in specific contexts

On the whole, South African law does not deal with mountainous areas as a geomorphological phenomenon (Rabie 1992). Nevertheless, there are several pieces of general legislation that have implications for access to natural mountain areas.

#### **4.4.1 The NEM: Integrated Coastal Management Act (24 of 2008)**

Recognising the public interest in equitable access to the coast, the *NEM: Integrated Coastal Management Act 24 of 2008* provides for public access to the coast. In brief, Section 13 of the Act stipulates that all people in South Africa have the right to 'reasonable access to coastal public property' and the exclusions there under concern only environmental protection and not the rights of any present or adjacent landowners. Further, Section 18 stipulates that municipalities should designate strips of land as public coastal access land, and regulations published there under have suggested that these strips appear every 6kms along South Africa's coastline. While not directly relevant to issues of mountain access, it is nevertheless an important legal precedent in providing public access.

#### **4.4.2 The NEM: Protected Areas Act 57 of 2003**

Under this act, private land may be among that declared and included as 'special nature reserve' but according to Section 18(3), only with the consent of the landowner. There appears to be little legal right of enjoyment provided for in the legislation beyond what is voluntarily made available.

#### **4.4.3 The National Forests Act 84 of 1998**

According to Section 19 of this Act, '*Everyone has the right of reasonable access to state forests for the purpose of recreation, education, culture or spiritual fulfilment...*' Various subsections outline the terms of this access. Private property may be declared as a forest reserve but similarly to the NEM: PAA, only '*with the consent of the registered owner of the land (s8(1)(c))*'. While the combination of these might espouse an aspiration of open access, the right of admission is effectively retained.

#### **4.4.4 The National Water Act 36 of 1998**

Water-bodies may be used as channels of access past otherwise private land, after the NWA nationalised all bodies of water in 1998. While previously all landowners owned the water-bodies on their properties by virtue of ownership of the property and everything on it, the use of water by landowners is now regulated by the Water Act. In many cases, landowners may use the water only under license. Water bodies, including streams, are

thereby also state property, and may be accessed or used as a passage of access in the same way that any other state land might.

Section 4(1) of the Act states that '*A person may use water in or from a water resource for...recreational use*' and schedule 1 of the Act, entitled 'Permissible Use of Water' specifies that '*A person may, subject to this Act:*

*(e)... for recreational purposes ...*

*(i) use the water or the water surface of a water resource to which that person has lawful access*

*(ii) portage any boat or canoe on any land adjacent to a watercourse in order to continue boating on that watercourse'*

This latter provision allegedly came about following a series of events on the Crocodile River in Mpumalanga which is frequently used by paddlers for recreation in a similar manner that hikers and climbers might use the mountains. A particular landowner erected a bridge across the river on his land, obstructing river passage. He then allegedly made a point of attacking paddlers as they portaged around the obstacle, setting dogs on them and even shooting one paddler for trespassing.

## 4.5 Liability

Experts in the mountain-user fraternity suggested that liability for injury to users, as well as liability for fire started by users might be among the more prominent landowner concerns. To this end a short overview of the law of delict<sup>1</sup> is presented:

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<sup>1</sup> Delict is a common-law principle, also known in English and American law as 'tort', concerning civil liability for damages where there is no initial contract in place between the parties concerned. It is under the laws of delict under which one would normally 'sue'

#### 4.5.1 Liability for injury to hikers

Under South African common-law, there are five requirements, each of which must be satisfied independently in order to support a claim for liability. They are:

**Conduct:** An act or omission

**Wrongfulness:** Conduct must be legally wrongful (not just morally wrongful)

OR *boni mores* that the conduct should be so wrongful in the eyes of the community that one should be held to have committed a legal wrong, rather than just a moral wrong

**Fault:** Either an intentional act, or negligence.

Negligence relies on a reasonableness test – did the person not act where a reasonable person would have?

**Causation:** There must be a causal link between the conduct of the wrongdoer and the damage which is suffered. The law limits the causal chain – it must not be ‘too far removed’

**Harm:** There must be legally recognised damage (in other words, hurt feelings are not applicable)

In the South African environment, case-law is often consulted in cases of subjectivity. In South Africa there is apparently no legal precedent where the concern of liability in the case of recreational access to wilderness has been tested (Shroyer, 2001). In England too, there is also no legal precedent in this context (Flitcroft, 2010, pers. comm.). As is supported by case-law,<sup>1</sup> British landowners do not have a duty to warn about dangers on their property when it is reasonable to assume that those dangers are obvious. Landowners subject to Britain’s *Countryside and Rights of Way Act* (discussed in Chapter Three) enjoy limited occupier liability.

Assessing for liability is a complex issue, and tests for ‘reasonable-ness’ are of course subjective. It would be beyond the scope of this research to offer a conclusive legal opinion on the matter, but some of the caveats in the mountain context and a discussion about how they might unfold are presented in Chapter Six.

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<sup>1</sup> English case-law: *Cotton Vs Derbyshire Dales District Council* (1995) Here a man who was injured falling from the top of High Tor at Matlock failed to prove that the landowner was negligent in failing to erect notices warning of the danger, as the danger was obvious.

#### 4.5.2 Liability for fire

In the context of fire liability, provision of access to mountainous areas on private property has been further constrained by the advent of the *National Veld and Forest Fire Act 101 of 1998* and regulations published there under, namely government notices R665 and R953 dated 26 May and 4 July 2003 respectively (DWAF 2005). This new law places a burdensome obligation on landowners with respect to their logistical and legal obligation prior to, and in the event of fire. In particular, Section 12 of the Act places a duty on all landowners to prepare and maintain adequate firebreaks, and Section 17 obligates landowners to have adequate 'readiness for fire-fighting'.

Section 34 overrides the law of delict and states that if landowners do not belong to their district Fire Protection Association (FPA) that there will be a presumption of negligence with respect to fire unless proven otherwise. The cause of ignition plays no role in determining liability. Figure 4.3 illustrates the requirements for delict, as well as the implications on this under the *National Veld and Forest Fire Act*.

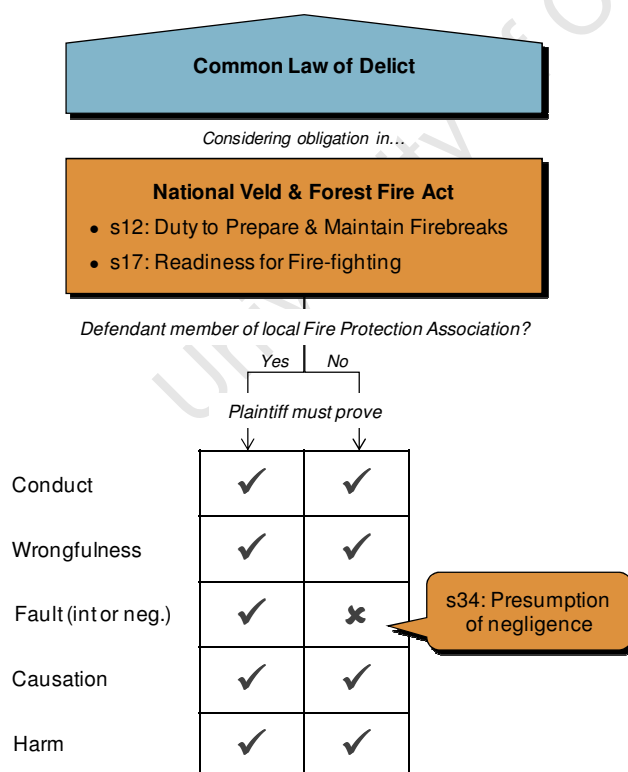


Figure 4.3 Liability and the NVFF Act

## **4.6 Conclusion**

The policy and legal framework supports the premise that landowners in South Africa have, by and large, zero obligation to enter into an access agreement save out of their own goodwill. While the option of servitude may in certain instances play a role in negotiations, this role will typically be limited. The rights that landowners have with respect to access control and the many concerns including liability and fire damage, far outweigh the legal effectiveness of any legal tools that may be ruled to favour access.

This again supports the conclusion in Chapter 3, that any efforts for the cause of access to natural or mountain areas are therefore rather best spent investing in relationships and constructive negotiation through goodwill.

## Chapter Five Overview of case-sites

The chosen case-sites cover a wide geographical area in the Western Cape including Montague, Rawsonville, Tulbach, Clanwilliam and Cape Town (see Figure 5.1). Each presently, or in the past, has had some form of access agreement for hiking or rock-climbing. The chosen case-sites also reflect a range of circumstances with respect to the interview discussion topics. This chapter contains a brief description of each case-site and a contextual summary of how recreational access issues have manifested at each. Each is based on discussions with the four expert mountain users, the landowner concerned, and the researcher's knowledge of the case-sites. The common names of the areas have been used as opposed to the registered farm names.



Figure 5.1 Topographical map showing the sites of the fifteen case-site interview  
Source: Clipclop.co.za

## 5.1 Agtertafelberg - Du Toits Kloof, Worcester

The Agtertafelberg case-site comprises a large portion of mountain land which provides access to many of the off-trail hiking and scrambling routes to the west of Du Toits peak, a particularly rugged mountain area. The Mountain Club of South Africa owns a mountain hut on a one hectare plot by a stream in the middle of this property.

Many years ago, in a bid against the MCSA, the late Elizabeth Visser purchased the Agtertafelberg land but nevertheless donated a small portion of land to the MCSA on condition that they erect a clubhouse within five years, which was done. The title deed transferring the land to the MCSA was silent on the issue of access which meant that any conditions of access were contained only as institutional knowledge.

There is a road which carves deep into the property, almost past, and then beyond the MCSA plot. At the time of the gift, this road stopped significantly short of the MCSA's plot and the only means of accessing it was a lengthy hike on foot. The extension of the road eliminated the need for this hike and resulted in increased pressure to be allowed to use the road, contrary to the spirit of the original agreement/gift. When the present landowner bought the property in 1995, the issue of access remained unresolved. In 1998, however, he signed an agreement with the MCSA to clarify and entrench the status quo, which remains until the present.

### Current access

A written agreement between the landowner and the MCSA governs the terms of access, and all users must subscribe to this. Pedestrian access continues to be guaranteed (out of goodwill – but see '*via necessitates*' in Chapter 4) while vehicular access is permitted as a privilege at certain times and under certain conditions. The landowner prefers to channel private enquires through the MCSA's agreement.



Du Toits Peak viewed from the North-West

## 5.2 Milner Amphitheatre - Hex River Mountains, Touwsrivier

Milner Amphitheatre lies in the heart of the eastern portion of the Hex River Mountains, between Worcester and De Doorns. Two main kloofs, Moraine Kloof and Buffelshoek Kloof, offer hiking access to the greater Hex through steep and rugged terrain. The lower Milner Amphitheatre, located in Moraine Kloof in a particularly pristine and fragile environment, is a favourite venue for rock-climbers. The owner, a 5<sup>th</sup> generation descendant, is passionate about the mountains, happy to share them but adamant that the pristine nature of the land be preserved. An environmental scoping report conducted in 2008 determined the carrying capacity of the lower Milner area and the appropriate ethics by which users should abide.

### Current access

There is a written agreement governing access, which describes the conditions of access and protocol to be followed when visiting the property. The landowner's secretary administers a booking system. One user may book a permit per weekend in the summer months, and may take a group of up to eight people to the venue. This user is expected to supervise their party and ensure adherence to the rules.



A view of the property leading to Milner Amphitheatre, Moraine Kloof and Buffelshoek Kloof



Cleft Peak in the Hex, viewed from Moraine Kloof

### 5.3 Waaihoek - Hex River Mountains, Ceres

The Waaihoek property lies on the western end of the Hex River Mountains between Worcester and Ceres. The property contains one of only a few passages to and from this end of the range. The University of Cape Town purchased the land in 1960 and it is a favourite hiking area of the University's Mountain & Ski Club.

During winter, students enjoy snow-skiing in a particular south-facing gulley, while in summer the property provides a key linkage to many challenging hikes including the popular four-day long Witels River hike. Access is open but permits are required to hike the Witels and must usually be obtained far in advance. Over the space of 75 years, students have built three huts on the property to provide shelter for hiking parties and for skiing weekends in the winter.

Access to the property is via other privately-owned land. Despite numerous challenges over the years, relationships with adjacent landowners are currently very good.



Waaihoek, owned by the University of Cape Town, is a favourite summer hiking and winter snow-skiing area. Source: Andrew Hagen

#### Current access

A written agreement exists with one landowner over whose land the access road briefly passes, and a verbal agreement exists with the others. Users from outside the UCT fraternity must obtain a permit from the club and be informed of the relevant concerns such as parking.

## 5.4 Klein Winterhoek – Bergplaas, Tulbach

The Winterhoek range is among the wildest in the Western Cape, with the Groot Winterhoek peak rising over 2000m. The Klein Winterhoek peak abuts on 500m of overhanging rock and hosts some of South Africa's most challenging big wall climbing routes.

For many years, hikers and climbers used the Bergplaas property, at the head of the Tulbach valley, to access the less accessible hiking areas of the Winterhoek, and in particular to climb in the area of the Klein Winterhoek Amphitheatre. In 2005, the landowner chose to discontinue allowing access, citing discontent with the coercive relationship that had developed between the state conservation agency users and himself.



The Klein Winterhoek foothills

### Current access

Public access is not permitted, although the landowner has expressed willingness to renegotiate an arrangement with users.

## 5.5 Klein Winterhoek - Fisaasbos, Tulbach

When access to the Klein Winterhoek via Bergplaas was discontinued, some users asked the owner of the neighbouring property, Fisaasbos, if they could access the Klein Winterhoek climbing routes via his land. The distance between the road and the climbing area increased the hiking time by 1½ hours. The landowner, an avid hiker himself, has to date been happy to oblige.

### Current access

The landowner must be phoned beforehand to ensure that the appropriate gates will be accessible. A verbal agreement regulates the ethics of use.

## 5.6 Oorlogskloof (East)- Montagu

The Oorlogskloof on the outskirts of Montague hosts a niche selection of classic and mostly more difficult rock-climbing routes, and has been a favourite venue for rock-climbers since the late 1980's.

The property, currently a fruit farm, has been held by the landowner's family for 150 years. He has always been very happy to have climbers visit the property, and maintains that his generosity has always been treated with respect for the entirety of the 20-year relationship.



Oorlogskloof with the landowner's orchards and homestead in the foreground

### Current access

A verbal agreement governs access, and the landowner asks only that visitors phone him beforehand and of course take care of the environment.

## 5.7 Oorlogskloof (West)- Montagu

Oorlogskloof can be accessed via one of two properties. The choice is dictated by the changes in the course of the river originating in the kloof. The current landowner of this second adjacent property purchased it in 2006 'for the peace and quiet' and while not yet resident on the land, expressed the intention of perhaps residing there in the future. The landowner is very amenable to allowing access, on a similar basis to his neighbour. This same landowner owns one of the properties concerned in the Skoorsteenskop case-site.

### Current access

A verbal agreement provides that users enjoy the property on a similar basis that on the neighbouring property.

## 5.8 The Lost World - Montagu

This unfortunately named area was one of the first rock-climbing areas discovered in the Montague area and, by all accounts, remains the best. When the property changed hands in the late 90's, the new landowner established a guest lodge and refused to continue allowing access. The landowners refused an interview but provided some of their reasons for disallowing access.

### Current access

Not permitted

## 5.9 Karbonatjieskraal – Touwsrivier

This property is named after the *karbonaatjie* or picnic lunch that travellers in the late 1800s would purchase while journeying through the Hex River Pass. The property ends at a waterfall over a rock amphitheatre which offers a fine selection of traditional-style rock-climbing routes. While this amphitheatre technically falls on adjacent and very inaccessible state land, the climbing area and access to it belongs to the Karbonatjieskraal property. The current landowner has developed the property which now comprises a luxurious lodge and dining, contemporary art and conference facilities.

### Current access

By verbal agreement, users may access the site so long as they make use of the restaurant facility before or after their visit.



At Karbonatjieskraal, the homestead and guest facilities are 200m behind the cliffs

## 5.10 Eensgevonden – Rawsonville (pilot study)

The Eensgevonden property is situated at the base of the Du Toits Kloof foothills in Rawsonville. The owners derive their income from self-catering accommodation and small-scale wine farming. They agreed to be the pilot project for the interview process and made suggestions about how to account for a range of landowner perspectives encountered.

### Current access

Users must make prior arrangement with the landowner, and a verbal agreement governs the ethics of use.



A delightful stream and hiking area above the Eensgevonden homestead

## 5.11 De Pakhuys / Rocklands - northern Cederberg, Clanwilliam

Bouldering (a sub discipline of rock climbing) in the Rocklands area in the northern Cederberg attracts international visitors and locals alike and the land is accessed by more climbers than any of the other case-sites in this study. A large portion of the land falls on private property adjacent to the protected Cederberg Conservancy.

The landowners of a particularly significant piece now *boer met klippe* (farm the rocks) and derive a material portion of their income by catering to climber's needs from accommodation to access to the bouldering area. The landowner regularly consults with 'expert' climbers to ensure that proper protocols are established and followed.



The De Pakhuys farm in the Northern Cederberg  
Source: [www.depakhuys.com](http://www.depakhuys.com)

#### **Current access**

Typically those paying for accommodation are granted free access to the boulders. Day trippers have to pay a nominal fee. Signage at the entrance to the property and at the campsite governs the terms of use. Users are also asked to sign a waiver and indemnity.

### **5.12 Nuwerus / Rooiberg - southern Cederberg, Ceres**

The Nuwerus property is one of the many properties (both private and state) that together make up the Cederberg Conservancy. The property incorporates a very nice campsite, a cliff with enjoyable rock-climbing routes, and is the starting point for several hikes. The landowners are very happy to allow access for hiking and climbing, as users will typically overnight at their camping facilities. The number of users is monitored to ensure that the fragile environment is look after.

#### **Current access**

Users who make use of the campsite are given free access. A verbal agreement governs the terms.

### **5.13 Cederberg Conservancy - Greater Cederberg, Clanwilliam / Ceres**

The Cederberg Conservancy consolidates 22 private and state-owned properties in the central Cederberg that, since 1997, have a voluntary agreement to manage the environment in a sustainable manner. Jan Niewoudt, the chairman of the conservancy, himself an agricultural farmer, is 10<sup>th</sup> generation descended from the original settlers from the 1820s. While it was originally established as a conservation initiative, the conservancy now oversees 42 projects ranging from conservation to tourism to farm safety to telecommunications. The conservancy has made a decision to encourage educated



Renowned mountaineer Sir Chris Bonnington at the iconic Maltese Cross in the Cederberg

awareness rather than to exclude people from the area. Recognising the remote nature of the land, the conservancy gives landowners the opportunity for somewhat of a co-management of the greater area. Individual landowners are free to conduct activities on their properties as they choose, but agree to solve problems on a collective basis. The chairman cited the *verfilmingsbeleid* (literally, the film-board) where landowners can table concerns collectively. This committee was borne out of the need to negotiate and manage the requests for use by the film industry collectively, rather on a farm-by-farm basis. This committee now tables any group concern that constituent landowners may face.

#### **Current access**

Access to state land within the conservancy is by permit, obtainable at two of the participating farm offices. Access to private land varies, but is usually associated with a nominal fee, and governed by terms that are general throughout the conservancy.

### **5.14 Suurvlakte / Breekrantz - Cederberg, Citrusdal**

The Suurvlakte property is one of two by which hikers may access the MCSA-owned Breekrantz mountain property in the Southern Cederberg. The non-resident landowner allows access to this mountain area through his property, but insists that the MCSA handle a simple permit system on his behalf.

#### **Current access**

A permit must be obtained from the MCSA before visiting the area, and users are told to contact the farm foreman to arrange to have the gate opened. The MCSA will issue users with a written protocol.

### **5.15 Skoorsteenskop - Hout Bay, Cape Town**

The most urban example, Skoorsteenskop, is a rock-climbing venue on state property in Hout Bay, Cape Town. Residential development adjacent to the state conservation area has largely ring-fenced the area from publicly access roads. One of several of these landowners was interviewed. Security concerns are high considering the urban context. Access via vacant plots has been closed by development and the installation of a security gate means that users have to park much further away and walk. Free access in the area is constricted considering the need for security.

**Current access**

Recently, a verbal agreement between the concerned landowners and users was made whereby a combination lock, with a regularly renewed code provides access through a security fence to the mountain behind these properties. Users may obtain the code from the MCSA.

The fifteen case-sites provide an overview of a range of areas within the Western Cape, and of venues that attract a varying profile of user groups, including hikers and various different rock-climbing styles. Owners at these venues are largely in favour of accommodating users on the properties, but each case gives rise to concerns that must be met – some common across several sites, and others unique. Chapter Six now examines the specific and thematic findings.

## Chapter Six      Research findings and discussion

This study has set out to gain an understanding of the views, and in particular the motivations, of landowners with respect to granting access to privately-owned natural areas in the mountains of the Western Cape Province. The first five chapters have provided the background and context for this research which has been largely informed by the responses obtained from interviews with 15 landowners of such properties.

Few shared divergent views. Rather, different landowners chose to highlight different aspects about which they felt more strongly, or which they felt were more relevant to their situation.

The findings of the study are presented under the following key thematic areas:

- 6.1      economic profile of land and landowners with respect to charging for access
- 6.2      factors motivating the granting of access
- 6.3      views on access to natural areas with respect to international access considerations
- 6.4      views on appropriate negotiation processes
- 6.5      views on the scope of substantive issues for consideration
- 6.6      views on possible control mechanisms
- 6.7      views on the use of tools to support an access agreement

Several of the figures, tables and check-lists in Chapter 6 are reproduced in Appendix 2: 'Guidelines for access negotiation'

## 6.1 Economic profile of land and landowners with respect to charging for access

Landowners and their occupancy of the land can be categorised in several ways including the means by which they acquired their properties, tenure, whether they are resident on the property or not, the land-use type (agriculture, tourism, leisure or other), and the scale or extent of economic activities on their properties. Nearly half (7 out of 15 of the landowners interviewed said that they derived some of their income from tourism-orientated activities on their properties (see figure 6.1).

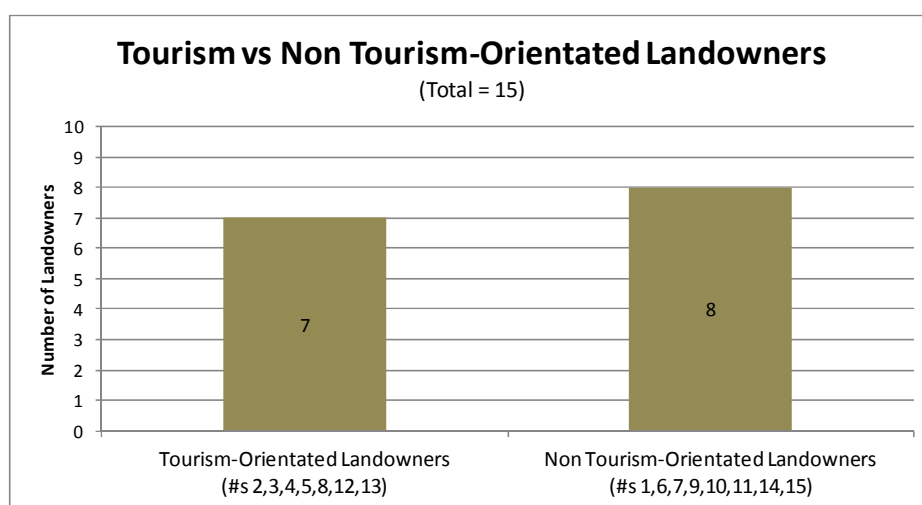


Figure 6.1 Tourism vs. non tourism-orientated landowners considered by the study

It was found that this delineation between tourism and non tourism-orientated properties was a significant factor when determining both procedural and substantive issues relevant to access (discussed in Section 6.5 below). Concerns regarding access emphasised by tourism-orientated landowners were largely environmental whereas non tourism-orientated landowners raised greater anthropocentric, or human-centered concerns, such as privacy or personal liabilities (see figure 6.2). Tourism orientated landowners are principally concerned with the visible signs of environmental deterioration associated with the total numbers of users, while non tourism-orientated landowners are concerned about the nature of the activities, the ethics and the impact of each individual user.

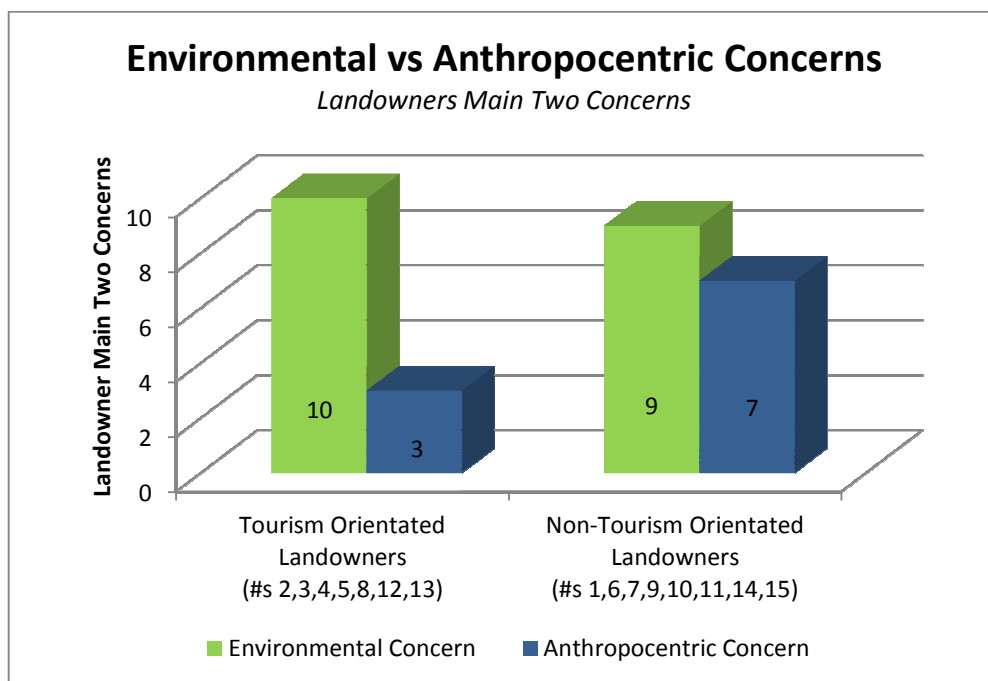


Figure 6.2 *Environmental VS Anthropocentric concerns – Landowner responses*

#### 6.1.1 Charging for access

Tourism and non tourism-oriented landowners also differ as to whether or not they want to or should charge a fee for access (Figure 6.3).

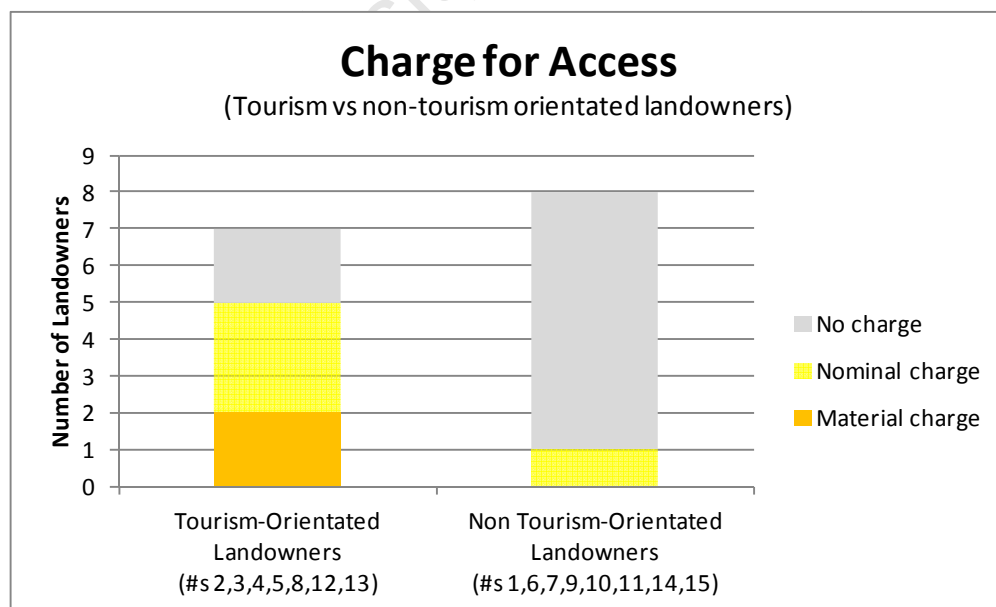


Figure 6.3 *Charge for Access – response variances of tourism compared to non tourism-orientated landowners*

Economic theory states that an asset, especially land, should be purchased for a capital amount, and should generate revenues in proportion to the financial costs as well as risks associated with the revenue stream. Similarly, owners who choose not to sell an asset do so at an opportunity cost that this capital could attract on the open market. This research with owners of natural mountain land showed this to be far from true.

*Land runs in the blood* said one landowner, summing up the sentiment of most landowners interviewed in this study. Ten out of the 15 landowners indicated that their land had not been bought or sold on the open market. Some landowners are fifth generation owners, while others bought their properties from family or neighbours. Those landowners who bought their properties more recently have done so as a lifestyle investment, rather than as a strictly financial investment.

Tourism-orientated properties typically offer accommodation and charge a nominal fee for access. Access to the natural areas on properties like these is encouraged by the landowners for two reasons. Firstly, granting people access gives the landowners a means to market and create demand for their accommodation facilities. Secondly, users seeking access offer landowners an opportunity to derive additional revenue from the land.

All tourism-orientated landowners said that any fees generated by granting access to their properties amount to a fraction of fees generated by accommodation. According to these landowners, only a small percentage of their target clientele hike or climb in their mountain areas in the manner contemplated by this research. That notwithstanding, because tourism-orientated landowners already cater for tourism needs, they indicated that they are usually willing to shoulder any administration associated with receiving visitors.

Non tourism-orientated landowners typically derive their income from agriculture and two of these landowners bought their land as a lifestyle investment. None of these landowners interviewed charge for access. Firstly, they do not want to charge as a matter of principle. They recognise that their admission of users to the property is out of goodwill, and believe that charging people may bring a bad element to the relationship. Some believe that as soon as they start charging a fee, users may begin to believe that their fees are in exchange for a service rendered which the landowners are wary of.

*I don't want a cent. Charging people just brings more kak [trouble] (see Table 6.1 - landowner 7).* Secondly, landowners who are not involved in the tourism industry realise

that the number of users is well below an economically viable critical mass and thus the marginal revenue associated with charging for access is not worth their while.

*The Canadian Rockies have very high user numbers, therefore access and economic considerations can be linked, but it would be silly to try that here (Landowner 9).*

A selection of responses on the topic of charging for access appears in Table 6.1 below.

Table 6.1 Examples of landowners views on charging for access

| Landowner   | Response                                                                                                                                                         |
|-------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Landowner 7 | I don't want a cent. Charging just brings more <i>kak</i> (trouble).                                                                                             |
| Landowner 2 | Paying guests at the lodge may make use of the facilities. It's part of my business                                                                              |
| Landowner 6 | I think if I wanted to charge people then I'd have to be much more careful about getting them to sign things and stuff – I can't be bothered with that.          |
| Landowner 9 | In Canada there are lots of people wanting to climb so it's viable for landowners to allow access on a commercial basis, but it would be silly to try that here. |
| Landowner 3 | Maybe R10 per person to cover some alien clearing at some stage.                                                                                                 |

Mountain-user fraternity experts and landowners suggested several other less direct methods of charging users that might be explored. These include a purchase or lease of servitude rights, or having an NGO such as the MCSA negotiate access in return for annual lump sum payments.

Charging for access, arguably changes the dynamic in terms of the supervision that landowners might expect themselves to afford to users. While this research does not offer conclusion on legal issues, the concerns around liability for injury to users may also be influenced by an entrance charge (see further discussion in Section 6.5.4 below).

Table 6.2 shows a summary of the main differences between tourism-orientated landowners compared to non tourism-orientated landowners when they are considering granting access to their properties.

**Table 6.2** A comparative summary of the main concerns raised by tourism and non tourism-orientated landowners

|                                          | <b>Environmental Concern / Issue</b>                                                                                         | <b>Anthropocentric Concern / Issue</b>                                                                          | <b>User Fees</b>                                                                                                                                                                                                                     |
|------------------------------------------|------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Tourism-orientated landowners</b>     | Environmental concerns are more important and are a function of total user numbers                                           | Anthropocentric concerns are less important as landowner's have capacity to assist user's enjoyment of the area | Landowner's principle revenue is not wilderness access, rather accommodation<br>Landowners are hospitality orientated<br>Landowners typically charge a nominal access fee                                                            |
| <b>Non-tourism-orientated landowners</b> | Environmental and Anthropocentric concerns are equally important<br>Environmental concerns are a function of impact-per-user | User's access must place minimal practical disturbance on landowners                                            | Landowner do not want to charge as a matter of principle, or believe the revenue is not worthwhile<br>Landowners are not visitor orientated, and users must self-manage and self-administrate<br>Landowners do not charge for access |

Only two landowners suggested that the age of a landowner might influence their attitude to issues of access. Landowner 1 suggested that while older landowners might typically be more conservative about allowing users onto their land, they would also tend to also be more forgiving towards users. *If I look back fifteen years, I'd describe myself as an angry young man. Age has given me the opportunity to learn and appreciate that other people can be coached* (Landowner 1).

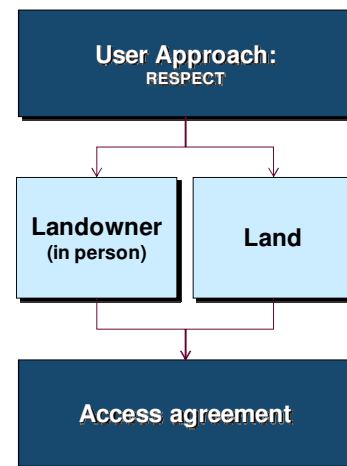
## 6.2 Factors motivating the granting of access

Thirteen out of fifteen landowners interviewed expressed a liberal approach to access to their properties. They feel a deep attachment (in many different ways) to the land and are open to sharing it. Table 6.3 below highlights some notable examples illustrating this sentiment).

*Table 6.3* Examples of responses indicating a liberal approach to granting access

| Landowner    | Response                                                                                                            |
|--------------|---------------------------------------------------------------------------------------------------------------------|
| Landowner 9  | It would be very selfish if you didn't allow others to share nature ... but only with people who care for the land. |
| Landowner 3  | One doesn't 'own' the mountain, one 'care-takes' it. Anyone who walks here can care-take it with us.                |
| Landowner 13 | Why conserve if you can't share?                                                                                    |
| Landowner 6  | Why do I allow access? Just because!                                                                                |

A theme emerging throughout the analysis was the need for respect (see Table 6.4). All the landowners that were interviewed raised their concerns over the issue of respect albeit in two separate contexts (see Figure 6.4). The first context was anthropocentric: respect for the landowner in person. Landowners are anxious that their ownership be respected, and that access should complement and not have a negative impact on their personal circumstances. The second context was environmental: respect for the land and the environment. Each of these contexts gives rise to a different set of substantive concerns. While some landowners mentioned both, this highlights the need for users to address each of these concerns independently.



*Figure 6.4* Negotiating access requires respect for both the land, and the landowner.

Table 6.4: Landowners responses indicating the need for 'respect' in access relationships

| Landowner    | Response                                                                                                                                                    |
|--------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Landowner 1  | As long as people have an affinity [respect] for the land.                                                                                                  |
| Landowner 2  | If respect is shown to the owner, his rules followed and the area maintained...                                                                             |
| Landowner 3  | As long as it [the environment] is cared for.                                                                                                               |
| Landowner 4  | The landowner is the custodian or controller for a period of time. People should be able to access it as long as rules are adhered to and respect is shown. |
| Landowner 5  | I like to divide the contents of an agreement into 'rights' and 'privileges' so everyone knows where they stand.                                            |
| Landowner 6  | I'd only be concerned if people started taking advantage...                                                                                                 |
| Landowner 7  | ...as long as my rules are followed.                                                                                                                        |
| Landowner 8  | I don't see why I should have to [allow access] Why don't people respect that?                                                                              |
| Landowner 9  | ...only people who care for the land...                                                                                                                     |
| Landowner 10 | ...as long as they respect the pristine-ness of the environment.                                                                                            |
| Landowner 11 | Users must respect and maintain our relationships with our neighbors.                                                                                       |
| Landowner 12 | I don't mind [who they/users are] as long as they behave.                                                                                                   |
| Landowner 13 | ...as long as people understand that what we say goes!                                                                                                      |
| Landowner 14 | I'd like to be reasonable...                                                                                                                                |
| Landowner 15 | As long as people don't bug me.                                                                                                                             |

Thirteen out of fifteen landowners cited conditions or rules that should govern access and named themselves as the controller or guardian of these. *People should be able to access [land] but in a controlled fashion. The landowner is the controller* (landowner 4). All landowners were concerned with who should be allowed access and believed that only those *with an affinity for the land* (Landowner 1) be allowed to share it. Ten landowners expressed insecurity about other peoples' frame of reference – how they might perceive, value and respect the land. *Anything given for free will likely be met with blatant disregard at some point in the foreseeable future* (landowner 1).

Those landowners that did not share the liberal sentiments above, cited very rational reasons. *It is my private property – I don't see why I should have to [allow access]* (landowner 8). *I'd rather allow a bit of access than have a court case about it* (landowner 5).

A key question in the research was to ascertain the motivation behind a landowner's willingness to negotiate or allow access. As discussed in Chapter Two, parties in a negotiation will tend to perceive a proposal in one of two fundamental ways: normative or cognitive. In the research interviews, landowners espoused a variety of both normative (Table 6.5) and cognitive (Table 6.6) motivators for allowing access.

Of the four landowners who gave cognitive responses for their decisions to allow access, one currently allows no access to their property at all, a second allows access with serious restrictions and the other two allow access but with minor restrictions. Comparatively, of the 11 landowners who gave more normative responses, none refuse access completely, one places serious restrictions on access, four grant access with minor restrictions and another six allow access without any restrictions (see figure 6.5).

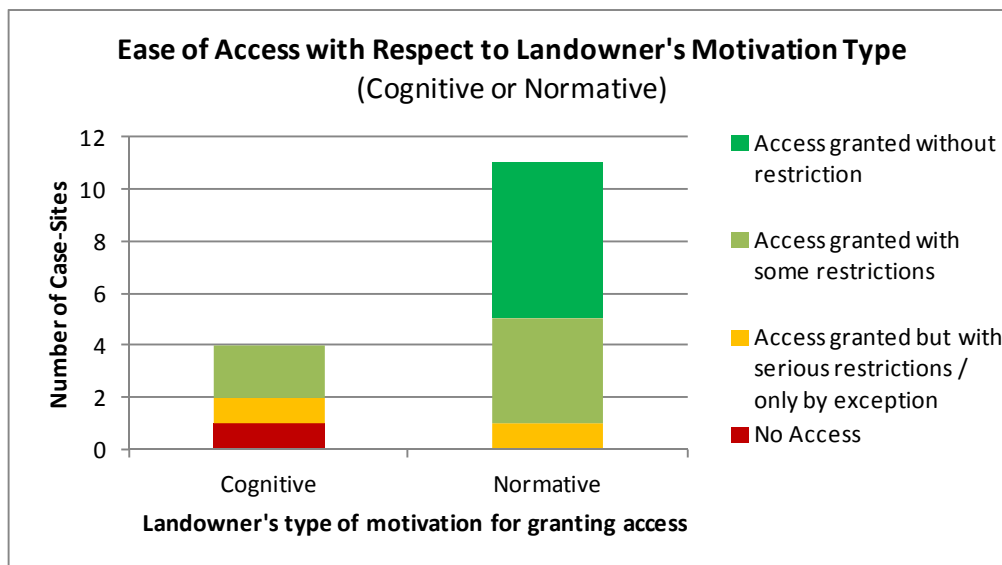


Figure 6.5 Ease of access and landowner's motivation type

Table 6.5 Examples of normative motivations for allowing access

| Landowner    | Response                                                                |
|--------------|-------------------------------------------------------------------------|
| Landowner 6  | Just because...                                                         |
| Landowner 3  | It's a beautiful thing, and it is good to let other people enjoy it too |
| Landowner 9  | It would be selfish if I just kept everybody out                        |
| Landowner 4  | I like to meet interesting people                                       |
| Landowner 13 | Why conserve if you can't share?                                        |

Table 6.6 Examples of cognitive motivations for allowing access

| Landowner    | Response                                                                                                                                                                                           |
|--------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Landowner 12 | Mostly to support the tourism element of the property                                                                                                                                              |
| Landowner 2  | ...for economic gain and promotion of my accommodation. One is catering for the tourism industry – the natural aspect is what you sell. I would prefer nature-minded people though                 |
| Landowner 5  | I believe that legally one is better advised to give some limited and controlled access rather than none, as I believe that increasingly the courts are favoring the public (viz the Knysna Heads) |
| Landowner 8  | I don't see why I should have to [allow access]                                                                                                                                                    |

There is a strong relationship between the ease of access to a case-site and the normative nature of the landowner's motivation (figure 6.3). The study found that landowners who do not allow access or impose significant constraints to access agreements, indicate cognitive rational motivations for restricting access. Any motivations along strictly cognitive or rational lines are not only unlikely to be successful, but also compete with any normative motivation that landowners may have.

One landowner came up with a clever way to differentiate between issues of right and issues of privilege. In his view, the MCSA has a limited legal right of access to his property. In his written agreement with the MCSA, the landowner clearly divides the agreement into agreement over rights and agreement over privileges.

### 6.3 Views on access to natural areas in relation to international models

Landowners were asked their views on how access to natural or mountain areas in South Africa compared with those in other parts of the world. Table 6.7 provides a summary of selected responses on this issue.

About three quarters of respondents believed that the approaches adopted in other countries are more liberal and many cited the UK's 'right to roam.' Eleven expressed an ambition for similarly liberal access in South Africa. They attributed the differences between the South African situation and the more liberal access models found overseas to South Africa's unique socio-economic history, and the vast differences in the numbers and types of users.

*Table 6.7* Examples of landowners views on how South Africa's approach to access compares with the rest of the world

| Landowner               | Response                                                                                                                                                      |
|-------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Landowner 5             | I think South Africa is very strict. In England they have the various roaming laws                                                                            |
| Landowner 3             | I'm aware that in Europe there is much more common area – it is bizarre that one can own such amounts of wilderness land in South Africa                      |
| Landowner 6             | In Mexico I went to a wilderness area and there was no access fee, people could come and go                                                                   |
| Landowner 9             | Other countries have significantly higher user numbers, which makes the economic model more feasible, and the cultural and legal environment more progressive |
| Landowner 6             | South African landowners are historically more stubborn and conservative                                                                                      |
| Landowners 2, 6, 11, 14 | South Africa has significantly higher security concerns, so I don't think the same level of access is possible                                                |

## **6.4 Views on appropriate negotiation processes**

Issues of process concern the manner in which negotiations are conducted. Interview questions about process were largely prompted by the literature on negotiation facilitation, a summary of which appears in Appendix 2.1. The findings below reflect the key points that landowners believed to be most important in negotiation processes.

### **6.4.1 Parties to an agreement**

Landowners were asked about who they would most prefer to deal with regarding an access agreement. While each landowner had a strong view, the responses across the 15 landowners were varied. The issues of legitimacy suggested by the negotiation literature (Lewicki 2003) were highlighted.

Seven landowners said that they would prefer to negotiate with a club such as the MCSA or some other body that provides formality, a framework for the agreement and some credible promise of responsibility. Landowners said they like dealing with clubs because, on the whole, this meant the types of users granted access were already subject to some sort of screening.

Four landowners said they would prefer to deal with individuals who represent smaller user-groups. These landowners believe that such individuals have better influence over users who will access their property and prefer the personal nature of the agreement. Four landowners said they prefer to deal with individuals on an ad-hoc basis, saying that they don't want any formal relationships and prefer to keep arrangements personal.

While landowners were divided on which of these three parties was the preferred party, all landowners said that they would like to have a relationship with at least two of the above three types of parties – either a club or NGO, an individual representing the user-group, and the individual users themselves.

### **6.4.2 Manner of recording an agreement**

The manner in which an agreement is recorded is an important consideration, as it has implications for both the negotiation process and the implementation of the agreement. The research revealed that there were currently two ways in which the terms of an access agreement are noted: either an agreement with the landowner or a protocol. An

agreement is a written or verbal agreement between the landowner and users. A protocol is a set of conditions and rules associated with accessing a property, agreed to between users. Both forms of agreement can be used by users to establish credibility with a landowner. In many instances (11 out of 15 respondents), the agreement between landowners and the user-fraternity is a verbal agreement, while the protocol is often in written form with the approval of the landowner.

The advantage of written agreements is that they establish a clear understanding of what all parties expect from one another and the terms on which access shall be granted.

*With a written agreement, everyone knows where they stand* (Landowner 5).

Establishing a status quo can make all parties more at ease in a negotiated agreement. Like a written protocol, a written agreement can be easily disseminated to users prior to their visit. Eleven out of 15 landowners do not have written agreements regarding access to their land. Most of these landowners indicated that were reluctant to engage in written agreements because they don't wish to be drawn into any binding contract – they want to retain sovereignty over their land, and the absolute right to regulate any particular circumstance as they please. They hold the view that written agreements have the potential to exclude unwritten or commonsense rules.

*Protocols are however a live [evolving] document. So much is lost when an informal arrangement must be formalised* (Landowner 1). Based on landowners needs for both informality and a measure of control, one solution to this problem may be a 'dual protocol' approach. Here, access to numerous sites in a region might be covered by a set of two protocols. The first is a general code of conduct applicable to the region, detailing the ethics, and general rules to be observed. A second protocol is then created for each individual site, and should be a very succinct list of rules that are specific to the site and may be contrary aspects of the general code. For example, the site-specific code would detail the exact place where users have been requested to park their cars, or liberties contrary to the general code such as being allowed to swim in a particular stream or being allowed to make a fire at a designated point at a particular site.

Eleven of the landowners interviewed said that they believe that written agreements are most appropriate in cases where 1) they consider user numbers to exceed the capacity of an informal agreement; 2) when rules are particularly unique or new to a particular area, or 3) when there is some reason for the landowner to commit to a

particular undertaking as part of the agreement. Unwritten, informal or verbal agreements were found to be the norm with landowners who believe they experience “low” user numbers, or with whom the arrangements have been stable and respected over a long period of time. Informal agreements place a greater onus of awareness and commonsense on users. The drawback with informal agreements (witnessed in at least three case-sites) is that they are open to misunderstanding which, if unmonitored, can strain the relationship and goodwill between users and landowners. The advantages and disadvantages of written vs. verbal agreements are summarised in Table 6.8.

*Table 6.8* Advantages and disadvantages of written vs. verbal agreements

|                | <b>Advantages</b>                                                                                                                                                                              | <b>Disadvantages</b>                                                                                                                                                                                                                               |
|----------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Verbal</b>  | <ul style="list-style-type: none"> <li>• Non-committing nature is more comfortable for landowners</li> <li>• Focuses on the goodwill nature of the agreement</li> </ul>                        | <ul style="list-style-type: none"> <li>• Open to misinterpretation or creative ‘reinterpretation’</li> <li>• Misunderstandings can strain the relationship</li> </ul>                                                                              |
| <b>Written</b> | <ul style="list-style-type: none"> <li>• Establishes a clear understanding<br/>All parties know where they stand and can abide by the terms</li> <li>• Easily disseminated to users</li> </ul> | <ul style="list-style-type: none"> <li>• Landowners uncomfortable with seemingly relinquishing their sovereignty, although this needn’t be the case</li> <li>• Erodes the value placed on the ‘unwritten rules’ or commonsense practice</li> </ul> |

At least half of the landowners (8 out of 15) said that they appreciate users’ efforts to conscientiously maintain relationships, while about a quarter (4 out of 15) said they prefer to be left alone. Landowners suggest that the formality of an agreement may evolve over time as appropriate to the circumstance. Most landowners (10 out of 15) indicated that when users initially seek access, user numbers are usually low, meaning that landowners consider their use to have negligible practical impact. Here - an informal agreement is most appropriate – one that relies on goodwill between landowners and users. In cases where increasing numbers of users wish to enjoy a particular area, landowners agree that a

written agreement is likely to be a more appropriate manner of regulating the relationship between users and landowner. Finally, as user numbers stabilise and protocols becomes well-established, it is found that a return to a less formal agreement is preferred in order to maintain the goodwill nature of the agreement, provided that the relationship is still proactively maintained.

Figure 6.6 illustrates the evolving nature of access agreements which landowners alluded to. Nine of the case-sites considered in the study fall in the left-third of the diagram.

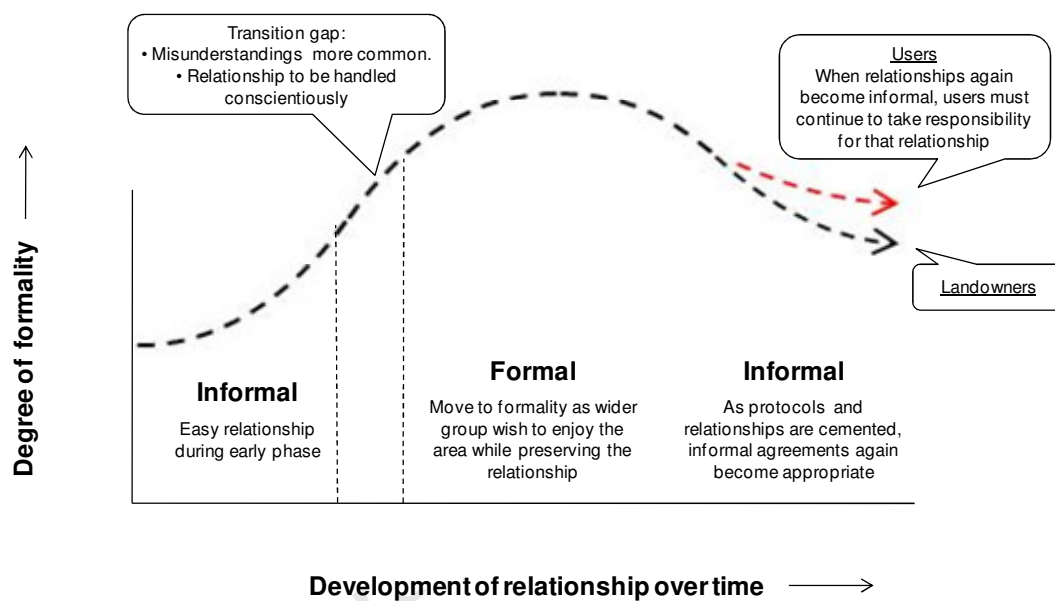


Figure 6.6 Illustration of the progressing formality of access relationships over time  
Source: Landowner interviews

This topic of how best to record an agreement was discussed by landowners in relation to several other concerns. In particular, landowners noted a relationship between the style of recording an agreement, user numbers, the economic nature of an access agreement, and the degree to which landowner's view is anthropocentric (personally orientated) or environmentally orientated. The exact interrelationship between these factors remains indeterminate, but suggests that further research examining these relationships, perhaps using psychometric methods would be warranted.

### 6.4.3 The housing of an agreement

Responses from interviews in relation to the issue of where the agreement should be housed suggest that such access agreements, whether written or verbal must be stored with an owner or in a place that the parties can access it. In five out of ten cases where there is a verbal agreement in place, landowners said that the agreement requires a custodian, or ‘elder’ (landowner 1) with whom users typically consult with before visiting the area. Most landowners (14 out of 15) agreed that they “own the agreement”, considering they are the primary stakeholder. Only one landowner specifically wanted the agreement housed with a third party – in this case, with the MCSA. All landowners said that the agreement should be housed with whomever users could come into contact with before accessing the property. It is this public availability of information that Ribot and Peluso (2003) refer to as access through access to knowledge. Such a custodian of the agreement could be a particular person, an institution/NGO such as the MCSA or the landowner themselves, depending on the agreement. Landowners agreed that any publication of information about the area should either include the necessary protocol, or information about who to contact with respect to obtaining access.

Table 6.9 Example responses on the housing or custodianship of an agreement

| Landowner    | Response                                                                                                  |
|--------------|-----------------------------------------------------------------------------------------------------------|
| Landowner 5  | I think all parties should have a copy, but particularly the landowners – it’s there for their protection |
| Landowner 6  | Somewhere and in a manner that all users are aware of the agreement and the protocols                     |
| Landowner 12 | Where it is readily available to those contemplating visiting. That way everyone knows the rules          |

### 6.4.4 Monitoring, feedback or periods of review

The literature on negotiation facilitation suggests that an agreement can be made more sustainable by including provisions for monitoring, feedback or periods of review. Most landowners stated that their access agreements would be “*reviewed as necessary*”. However, in only two cases, did landowners say that their agreements include particular provisions for monitoring, feedback or periods of review. Almost all landowners (12 out of 15) said that they appreciate, or would appreciate, regular feedback from users. This would provide them with information about what is happening on their land, create a level of

personal interaction with users and build the credibility of user's stated intentions on the property.

All landowners clearly stated that the agreements were subject to immediate change at their discretion. In all but one case, the agreements were open-ended, to be reviewed as and when necessary. One landowner stipulated that, while open-ended, the agreement should be reviewed every three years. He believed that this length of time does not add undue administration, but ensures that dialogue can be proactively maintained. In fact, at least 10 landowners agreed that regular reviews of the agreements would ensure that issues are discussed and resolved before they became problems and therefore such reviews would facilitate a healthy relationship between users and landowners. One landowner said that at times he temporarily closes certain portions of his property to allow for environmental rejuvenation. This would appear to be a very useful tactic for managing potential environmental impact or other landowner concerns.

The findings suggest that many landowners might feel more comfortable, and an agreement might be more resilient, if clear provision is made for periodic monitoring and review.

#### **6.4.5 Dispute resolution**

Many respondents agreed that small disputes are inevitable, and that there will often be only one or two people who *'spoil it for everyone'* (Landowner 1). In spite of this, few landowners had explicitly thought about dispute resolution or how they would deal with an issue if it arose. One landowner's written agreement states that 'the agreement will be terminated [in its entirety] by any breach that is not rectified in thirty days'. Another cited a blacklisting system in cases where any dispute is uniquely linked to one individual. Seven landowners said that they would take up a concern with the individual with whom they negotiated the agreement, and four mentioned a particular person by name. For example, landowner 4 stated that *"I feel that I have recourse to climbers through [...] who I feel has adequate respect in the community."*

#### 6.4.6 Breakdown of negotiations or an agreement

The negotiation literature encourages facilitators to consider in advance, the reasons that a particular negotiation may break down. Landowners were asked about why any agreements may have broken down in the past or why they might break down in the future. Landowners unanimously agreed that the largest threat to access agreements is if rules, conditions or protocols were broken. This highlights how important it is that rules are clear and available to all parties who might make use of a particular area, and also how important it is that access agreements are carefully negotiated to ensure that they do not contain rules that will inevitably be broken.

After some reflection, most landowners (13 out of 15) then backed this up by also adding that the agreement would be threatened if users were to disobey the *unwritten rules* (Landowner 4). In other words, users need to use their common-sense and a sense of responsibility when accessing natural mountain areas as opposed to simply abiding by the letter of the law.

About half of the landowners (7 out of 15) acknowledged that transgressions are usually made by *one or two individuals who spoil it for everyone* (Landowner 7). Transgressions or anxieties that cannot be attributed to one or two particular individuals would have far graver implications on landowner's readiness to allow access. A third of landowners specifically raised the concern that any access agreement should not interfere with their relationships with their neighbours. Landowner's views on actions that may cause a breakdown of agreements appear in Table 6.10.

Table 6.10 Landowner views on actions that may cause an access agreement to breakdown - example responses

| Landowner                    | Response                                                                                                            |
|------------------------------|---------------------------------------------------------------------------------------------------------------------|
| All landowners               | If the rules, conditions or protocols were broken                                                                   |
| Landowners 1,3, 9, 10, 14    | If people don't look after it                                                                                       |
| Landowners 1, 2,3, 9, 10, 14 | If the environment takes too much strain                                                                            |
| Landowner 4                  | If people don't stick to the unwritten rules                                                                        |
| Landowner 7                  | As long as the agreement doesn't annoy [my neighbour]                                                               |
| Landowner 5                  | If a group element were to try and force rights of access rather than gaining access by privilege based on goodwill |

## 6.5 The scope of substantive access issues for consideration

In an open-ended question, landowners were asked to list the issues that they thought were most important with regard to negotiating an access agreement (see Table 6.11, a summary of which also appears in Appendix 2.3). One purpose of this was to assess the scope of all possible substantive issues, and to compile a succinct list creating an easy point of reference for users and landowners contemplating access agreements in future. The other purpose was to explore and discuss how each issue might best be mitigated. The following substantive issues were cited as being the most important (see Table 6.11):

- respect for the environment and particularly for not littering,
- respect for the landowner and that his/her rules are obeyed,
- the rationale and ethic of users accessing the land,
- that the natural ambience of the land is maintained,
- liability to neighbouring farms for fire,
- potential liability for injury to users ,
- landowner's wish to retain rights of control over access,
- that the landowner's relationships with their neighbours are not jeopardised, and
- that flora is not trampled.

Discussions with mountain user experts in the process of developing the interview schedule suggested that concerns would include the burden of custodianship, issues of water resource quality and concerns of future increase of user numbers. However these three issues did not emerge as such from the interviews with landowners.

The issues raised by landowners have been grouped into themes as follows: environment, fire, privacy, burden of custodianship, burden of administering the agreement, user-profile and water resources. Table 6.11 details the scope of all substantive issues raised by all 15 landowners, and a rating of 'High', 'Medium', or 'Low' that each landowner attached to each. This rating was determined by the researcher considering the following criteria: 'High' is given to grave or primary concerns – issues over which landowners were particularly concerned or described as 'deal-breakers'. 'Medium' is given to issues causing some concern, but which landowners believe are not critical in isolation, or for which remedies

are readily available. 'Low' is given to issues of minor concern, or issues that landowners perhaps only confirmed after prompting. Each of 'High', 'Medium', and 'Low' were given a weighting of 3, 2, and 1 point respectively, and the sum of the responses was used to categorize each issue. Issues scoring less than 7 points are rated 'Low' overall, issues scoring between 8 and 13 points are rated 'Medium' and issues with greater than 13 points are rated 'High' overall. The most concerning issue scored 22 points on this scale. These values that distinguish between 'High', 'Medium' and 'Low' were chosen so as to divide the measure of severity into three. This delineation also corresponds with the overall sentiments of the individual landowners on each issue.

A checklist-style summary of Table 6.11 appears in Appendix 2.3 – 'Guidelines'.

The purpose Table 6.11 is twofold:

- 1) To assist parties in future negotiations by providing a check-list of the substantive issues for consideration when contemplating an access agreement; and
- 2) To provide an indication of the relative importance of each as found by this study.

This is not to suggest that an issue rated 'Low' cannot feasibly be of grave importance to a particular landowner in the future. Rather, the research suggests that a negotiated agreement could focus on other more pressing issues once a 'Low' issue has been briefly discussed. Conversely, the research suggests that all substantive issues rated as 'High' as well as remediation measures for these, should be dealt with in detail as part of an access agreement, despite the apparent relevance of this issue at the time of negotiation.

The most highly rated concerns were litter, user's respect for landowners and their rules, whether users have an affinity for the land, and retaining the ambiance of a natural environment, scoring 22, 21, 20 and 19 points respectively.

Table 6.11

Substantive concerns identified by the research

| Substantive Issues Mentioned by Landowners<br>(Grouped) |                                                                               | Responses: |   |   |   |   |   |   |   |   |    |    |    |    |    |    | Score<br>(Sum) | Rating |
|---------------------------------------------------------|-------------------------------------------------------------------------------|------------|---|---|---|---|---|---|---|---|----|----|----|----|----|----|----------------|--------|
| Landowners:                                             |                                                                               | 1          | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 | 14 | 15 |                |        |
| <b>Environmental:</b>                                   | Environmental carrying capacity / resilience                                  | 3          |   |   |   |   | 1 |   |   |   | 2  |    |    | 3  | 2  |    | 11             | Medium |
|                                                         | User numbers                                                                  |            | 2 | 1 |   | 1 |   |   |   |   |    |    | 1  | 3  |    |    | 8              | Medium |
|                                                         | Ambiance - Natural environment                                                |            |   |   |   |   |   |   |   |   |    |    |    |    |    |    | 19             | High   |
|                                                         | Ambiance - Any human sign - rocks rearranged etc                              | 3          | 3 |   | 3 |   |   |   |   | 1 | 3  | 2  |    |    | 3  |    | 9              | Medium |
|                                                         | Litter - General                                                              |            |   |   |   |   |   |   |   |   |    |    |    |    |    |    | 22             | High   |
|                                                         | Litter - Particularly cigarettes                                              | 3          | 2 |   |   |   |   |   |   | 3 | 2  | 3  | 2  |    | 2  |    | 1              | Low    |
|                                                         | Litter - Particularly toilet paper                                            |            |   |   |   |   |   |   |   |   |    |    |    |    |    |    | 4              | Low    |
|                                                         | Fauna - Scaring off of wildlife (leopards)                                    | 2          |   |   |   |   |   |   |   |   |    |    |    |    |    |    | 2              | Low    |
|                                                         | Flora - Trampling                                                             |            |   |   |   |   |   |   |   |   |    |    |    |    |    |    | 14             | High   |
|                                                         | Paths - Condition, erosion, and maintenance                                   |            |   |   |   |   |   |   |   |   |    |    |    |    |    |    | 12             | Medium |
| <b>Fire</b>                                             | Heritage - Preservation of archaeological features i.e. bushman paintings     |            |   |   |   |   |   |   |   |   |    |    |    |    |    |    | 4              | Low    |
|                                                         | Damage to property                                                            | 2          |   |   |   |   |   |   |   |   |    |    |    |    |    |    | 12             | Medium |
|                                                         | Liability to neighbours                                                       | 1          | 2 | 2 | 3 |   |   |   |   | 2 |    |    |    |    |    |    | 18             | High   |
| <b>Privacy</b>                                          | That users should be respectful of landowner's wishes, and obey rules         | 3          | 2 |   |   | 3 | 3 | 2 | 2 | 1 | 1  | 1  | 1  |    |    |    | 21             | High   |
|                                                         | Of homestead                                                                  |            |   |   |   | 1 | 1 |   |   |   |    |    |    |    |    |    | 3              | Low    |
|                                                         | Of paying guests in the case of tourism related properties                    |            |   |   |   |   |   |   | 3 |   |    |    |    |    |    |    | 7              | Medium |
| <b>Burden of Custodianship</b>                          | Parking and vehicle security – Liability or administrative hassle             | 1          |   |   |   |   |   |   |   |   |    |    |    |    |    |    | 4              | Low    |
|                                                         | Liability for landowner's dogs (they bite!)                                   |            |   |   |   |   |   |   |   |   |    |    |    |    |    |    | 2              | Low    |
|                                                         | Liability (legal) to hikers and climbers for injury sustained on the premises | 2          | 1 | 2 | 2 |   |   |   |   |   |    |    |    |    |    |    | 12             | Medium |
| <b>Burden of administering the agreement</b>            | Liability (moral – worry and hassle) to users for injury                      | 2          | 2 | 1 |   |   |   |   |   |   |    |    |    |    |    |    | 8              | Medium |
|                                                         | Hours of any disturbance                                                      | 1          |   |   |   |   |   |   |   |   |    |    |    |    |    |    | 9              | Low    |
|                                                         | Gates to be kept closed - Security & livestock control                        |            |   |   |   |   |   |   |   |   |    |    |    |    |    |    | 12             | Medium |
| <b>User profile</b>                                     | Security (indirect, not from users directly)                                  |            |   |   |   |   |   |   |   |   |    |    |    |    |    |    | 10             | Medium |
|                                                         | Time and effort                                                               |            |   |   |   |   |   |   |   |   |    |    |    |    |    |    | 6              | Low    |
|                                                         | Level of organization / orderliness                                           | 1          |   |   |   |   |   |   |   |   |    |    |    |    |    |    | 10             | Medium |
| <b>Water resources</b>                                  | Setting of precedent - retaining rights of control over access                | 2          | 1 |   |   |   |   |   |   |   |    |    |    |    |    |    | 17             | High   |
|                                                         | Relationships with neighbours - users don't upset neighbours                  |            |   |   |   |   |   |   |   |   |    |    |    |    |    |    | 16             | High   |
|                                                         | User's rationale for wanting access                                           | 3          |   |   |   |   |   |   |   |   |    |    |    |    |    |    | 11             | Medium |
| <b>Key:</b>                                             | Whether users share an affinity for the land / passion for conservation       | 3          | 3 | 3 | 1 | 1 | 1 |   |   | 3 | 1  | 2  | 3  | 1  |    |    | 20             | High   |
|                                                         | Adequately prepared (commonsense) - supervision required?                     | 1          | 2 |   |   |   |   |   |   |   |    |    |    |    |    |    | 10             | Medium |
|                                                         | No dogs or mountain bikes                                                     |            |   |   |   |   |   |   |   |   |    |    |    |    |    |    | 5              | Low    |
| <b>Weighting:</b>                                       | Quality for drinking or agriculture                                           | 2          |   |   |   |   |   |   |   |   |    |    |    |    |    |    | 4              | Low    |
|                                                         | Issues of primary and grave concern                                           |            |   |   |   |   |   |   |   |   |    |    |    |    |    |    | > 13           |        |
|                                                         | Issues of some concern, not grave in isolation                                |            |   |   |   |   |   |   |   |   |    |    |    |    |    |    | 7 < x < 13     |        |
|                                                         | Issues of minor concern, or raised only after prompting                       |            |   |   |   |   |   |   |   |   |    |    |    |    |    |    | < 7            |        |

### 6.5.1 Environmental concerns

All landowners feel a deep connection with their land and are wary about the possibility that granting access might result in it being abused.

Table 6.12 Examples of landowner's identification with the natural aspects of their properties

| Landowner    | Response                                                                                                           |
|--------------|--------------------------------------------------------------------------------------------------------------------|
| Landowner 1  | My litmus test is often what other people in years to come will think about my respect for the land as a landowner |
| Landowner 11 | The land was purchased for the purpose of preserving it in a pristine state and securing access to the area        |
| Landowner 6  | The land has been in the family for years – my father is retired on the property. We love it here                  |
| Landowner 10 | I bought the farm because of the aesthetic value of the river – my little piece of the earth                       |

At least 10 landowners expressed concern that the environment should remain pristine and not show any evidence of human traffic. Eleven landowners spoke briefly about a need to limit user numbers, but only six said they had a firm idea about exactly how many people constituted too many. Non tourism-orientated landowners (refer Table 6.2) typically reported being more concerned with the impact per individual user and the types of activities taking place, while tourism-orientated landowners wanted to discuss impacts in terms of the total number of users. Papers, wrappers and other litter were mentioned by 9 landowners as a concern, but most of these agreed that this issue would be the easiest to solve with proper protocols in place by briefing to users prior to entry. Four landowners singled out cigarettes or toilet paper under litter. Table 6.11 retains the distinction between these and general forms of litter, as landowners indicated that these might perhaps be attributable to particular user or activity types.

Eight landowners mentioned trampling of plants, and 6 mentioned the erosion, degradation or maintenance of existing paths. The latter however received far more emphasis than the prospect of new paths to different areas of the property. Landowners believed that the existing ethic on new paths should remain- that developmental or experimental paths should only be used by an absolute minimum number of users and that only well thought-out and well intentioned paths should be allowed to become established.

Two landowners said that they would not wish for any organised path building to take place at all (some examples of landowner responses concerning environmental concerns are given in Table 6.13).

Table 6.13 Landowner responses on environmental issues

| Landowner    | Response                                                                                                            |
|--------------|---------------------------------------------------------------------------------------------------------------------|
| Landowner 1  | My litmus test is often what other people in years to come will think about my respect for the land as a landowner  |
| Landowner 14 | Any sign that you're not the first one there                                                                        |
| Landowner 10 | I don't want to see any evidence of other people being there - fireplaces, buildings, caches, stones rearranged etc |
| Landowner 2  | The wilderness must not become a victim of it's own success                                                         |

### 6.5.2 Fire

Only two landowners raised concerns about recreational hikers and climbers starting fires. Five agreed that the chance of recreational hikers starting an uncontrolled fire were very low, especially in comparison to other causes such as ignition through natural or industrial causes, or by farm residents and arson. *I'm not that concerned about fire. I know the people, and besides, farmers themselves have been making fires for years* (Landowner 6).

The consequences of fire, however, are grave on two separate counts. First is the damage to a landowners' own property, and second is the direct financial burden of liability for damage to neighbours' properties, considering the *National Veld and Forest Fire Act 101 of 1998* described in Chapter 4.

Roughly half of the landowners were far more concerned about damage to their neighbours' property than they were about damage to their own. All but 4 landowners acknowledged that they did not entirely understand the legalities around liability for fire, only that they felt uncomfortable with the presumption of negligence assumed by the law and vulnerable considering the extent of the possible financial damages which might be claimed against them. Less than half of landowners said they believed that they understood what was entailed in joining the appropriate Fire Protection Association.

Table 6.14 Examples of landowner views on the risk of and liability for fire

| Landowner    | Response                                                                                                                                                     |
|--------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Landowner 12 | If someone were to take me to court over a fire, that would be the end of me                                                                                 |
| Landowner 7  | I have been threatened with legal action if a fire were ever to spread from my property but this threat was rooted in other issues with <i>[a neighbour]</i> |
| Landowner 6  | I'm not that concerned about fire. I know the people, and farmers themselves have been making fires for years                                                |

### 6.5.3 Privacy

Landowners were concerned about privacy, but in varying contexts. Three key issues were raised, some example responses of which appear in Table 6.15. The highest priority concerning privacy is that users respect their wishes and obey the rules. This doesn't necessarily concern logistical or physical disturbance of their privacy, but rather landowners want the comfort of knowing that visitors will be respectful in the absence of the landowner's active supervision. The next most mentioned concern was in the case of tourism-related properties namely; the privacy of paying guests should not be compromised in any way. The third and least-cited concern was for privacy of the landowner's own homesteads: landowners should not have to be present at all times, should not be unnecessarily disturbed especially outside of daylight hours.

Table 6.15 Examples of landowner's views on respect for their privacy

| Landowner          | Response                                                                                             |
|--------------------|------------------------------------------------------------------------------------------------------|
| Landowner 1,6,7,10 | If I feel that people don't respect me I would feel very uncomfortable allowing them here            |
| Landowner 2        | Any access agreement must not intrude on the privacy of my guest chalets because that is my business |
| Landowner 7        | I understand that people need to come and go but they mustn't come and bug me at funny hours         |

#### **6.5.4 The burden of custodianship**

##### **Waiver and indemnity**

Allowing users onto a private property may give rise to several logistical burdens. In this regard, 7 out of 15 landowners said they were very anxious about their legal liability to hikers and climbers for injury sustained on their premises. In spite of these concerns, these landowners all indicated that they were unsure of the law. They simply agreed that they wouldn't want to risk placing themselves in a very financially awkward position.

Around the world, and including South Africa, climbers and mountaineers practice their activity under the presumption of own risk (Tony Lourens, 2009, pers. comm.). Indeed, they pride themselves on it. Considering the many years over which the fifteen case-sites have been accessed, only a very small number of incidents of injury (major or minor) could be recalled by interviewees. In each case, landowners reported no suggestion of landowner liability whatsoever.

Tests for liability and delict, described in Chapter Four, rely on tests for reasonableness. Such tests are, of course, subjective and to offer any legal opinion based on the research discussions would be merely conjecture. It would, however, be fair to offer the following observations:

- the reasonableness test is likely to hinge around the expectation of service or supervision in the mind of the person accessing a property;
- the common duty of care would seek to protect a person who might unwittingly or involuntarily expose themselves to risk. Such people would include passers-by or members of the public who would reasonably be expected to arrive at the property or at particular locations on the property. Their exposure to risk could be inadvertent exposure as a result of their anticipated activities on the property or in the course of travelling past or over the property.

However, if a person were to arrive at a property by their own means and enter with the clear premeditated purpose of going rock climbing or hiking (evidenced by their bringing with them the necessary effects), it would seem unreasonable for them to suggest that they were unwittingly or involuntarily exposed to risks by virtue of their access to the property. If landowners were to advertise or solicit for members of the public to visit their property and stay in accommodation, they owe their guests the duty of care to protect them from dangers on the property that would reasonably be associated with such a visit. If

landowners were to solicit for members of the public to visit the property for the expressed purposes of rock climbing, then that would seem to imply a heightened duty of care with respect to that activity (Grant Marinus, 2011, pers. comm.).

If landowners charge a fee for access, this may have ramifications for the expectations of the person paying the fee. Because such payment implies a service, it is important that the terms of the service be well understood between the parties.

### **Waiver and indemnity**

*By signing a waiver, an individual contractually releases the landowner from a duty of care,* and thus from the right that individual may have to claim against the landowner. A waiver is limited in its reach, and the laws of delict would maintain that one may not contract out of responsibility for gross negligence, despite words in the contract to that effect. What such a document does achieve, however, is to substantially raise the bar in terms of what might be considered reasonable. Only one of the case-site landowners said they made use of a written waiver and indemnity form, while three landowners believed that such assumption was in place by virtue of the arrangement with the MCSA or via signage on the property (see Table 6.16 below).

A waiver and indemnity agreement does provide one of many opportunities for defining a protocol associated with an access agreement. A clause such as 'I understand that I am entering a mountain area and accept the associated danger' will help a legal juror to establish an expectation that was set. Other methods of accounting for liability concerns are to set expectations through the use of a protocol or with appropriate signage.

*Table 6.16* Examples of landowners views about liability to users for injury

| <b>Landowner</b> | <b>Response</b>                                                                   |
|------------------|-----------------------------------------------------------------------------------|
| Landowner 12     | I don't think I am legally liable but I feel a moral responsibility towards users |
| Landowner 6      | We're unsure what the law says about our liability                                |
| Landowner 4      | I put a waiver on the permit then I know I'm covered                              |
| Landowner 13     | People are suing for everything these days                                        |

A similar concern for many landowners (at least six) was the moral obligation that they feel towards users who access their property. They said they needed either to screen and brief users to ensure they were adequately prepared for their activity, or be on standby '*in case they [users] don't come back on time*'. While these landowners at first indicated that this concern should be rated 'high', further discussion with revealed that they feel adequate protocol (formal or informal) is already in place, and that users are usually adequately prepared. Only one landowner mentioned his concern about liability for his dogs and his need to control them because of user's presence on the property. Any protocol should list any objective hazards on the property, including dogs.

A few landowners raised concerns about parking. Five landowners said that it was important that users parked in a specific place on their properties, and two said that they were slightly worried about security of vehicles on the outskirts of their properties. A designated parking spot should be decided on by the landowner, appropriate warnings given in the permit/protocol, and users encouraged to avoid involving landowners with vehicle security concerns.

#### **Hours of any disturbance**

Seven landowners asked that they should not to be disturbed after 'reasonable hours' and any access agreement should facilitate this. The hours of recreation are, however, often at odds with normal business hours. About 4 landowners, but certainly not all, understand that many hikes and climbs demand many hours, or often a full day of activity, without an option to retreat at short notice. Unanticipated delays can happen, and users are trained to focus on safety. The logistical arrangement should ideally cater for such instances. In one case-site, there was an instance where access was allowed during strict hours, with a gate being locked at 6pm sharp. A user broke this curfew, and the relationship with the landowner deteriorated as a result. Access agreements should be practical and attempt to accommodate such an occurrence.

At least 12 of the landowners said that the control of gates was important, either for keeping livestock contained or for security. They stressed the importance of this, but believed that this was something easy to control. None of the landowners cited infringements concerning gates.

### **6.5.5 The burden of administration of the agreement**

#### **Time and effort**

Only 3 landowners were concerned about the time and effort that granting users access to their properties would consume. Nine were keen to assume the duties in person. The notable exception was the small number of non-resident landowners who, for logical reasons, were less interested in getting personally involved (although they were happy that access be granted).

That said, access agreements should be conscientiously designed to place as little burden on landowners as possible.

It is suggested that users can politely offer the assistance of an NGO such as the MCSA in instances where landowners may want to delegate some administrative functions associated with an access agreement. Three landowners already make use of the MCSA in some capacity.

#### **Level of organisation / orderliness**

Eleven out of fifteen landowners reported feeling far more comfortable with allowing users onto the property when they felt that there was a measure of orderliness and organisation among the users. At all 15 case sites there is some kind of protocols associated with maintain the access agreement, (although all but 2 are informal) and landowners like to know that each user accessing their property is adequately familiar with these.

#### **Owner's wish to retain control of access**

All landowners feel a deep connection with their land, and any perceived challenge to their sovereign control will be met with unease. Nine landowners made specific mention of this concern and any efforts to establish an agreement should stress the voluntary nature of the agreement. Landowner 1 suggested that the agreement should clearly outline what are rights and what are privileges, and that the agreement should be renewed from time to time (see 6.4.4 above)

Only 1 access agreement in the study presently features a period of review. All landowners want to retain the right to review or change the agreement at will, while users are perhaps anxious that working access agreements are not threatened unnecessarily. Four landowners, particularly those with written agreements or protocols, agreed that such a period of review may be beneficial for both parties. Such a period of review or monitoring mechanism can serve as a means to identify issues early, whereupon such issues can be

dealt with in a co-operative and even relationship-building manner and before such time that any changes in expectations can strain the relationship.

### **Relationships with neighbours**

Eight landowners were anxious that any agreement to allow recreational users onto their property should not jeopardise their relationships with neighbouring landowners. Users should respect their neighbours equally and not cause any problems between landowners by virtue of the access agreement

User-landowner relationships are seldom simple one-on-one agreements. Rather there are multiple stakeholders. Landowners indicated that they have varying relationships with their immediate neighbours - some good, some bad - which invariably influence their enjoyment and use of their own property. An access agreement needs to take these relationships into account. A good idea might be to map the range of neighbours that might possibly be affected by an access agreement, as well as how they may be affected. Even a minor issue could destroy the goodwill built up between users and landowners if it is ignored and not managed properly.

### **6.5.6 User's rationale for wanting access**

*It all depends on whether users share an affinity for the land (Landowner 1).*

Each landowner interviewed described a particular ambition with respect to the style of land-use on their property. Any user that a landowner feels shares the same ethic will invariably be welcome, while those who do not will be allowed access subject to more stringent conditions.

Eight landowners highlighted that users who clearly outline their reasons for wanting access offer landowners a far greater measure of comfort when considering an access agreement. Understanding exactly what users want to achieve gives landowners a better sense of control and with control comes willingness to allow access. Seven landowners told of how individuals in the user fraternity had supplied them with information about the activity (for example, the walking routes, the style of climbing) and how this had made them feel far more at ease.

No landowners said that they feel any security threat from the users themselves but seven expressed a concern about the security implications from increased traffic, logistical accessibility and knowledge of an area. Where possible, the logistical aspects of an

access agreement should be done in such a way that users who are not privy to the terms of the agreement are not attracted to the site.

Over half of the landowners (8 out of 15) said that they want to know that users are adequately prepared or supervised. Any protocol pertaining to an agreement should be available to any user making use of the property. No information about the property should be available if not accompanied by such protocol. Most landowners would prefer to refer any concerns to a third party user as opposed to having to resolve issues by themselves in isolation from the broader user fraternity. The explicit exclusion of users with either mountain bikes or dogs was mentioned by five landowners

#### **6.5.7 Water resources – quality for drinking or agriculture**

*Farming is actually all about water-farming* said one landowner, summing up the importance that landowners place on their water resources. Traditionally, many landowners owned natural areas, and particularly mountain land, for the water collected and contained therein. Whilst the *National Water Act 36 of 1998* nationalised all water sources and made government responsible for the management of both the quality and distribution of water, many landowners still retain a feeling of ownership of these water bodies.

While only two landowners made mention of the concern about water quality, they felt it very unlikely that users would have an adverse effect on their water sources and supply. Landowners generally agreed that users typically have a very high ethic with respect to abluting in outdoor areas. Toileting is done far away from watercourses, cleaning of dishes is done in water that is thrown onto the riverbank, and no soap is used. The two abovementioned landowners take water from low-volume streams, and said that swimming is therefore prohibited. All landowners agreed that concerns around the ethic of water-use should be included in any protocol to ensure that this standard of practice remains high among users.

### 6.5.8 Conclusion on substantive issues

Landowners identified a large variety of possible substantive issues that needed to be taken into account when considering granting access to their properties. However they indicated that they are often satisfied if users can demonstrate that they have given adequate consideration to such issues, and can openly discuss these with the landowner.

The principle substantive issues that are of concern to private landowners considering granting access to their land were found to be:

- 1 respect for the environment and particularly for not littering,
- 2 respect for the landowner and that his/her rules are obeyed,
- 3 the rationale and ethic of users accessing the land,
- 4 that the natural ambiance of the land is maintained,
- 5 liability to neighbouring farms for fire,
- 6 potential liability for injury to users ,
- 7 landowner's wish to retain rights of control over access,
- 8 that the landowner's relationships with their neighbours are not jeopardised,
- and
- 9 that flora is not trampled.

By listing the full scope of possible substantive issues early in a negotiation, and by referring to such issues in prior cases, users can avoid anxiety on the part of both parties, and allow the necessary concerns to be succinctly addressed. This is the 'use of objective criteria' referred to by Fisher (1981) or even the 'arguing and scoping phase' recommended by Kennedy (2001).

## 6.6 Views on possible control mechanisms

Landowners offered their thoughts on a variety of mechanisms to control access to their properties. Eight landowners were found to be making explicit use of some control mechanisms and discussed their reasons for implementing them, while others described the controls they might use in the future and what they considered the advantages and disadvantages of each of these options to be. For discussion purposes these control mechanisms suggested by landowners can be grouped as control mechanism of either price, quantity or quality. A combination of several mechanisms was often found to be appropriate.

### 6.6.1 Control mechanisms - Price

The demand curve (McConnell & Brue, 2000) illustrates the inverse relationship between price and the quantity demanded by the market at that price. By setting price at  $P_1$  as per the illustrative diagram, a provider can expect the market to demand  $Q_1$ , all things being equal (Figure 6.7).

Considering that income = price x quantity, the income-maximising agent will typically attempt to set  $P_1$  such that the boxed area is maximised. (Remember that this is income-maximising behaviour, rather than profit-maximising, as here we ignore costs.)

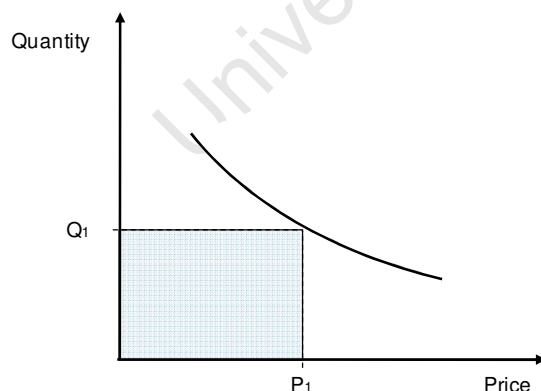


Figure 6.7 The supply curve

Only two landowners explicitly made mention of using price as a control mechanism, while many others discussed it.

### **Advantages**

- The distinct advantage of using price as a control mechanism is the economic incentivisation to landowners.
- The act of payment provides an opportunity to highlight any relevant protocols to users.

### **Disadvantages**

- The demand curve is for practical purposes, often an intangible function and the relationship between price and quantity are indirectly linked via a complex set of relationships. Price therefore, would seem to be a clumsy point of leverage if quantity is the variable we wish to control for.
- Nine of the 15 landowners believed that the introduction of a commercial arrangement or arms-length transaction will be at odds with the goodwill associated with a normatively-motivated agreement to provide access. Users might be inclined to perceive their access as a purchased service, rather than a privilege to be able to share these unique natural environments.
- By demanding payment, five landowners thought they might introduce an onus on themselves to take responsibility for user's experience in a manner they might otherwise not have, as well as introduce an unwanted administrative burden. If they have actively advertised and received payment for the activities associated with their property, landowners felt this might increased their chances of liability in the case of injury.
- Landowners consistently expressed concern about who might make use of an access arrangement, and were anxious that only those with an affinity for the land and who share their ethos of preserving the area should be allowed access. Price then would seem to be an ineffective mechanism to discriminate between customers in this regard.

### 6.6.2 Control mechanism - Quantity

Four landowners explicitly made mention of using direct quantity controls. Access and user numbers can be controlled in absolute terms by a booking or permitting system that stipulates the number of users that will be allowed into a given area for a given timeframe. Such booking systems can be administered by either the landowner themselves, or an NGO on behalf of both users and landowners. Quantity controls can be stipulated by the landowner based on two general factors:

- the landowner's personal willingness to accommodate users on their property from an anthropocentric (human-orientated) perspective
- the ecological carrying capacity of the land based on the landowners or users observations of impacts, based on the findings on an environmental report (*see 6.7.3*)

One useful tool highlighted by the research is the experienced and responsible leader model, which is presently in use at two case-sites. Here, groups are only allowed access if led by an individual who has already visited the area, and such a leader takes personal responsibility for the conduct of the members of the party. The advantages and disadvantages associated with this model are summarised below.

#### Advantages

- Quantity control provides direct control on user numbers in absolute terms.
- Controlling the number of users allowed access offers a mechanism of linking responsibility between landowners, any intermediate institution, user group-leaders and the individuals in a group.
- Control offers an opportunity or mechanism to highlight protocol to users.

#### Disadvantages

- The focus is on user control as a function of absolute numbers rather than the impacts (landowner and ecologically orientated) associated with these users on a per-user basis.
- Control may potentially involve undue administration.

### 6.6.3 Control mechanisms - Quality

At least seven landowners explicitly made mention of using the quality or nature of the experience offered on their property to control numbers. The type of experience that is provided by a particular natural area has a huge influence on the type and number of users that it attracts. For example, the presence of huts or refuges, suitable campsites, or ablution facilities might make an area more popular. Physical ease of access is also a big factor. The length and seriousness of any hiking routes, and even the state of paths, might influence the type of enthusiast that it attracts. Climbing areas will attract different users depending on the grades and the nature of the climbing routes at the venue. Areas with braai and picnic areas within easy reach of vehicle access will again attract users that seek a fundamentally different outdoor experience. Table 6.17 summaries those landowner responses that focus on mechanisms of controlling the quality of the user's experience.

Table 6.17 Examples of landowner views about how the quality of the outdoor experience controls numbers

| Landowner    | Response                                                                                                                                             |
|--------------|------------------------------------------------------------------------------------------------------------------------------------------------------|
| Landowner 6  | If the impact became too great, I'd stop allowing people to park at the top of the vineyard. The longer walk will keep the wrong type of people away |
| Landowner 11 | Users are often obliged to help maintain the paths or the hut while they are there, and the hike is pretty big, so we've never had a problem         |
| Landowner 9  | The kloof on my property is a particularly difficult place to climb. Only the top climbers can enjoy themselves here and that limits the numbers     |

#### Advantages

- In the case of landowners with a high conservation ethic, tailoring the experience can typically mean doing nothing, and maintaining the wild and sometimes harsh nature of the area.
- By tailoring the experience, landowners can effectively segment the market or control for which type of people have access to their land, a factor that landowners listed very highly among the issues and conditions of access. Landowners express a strong preference for people who *share an affinity for the land* (Landowner 1) or who *can caretake it with us* (Landowner 3).

### Disadvantages

- This measure has the potential to indiscriminately constrain activities or experiences that the land 'ought' to be able to offer users, to which the land lends itself, or on which appropriate users place high value

As above, control mechanisms of either price, quantity or control have a number of advantages and disadvantages. These are summarized in Table 6.18 below.

(Table 6.18 is also reproduced for completeness in the guidelines – Appendix 2.4)

Table 6.18 Control mechanisms – advantages and disadvantages

|                 | Control Mechanism                                                                                                                                                                         | Advantages                                                                                                                                                                                              | Disadvantages                                                                                                                                                                                                          |
|-----------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Price</b>    | <ul style="list-style-type: none"> <li>• Fee for access</li> </ul>                                                                                                                        | <ul style="list-style-type: none"> <li>• Economic Incentive</li> <li>• Act of payment provides opportunity to highlight protocol</li> </ul>                                                             | <ul style="list-style-type: none"> <li>• Clumsy link to quantity</li> <li>• Increased landowner responsibility</li> <li>• Fails to properly segment users</li> <li>• Erodes goodwill nature of an agreement</li> </ul> |
| <b>Quantity</b> | <ul style="list-style-type: none"> <li>• Booking or permitting system</li> <li>• The 'experienced-leader' model</li> </ul>                                                                | <ul style="list-style-type: none"> <li>• Controls numbers in absolute terms</li> <li>• Creates chain of responsibility between parties</li> <li>• Provides opportunity to highlight protocol</li> </ul> | <ul style="list-style-type: none"> <li>• Ignores impact-per-user</li> <li>• Potentially undue administration</li> </ul>                                                                                                |
| <b>Quality</b>  | <ul style="list-style-type: none"> <li>• Distance to walk</li> <li>• Amenities or lack thereof</li> <li>• Regulated climbing or hiking ethic</li> <li>• Partial access/closure</li> </ul> | <ul style="list-style-type: none"> <li>• Typically means maintaining the 'wild' nature of the area</li> <li>• Effective at segmenting users</li> </ul>                                                  | <ul style="list-style-type: none"> <li>• May avert some very worthwhile activities</li> </ul>                                                                                                                          |

#### 6.6.4 User numbers

The 15 landowners were asked about the numbers of users accessing their properties. Estimates at each case site ranged from four to sixty people per month. Landowners experience different numbers of users depending on the season, and that the timing of the season in each case varies depending on the exact nature of the activity on the property. As user numbers increase, it becomes increasingly viable for landowners to expend the necessary effort to charge a fee for access. Some landowners (four out of fifteen) believed that they would need to charge a fee if user numbers were to increase to such a degree that they (landowners) were forced to play a more proactive role in managing the arrangement. They added that they would not like to see this eventuality, and prefer things the way they are.

The range of user numbers found at the case-sites lends weak support to the relationship between user numbers and charge for admission. It also suggests that the critical mass of users required to make charging for access worthwhile is significantly higher than is presently being experienced at the case-sites considered.

Nine landowners believed that as numbers increase, so a written agreement would be necessary in order manage and maintain the relationships. (See figure 6.6)

An NGO or club can leverage its administrative capacity to facilitate access agreements in cases that this may be required. Eight landowners said they would prefer to administer an access arrangement through an NGO or club if user numbers increased to such a degree as to increase the administrative burden. However only two landowners are formally making use of the MCSA in this regard, and in both cases the number of users at the site is comparatively low. There therefore appears to be only a weak link between user numbers and the necessity of involving an NGO or club in the formation and administration of an agreement.

The literature on access theory (Ribot and Peluso, 2003) suggests that one of the structural mechanisms to facilitate or control access is access to information. Landowners were polled about how they felt about the distribution of information about recreational activities on their land, particularly the descriptions of either hiking or climbing routes. Landowners who operate their properties for the purpose of tourism are generally enthusiastic that information about activities on their land should be made available. Non tourism orientated landowners said '*there is nothing to hide*' and did not feel the need to

constrain access by limiting access to information, and they only asked that the activities on their land should not be actively promoted or advertised. All were happy with the present practice of publishing information in climbing guidebooks and making information readily available within the user fraternity. Any rules or protocols regarding access should however always accompany such information.

Only two landowners mentioned limiting access by limiting access to information.

*Table 6.19*      Examples of landowner preferences regarding the manner and distribution of information about the activities on their properties

| <b>Landowner</b> | <b>Response</b>                                                                                                                       |
|------------------|---------------------------------------------------------------------------------------------------------------------------------------|
| Landowner 6      | ... prefer that it is word of mouth or just as it is now. The MCSA and people who know how to find the information have access to it  |
| Landowner 7      | [Distributing information] ...doesn't matter as long as the rules are followed                                                        |
| Landowner 12     | [Distributing information] ...doesn't matter as long as the rules [or protocol] accompany any route information                       |
| Landowner13      | We have made a decision to encourage educated awareness rather than excluding people. This invites the respect for nature to be grown |

## **6.7 Views on the use of tools to support an access agreement**

After consulting mountain-user experts and considering the case-sites before the interview stage, the following tools that could be used to facilitate access agreements were identified:

- an established protocol among users
- a permitting system
- an environmental report
- other tools

Landowners were asked for their views on each.

### **6.7.1 An established protocol among users**

In the context of an access agreement, a protocol is a set of rules, procedures and etiquette associated with the agreement. Unlike an agreement, where the parties include the landowner, a protocol is a consensus among users (although often with the landowner's approval). Landowners unanimously agreed that an established protocol among the user fraternity was an essential tool in facilitating access, and they offered various suggestions about how this should be established or conveyed:

- in written form, accompanying any literature about the activities on the property,
- in written form, distributed to users by email by the user representative or club,
- in written form as part of a map, route description, permit or indemnity form,
- as a verbal arrangement between users,
- as a verbal arrangement or agreement between users, often with the landowner's consent; or
- in the form of signage on the property, installed by either the landowner or an NGO such as the MCSA.

All landowners interviewed in the study believed that a protocol among users is in place, whether formal or informal.

### **6.7.2 A permitting system**

A permitting or booking system is one whereby users must obtain permission from the landowner or designated third party prior to each visit to the area. Five landowners in the study presently make use of such a system. It can have several functions including:

- limiting the number of users in absolute terms,
- facilitating payment for access if applicable,
- providing a record of who is entering the property for the purposes of accountability,
- providing a record of who is entering the property for the purposes of security, and
- providing an opportunity for users to be presented with any relevant information, such as a protocol or for them to sign a waiver and indemnity form.

Four of the 6 landowners whose land accommodates more than an average of ten users per month, believed that a booking system was a good idea. The non tourism-orientated landowners in particular believed that the MCSA, as a reliable third party, should administer this. Tourism-orientated landowners were more inclined to administer the bookings themselves. Only one non tourism orientated landowner administers his own permit system and gives these permits for free.

Landowners with fewer than ten users per month generally believed that administering a booking system would be time consuming and not worth the effort. Several landowners insisted that if an NGO or government agency administers permits, they must be responsible for the conduct of users that acquire permits through them. One landowner explained how a government conservation agency had in the past often granted permits to users for state land, but furnished users with no information or supervision with respect to his private property that they would have to cross to access this state land.

### **6.7.3 An environmental report**

As in the Milner case-site, the purpose of an environmental report is to scope and assess the environmental impacts associated with users' enjoyment of a natural area. Such a report would identify issues such as any rare or endangered fauna and flora as well as archaeological or cultural features on the property; recommend no-go zones; assess the

impact of any proposed recreational activity on the land; and assess the maximum carrying capacity of the land considering the proposed activities. In the context of this study, an environmental report is a voluntary undertaking, has no mandated structure, and allows the author to identify and assess impacts and issues that they consider necessary.

An environmental report contemplated here<sup>1</sup> is fundamentally different from an Environmental Impact Assessment (EIA). An EIA is a particular process required by law<sup>2</sup> prior to the commencement of certain listed development activities. The law outlines the structure and requirements of such a report. Compliance with EIA reporting requirements is a taxing task, typically associated with high costs. This delineation should be clear if the use of an environmental report is discussed with respect to an access agreement.

Roughly half of the landowners believed that such a study would be of great interest, or had no problem if users wanted to undertake such a study. Most of these landowners noted that users should bear the cost if they wished to pursue this. The other half were not against the idea per se, but believed that there was little value in the exercise and would prefer to evaluate such concerns on their own.

All landowners made it clear that any findings would be merely advisory, with no binding, legal obligation. All landowners were anxious that environmental reports should not become a method of manipulation. A few landowners were sceptical about allocating influence over land-use decisions to any external party. Table 6.20 provides some examples of landowners' views on environmental reports.

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<sup>1</sup> EIA reporting regulations make use of defined terms such as 'Environmental Impact Assessment' and 'Environmental Scoping Report', and the term 'environmental report' is used in this study to avoid confusion between these two.

<sup>2</sup> National Environmental Management Act 107 of 1998 and regulations published thereunder: Government Notices R 543, 544, 545, 546 in Government Gazette 33306 of 18 June 2010

**Table 6.20** Landowner views about the use of an environmental report as a tool to facilitate access

| Landowner       | Response                                                                                                                                                     |
|-----------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Landowner 13    | I'm sure it would be very useful and we would be grateful for help from outside. As long as it is not a method of manipulation though                        |
| Landowner 9, 12 | It's too much fuss, I don't think we need it                                                                                                                 |
| Landowner 1     | I think it is very important. To conserve the environment we rely on expertise and modesty not arrogance                                                     |
| Landowner 4     | Yes it would be useful. Buying a farm doesn't make you an environmentalist and one may allow just anything for lack of knowledge                             |
| Landowner 2     | I'm indifferent at the moment but if there was an increase in numbers then it might be quite important                                                       |
| Landowner 10    | I'm uneasy with submitting land-use ideas to government. I understand it is voluntary but I have my own ideas about how I want my land managed and monitored |
| Landowner 9     | I'm content to evaluate this for myself and adjust any agreement according to any impacts that become evident                                                |

#### 6.7.4 Support

Various forms of support can streamline negotiations and be conducive to a more favourable result for all parties. While some landowners (12 out of 15) prefer to retain administrative roles, others (3 out of 15) believe that an NGO like the MCSA can leverage its capacity to offer administrative assistance for booking systems, distribution of protocols and so on. Eleven landowners said that they valued the access to information about issues like environmental impacts, hiking or climbing activities as well as the widely accepted norms of these activities (regarding ethics, safety and so on). This could be offered through recognised user experts or perhaps some prepared literature.

Two landowners said that they appreciated the activities of user hacking groups who occasionally help with alien clearing in more remote parts of the property. They acknowledged that the capacity of these groups is however limited.

### 6.7 Conclusion on the use of tools for access

There are a number of tools and means of support that can assist with the establishment and maintenance of an access agreement. Those discussed above are in common use at the chosen case-sites, but the list is certainly not exhaustive. Such tools however do appeal to the purely 'rational' landowner motivations for allowing access, and care should be taken that they are not asserted at the expense of the more normative, goodwill-based motivators – what Ribot and Peluso (2003) call structural and relational access mechanisms.

## Chapter Seven Conclusion and recommendations

This research set out to gain an understanding of landowners' views on and their motivations for granting recreational access to privately-owned natural areas in the mountains of the Western Cape. It also sought to determine issues that influence how access agreements are negotiated and maintained. In keeping with the literature on access (Ribot & Peluso, 2003) this research found that access to such areas is founded upon structural and relational access mechanisms, rather than any legally enforceable premise. The findings of the research suggest that landowners' motivations for granting access are largely normative, meaning that they do so because of a value judgment that holds that 'it's just a good thing to share'. Any motivations along strictly rational lines (such as economic incentiviation or legal obligation) are not only unlikely to be successful but also compete with any normative motivation that landowners may have.

The research reviewed several international examples, and particularly the British example, where the adoption of a legal 'right to roam' in terms of the *Countryside and Rights of Way Act of 2000* has taken over 70 years of development. Considering this, as well as the protection of property rights afforded by the South African Constitution, it can be concluded that current efforts to secure access rights in South Africa might best be spent building relationships through productive dialogue and negotiation between relevant parties, rather than adversarial lobbying.

This study has found that, on the whole, landowners are willing to share the outdoor experiences available on their land with people who will reciprocate with an appropriate ethic. It is this ethic that users in South African users have in common with their Swedish counterparts making use of the *Allemansratt* despite the differences in the legal regimes of these two countries with respect to access. The study found that in South Africa, this ethic required by landowners has two clearly separate components: respect for the environment and respect for the landowner.

To encourage such an ethic, a variety of control mechanisms can be used. The research found that the choice of mechanism employed will vary according to the landowners' circumstances, the nature of the terrain and the nature of the recreational

activities that typically take place on the land. Access to information is not believed to be an important control mechanism, and landowners generally advocate educated awareness rather than outright exclusion. The burden of administering an access agreement, and liability for injury to users on their properties is often of initial concern to landowners. However the research showed that in the selected case sites these concerns can mostly be addressed by the use of established protocols, and by including provisions for how the issue of liability will be dealt with in any agreements made.

An NGO such as the MCSA has an important role to play in facilitating access to such mountain areas, but ultimately gaining access depends on the relationship between individual users and landowners. Relationships are important. The research found that landowners typically want to have a relationship with an NGO, an individual representing the user fraternity, or the users of each visiting party, and most landowners prefer a combination of at least two of these.

Breakdown of agreements typically happens when the substantive issues are not adequately addressed. These include maintenance of the pristine ambiance of an area, respect for the landowners, respect for the environment (particularly no litter or indiscriminate trampling), disruption to neighbours, liability for fire damage to neighbours, liability for injury to users and landowner's wish to retain rights of control over access to their properties.

In addition to the full set of substantive concerns identified in Table 6.11, the research suggests that agreements should allow for periods of review and/or include monitoring mechanisms, which provide landowners with the opportunity to review the terms of an agreement, and users with the opportunity to maintain open dialogue with landowners. Users negotiating an agreement should also ensure that the conditions in the agreement are practical, and that all users will be able to abide by them. It would be better to terminate the agreement than accede to conditions that are likely to be broken and thereafter threaten the relationship.

Although beyond the ambit of this thesis, guidelines summaries have been prepared in the form of a toolkit, and are reproduced in Appendix 2. This appendix comprises a number of tools, diagrams, tables and checklists to guide facilitators, mountain users or landowners through the process of negotiating an access agreement. These guidelines are derived from

findings emanating from this research as well as information discussed in the literature review and include summaries of selected information (such as the checklist for facilitators, Appendix 2 ), but with interpretations specific to the context of access to natural mountain areas.

Following this research, it would seem appropriate for an institution such as the MCSA who have an interest in access to mountain areas to consider the following undertakings:

#### **Information resources**

The research found that landowners appreciate information about the proposed activities on their properties. To this end, concerned institutions should:

- identify users who landowners may call upon to give advice on hiking and climbing norms including the wider context of such activities, practices, ethics and safety,
- prepare some generic literature that landowners can use to familiarise themselves with the proposed activities on their land.

#### **Legal counsel and insurance**

The research revealed that the majority of landowners were uncertain about the legal issues involved in granting access to their properties and the extent of their liability.

Concerned institutions should consider:

- obtaining qualified legal counsel on the question of liability for injury to hikers and climbers on private land in both commercial and non-commercial circumstances; and
- assessing the financial feasibility of obtaining insurance to cover landowners for liability in the event that either an injury claim or a fire claim related to a mountain user be successfully brought against the landowner. This could be structured in several creative ways including pay-per use, or payment of a seasonal lump-sum.

#### **A dual-protocol approach**

Protocols have been shown to be an important feature in managing access. They reflect both common sense considerations and those relevant to the particular region or area. Codification of these can result in lengthy sets of rules with which users are unlikely to

familiarise themselves prior to visiting a particular area. To avoid duplication in the protocols for various areas, a dual -protocol system is suggested:

- a general or region-specific protocol including all the common practices or a code of conduct that is more universally applicable across a particular region; and
- a site-specific protocol, written with reference to the regional protocol that lists, for each area, only the aspects of the protocol that are specific to that area. (Many of these exist for specific areas but there is a lot of duplication and no common format.)

#### **A centralised landowner relationship database**

An NGO like the MCSA may not want or have capacity to directly manage every site that users might wish to access, but each site should have an individual explicitly nominated by the NGO to take responsibility for personally managing the relationship with the landowner. These individuals should be active users who visit their particular site regularly. These individuals might be asked to submit a short report to the NGO annually. This report could be similar to the national reports submitted annually by the MCSA to the UIAA Access Commission. The purpose of this database is twofold:

- as a mechanism to ensure that the relationship is being actively maintained, and
- to add to a historical log that future representatives can use to properly inform their management of the relationship.

A database containing the following should be maintained

- the names of individuals representing user interests at each site
- the names and contact details of landowners
- the names and contact details of any landowner agents, farm managers and so on who may be involved in the agreement
- a list of the range of landowners' neighbours that might possibly be affected in the case of each access agreement
- the procedures associated with accessing the site
- developments in such access (annual report)
- an ongoing history of relationships with the landowners

In conclusion this thesis has found that access is not about what is right or wrong, how to get in or keep out, but how to get on!

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### Personal communications (excluding landowners)

#### GREG MOSELEY

Greg is a former chairman of the MCSA. He also chaired the club's committee on access. Greg has been involved in numerous landowner negotiations for access through both goodwill and via legal purchases of servitude.

#### ROSS SUTER

Ross has worked as a professional mountain guide in the Western Cape mountains for 25 years and has been responsible for the discovery and development of several well-known climbing venues. He has been involved in several landowner negotiations, representing both the MCSA and non-institutionalised user-groups.

#### PETER PEARSON

Peter is a lawyer by profession and is a long-standing member of the MCSA. He has been involved with several landowner negotiations, as well as purchases of servitude.

#### TONY LOURENS

Tony is the author of at least six guidebooks to a variety of hiking and climbing areas in the Western Cape, and is the editor of the South African Mountain magazine. A well-travelled climber with thirty years experience, Tony has also been involved with several landowner negotiations.

#### DR LAURIE NATHAN

Dr Nathan was executive director of the Centre for Conflict Resolution at UCT from 1992 until 2003. He is a research fellow at the UCT Department of Environmental and Geographical Sciences, as well as at the Crisis States Research Centre at the London School of Economics.

#### DR DAVID SCHANDLER

David is a partner at the environmental consulting firm ERM, and previously founded a firm called Common Ground.

#### ADV JEREMY COLENZO

Jeremy Colenso represents South Africa on the UIAA's Access Committee. Resident in the UK, Jeremy is a legal professional, a mountain guide, and has 25 years of mountaineering experience both in the Cape and internationally.

#### DR CATHERINE FLITCROFT

Dr Flitcroft is an access and conservation officer at the British Mountaineering Council.

#### ETIENNE GROSS

Etienne Gross represents the Swiss Alpine Club on the UIAA's Access Committee.

#### GRANT MARINUS

Grant Marinus is a director at Werksmans Attorneys in Cape Town where he practises predominantly employment law and litigation. Grant started rock-climbing in his late thirties and describes himself as now spending as much time as possible pursuing this passion after "years in the wilderness".

## Glossary of terms

**Access** In this study, refers specifically to the context of access to privately owned natural mountain areas for the purposes of 'relating to nature' in the broad sense, meaning for purposes of sport, recreation, spiritual enjoyment, appreciation or any other relation that is not concerned with livelihood, commercial activity or the consumption of any resource.

**Agreement** An understanding or arrangement whereby users are granted access to a property under any given set of conditions. This may be formally or very informally noted.

**MCSA** The Mountain Club of South Africa is invariably the NGO in question in the context of this study. In this study, the terms MCSA and NGO are at times used interchangeably.

**Negotiation** In this study refers to the act of discussing the potential of an agreement, creating or maintaining one. While much of the literature on the negotiation is rooted in either business or conflict negotiation, this is very often not the context in which it arises here.

**NGO** In this study refers to any collective body representing the interests of users, who may often act as a third-party in the support of an agreement between individual users and landowners. An NGO can take the form of a club.

**Natural mountain areas** In this study refers to areas in the mountains of the Western Cape that are relatively undisturbed or perhaps in close to pristine condition, and to which recreational hikers and climbers typically seek access. It is the same as the British term 'countryside'.

**Protocol** The general set of rules or conditions, and the logistical arrangements associated with accessing a particular property. This could be written or verbal, and distributed to and among users via various means.

**UIAA** The International Union of Alpine Associations is a global level NGO, of which the MCSA is a member. The UIAA Access Committee meets annually review access considerations across all member nations.

**Users** Individuals, namely hikers and rock-climbers, sometimes as a collective, who wish to gain such access.

## Appendices

- 1 Landowner interview guideline
- 2 Guidelines for access negotiation

*The guideline appendixes offer a set of summary checklists and tables for reference by users and landowners contemplating an access agreement as outlined in this research:*

- 2.1a Check-list for facilitators (table)
- 2.1b Check-list for facilitators (discussion)
- 2.2 Cognitive biases and intangible motivators in negotiation
- 2.3 Substantive concerns identified by the research
- 2.4 Some common control mechanisms
- 2.5 Rational motivators for landowners to allow access

## Appendix 1      Landowner interview guideline

### Case-site interview guide

Interviewee: \_\_\_\_\_

Case-site: \_\_\_\_\_

*Interview notes in italics*

#### **Instructions**

*Interviews are to follow a discussion format.*

*All of the topics and concerns may not be relevant or appropriate to a particular case-site.*

*One of the objectives of the interviews is to identify new considerations, and adequate attention should be allowed for this.*

#### **Introduction**

- Greet
- Introduction to the project
  - *Academic nature*
  - *Anticipated outcomes*
  - *Methodology – how this interview fits into the project*
- How long have you owned or been resident on the land?
  - What is your connection with the land?

#### **General views on access to natural mountain areas**

Before discussing your own case, I'd like to ask you about your views on granting access to wilderness areas that are on private land:

- What are your views on granting access to wilderness areas that are on private land?
- Why do you grant access, or why would you consider granting access to your property? (*Interviewer note: Are reasons normative or rational?*)
  - What key factors would inform your decision about whether or not to grant access to your property?
- How do you feel that considerations of wilderness access in South Africa compare to other parts of the world?

|                                                                                            |
|--------------------------------------------------------------------------------------------|
| What do you think about the logistics of managing access, and the burden of custodianship? |
|--------------------------------------------------------------------------------------------|

### Substantive issues

*(open-ended question, then prompt)*

- In your experience, what are the key concerns, or factors you would take into account when considering granting access to your property, and
- How have they or could they be adequately addressed?
- What issues have proved to be the greatest stumbling block in negotiating access?

### Modular substantive issues

- How would you prefer that users find information about your land?  
*(Prompt: word of mouth, exclusive journals, internet)*
- Demographics of users:  
What is your perception of the demographics of the user-base, and how do you feel about this?  
*(Prompt: occupation, hometown, visitation appeal, environmental ethic, income group, as well as age, race gender etc)*
- *At what rate are users presently accessing your property – how many and in what timeframes?*
  - Do you think that a fundamentally different type of agreement might be necessary with different numbers of aspirant users?
  - Do you have any particular opinion about either **(as appropriate)**
- the maximum number of users that you would allow to access the land, or
- the carrying capacity of the land

**Interviewer Notes: To prompt as appropriate after landowner has finished offering comments in open-ended format**

- Privacy
- The logistics of managing access, and the burden of custodianship  
*Do you want a regulated access agreement, or would you prefer an ad-hoc approach?*
- Respect for ownership and the setting of precedent in an access agreement
- How important is the number of users to the substance of an access agreement?
  - Do you think that a fundamentally different type of agreement might be necessary with different numbers of aspirant users?
  - How do you feel about user numbers, past, present and future?
- Demographics of users
  - What is your perception of the demographics of the user-base, and how do you feel about this? *(occupation, hometown, visitation appeal, environmental ethic, income group, as well as age, race gender etc)*
- Environmental factors
  - Paths
  - Base of crag
  - Potential fire
  - Water resources
  - Toileting procedure and protocol
  - Carrying capacity of the land
- Liability to climbers
- Do you wish to make any economic benefits from allowing access?
  - For access
  - For amenities surrounding access ie campsite etc
- How would you prefer that users find information about your land? *(WOM, exclusive journals, internet?)*

- **If necessary:** Do you, or do you wish to charge fees for access or make any economic gain for allowing access?

**Process:**

- Do you presently grant access to your property to recreational users?  
Have you been, or are you currently involved a discussion or access agreement regarding access to your land?
- *Parties in the access negotiation process:*
  - How do you describe yourself as a landowner?  
(Prompt: Agricultural Economic/subsistence / industrial/ tourism entity, resident, retirement?)
  - Who has previously approached you, and/or who has typically been negotiation access with you regarding access to our property?  
(Prompt: Individuals, individual representing groups, NGO etc)  
(If individuals, particular person, persons or personalities, or ad-hoc with each user?)
  - Who do you believe should be the appropriate parties approaching landowners for access? Who would you prefer to deal with?
  - What perception do you hold of the party presently negotiating access?
- History
  - Please provide a brief history of your interactions and negotiations with recreational users regarding access to your land:
- How would you describe the relationship(s) that you have with users?  
Do you have different relationships with different parties involved?  
**Prompt:** What manner / style do you believe the negotiation is typically expressed? Adversarial, co operative, indifferent?

- The manner of negotiations for access can take several forms.

Describe the spirit in which discussions for access have taken place or the nature of the negotiation:

**Prompt:** Refer negotiation literature:

*Interests: Negotiation: Interest based negotiation etc*

*Rights: Adjudication: Litigation, arbitration, courts*

*Power: Coercion: Violence, boycotts, civil disobedience etc*

- End of process:
  - If the negotiation has broken down, why did it, or why might it have done so?
- Outcome:
  - How has the agreement regarding access been noted or recorded?  
(**Prompt:** Word-of-mouth / institutional knowledge / writing?)
  - In your view, what is the best manner of recording such an agreement?  
Why?
  - (**If NOT Word-of-Mouth above**)  
Where do you think that such an agreement or understanding should be 'housed'?  
Who should be the custodian of this?  
(Landowner? Individuals? Public? NGO? Individual o.b.o who?)
  - How have you felt about the implementation of the agreement?
  - (Over time there are invariably changes of circumstance.)  
Does the agreement contain provisions with respect to monitoring, feedback or periods of review?

- Does the agreement contain provisions on dispute resolution?  
(OR) Have there been any disputes thus far, and how have these been dealt with?

**Tools:**

- What do you feel are the merits of, the use and applicability in your situation to each of the following tools to facilitate an access agreement that is suitable to all?
  - Support  
Are there any forms of support (*language, transportation, access to information etc*) that you think might streamline negotiations and be conducive to a more favorable outcome for everyone?
  - An established protocol among users
  - An environmental report, objectively evaluating the impacts users have on the environment?
  - A permitting system?  
If a permitting system were to be appropriate, who would you prefer to administer this?  
(**Prompt:** Landowner? Individual? NGO? Government?)
  - Other?

**Closing comments and Notes:**

**Novel approaches, suggestions or key thematic takeaways:**

**Appendix 2:****Guidelines for access negotiation****Appendix 2.1a****Checklist for facilitators (table)**

| Theme                                                                           | Questions                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
|---------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Who are the parties involved?</b>                                            | <ul style="list-style-type: none"> <li>• Who are the parties involved?</li> <li>• Are they <u>all</u> at the table?</li> <li>• Who represents them?</li> <li>• Do the representatives have an appropriate mandate to represent the parties?</li> <li>• Do they have or need a 3<sup>rd</sup> party mediator / facilitator?</li> <li>• Who initiates the negotiation?</li> <li>• How is the negotiation initiated?</li> <li>• With what stated goals is the negotiation initiated?</li> </ul>                                                                                                |
| <b>What are the issues over which they are negotiating?</b>                     | <ul style="list-style-type: none"> <li>• In what context is the negotiation seated?</li> <li>• What are the substantive issues over which they are negotiating?</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                  |
| <b>What is the nature of these issues?</b>                                      | <ul style="list-style-type: none"> <li>• What is the nature of these issues?</li> <li>• What are the underlying needs and interests which may inform the positions of the parties?</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                               |
| <b>What perceptions do the parties hold of the negotiation and each other?</b>  | <ul style="list-style-type: none"> <li>• What perceptions do the parties hold about each other?</li> <li>• What perceptions do the parties hold about power relatives in the relationship?</li> <li>• What perceptions do the parties hold about existing mechanisms to handle conflict in negotiation?</li> </ul>                                                                                                                                                                                                                                                                          |
| <b>What preparations are made prior to the commencement of the negotiation?</b> | <ul style="list-style-type: none"> <li>• Do any of the parties need support?<br/>Access to information, language, transport etc?</li> <li>• Are there any timeframes relevant to the negotiation?</li> <li>• What is the substantive history of the negotiation?</li> <li>• What is the history of relations between the parties?</li> </ul>                                                                                                                                                                                                                                                |
| <b>In what manner is the conflict being expressed?</b>                          | <ul style="list-style-type: none"> <li>• What is the style of the negotiation?<br/><i>Word-of-mouth? Institutional knowledge? Writing?</i></li> <li>• Are there any established behavioral ground-rules?<br/><i>Acting with integrity? Transparency of information? Compliance? Respect? Civility?</i></li> <li>• In what manner is the conflict being expressed?<br/><i>Negotiation? Adjudication? Coercion?</i><br/><i>Note: The approach chosen by any of the parties reflects the tactics which it believes will produce the best returns with respect to it's interests</i></li> </ul> |
| <b>If the negotiation were to break down, why could it?</b>                     | <ul style="list-style-type: none"> <li>• Is there any history of a breakdown in negotiations?</li> <li>• If the negotiation were to break down, why could it?</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                    |
| <b>Outcome:</b>                                                                 | <ul style="list-style-type: none"> <li>• How is the agreement recorded?<br/><i>Word-of-mouth? Institutional knowledge? Writing?</i></li> <li>• Where is it housed? Or who is the custodian?</li> <li>• Does the agreement contain provisions on implementation?</li> <li>• Does the agreement contain provisions on monitoring, feedback or periods of review?</li> <li>• Does the agreement contain provisions on dispute resolution?</li> </ul>                                                                                                                                           |

## Appendix 2.1b

## Checklist for facilitators -

### ***Including comments and discussion with respect to mountain access:***

There are a myriad of concerns to keep in mind when facilitating a good negotiation in the context of access to natural mountain areas and various sources offer process-maps or checklists of issues to cover. The following negotiation check list was informed by the writing of Anstey (1993), Lewicki et al. (2003), Kennedy (2001), as well as the advices of Prof Laurie Nathan and Dr David Schandler (*see pers. comm.*).

- **Who are the parties involved?**

*Has the landowner been clearly identified? Full name? Telephone number? Email address?*

- **Are they all at the table?**

*Parties to a negotiation consist of both frontline actors and players whose interests are directly or indirectly affected.*

*Considering landowners: Remember that properties may be jointly owned, either by business partners or family members. There may very likely be neighbours whose interests are affected.*

*Considering users: Be careful to include the full spectrum of users. There are often different fraternities of climbers, hikers, mountain bikers, and even different fraternities within these interest groups. Negotiations that don't account for the interests of these parties are likely to lead to repeated negotiations in the short-term, and conflict rather than cooperation-orientated relationships in the medium and long-term.*

- **Who represents them?**

*The person representing users must be adequately briefed and their interests must be aligned with the cause they represent.*

*The landowner and the property/farm manager or residents of a property may be different entities. Landowners may sometimes even delegate responsibility.*

- **Do the representatives have a formal mandate to represent the parties?**

*The definition of formal is certainly questionable in this context. That said, access is dependent on the development and maintenance of relationships over the long-term, and it is essential that the persons approaching landowners do so with the blessing of the wider fraternity if relationships are to be constructively built and maintained.*

- **Do they have a 3<sup>rd</sup> party mediator / facilitator?**

*The research shows that in almost all cases, a third-party mediator or facilitator is not called for largely because the presence of such a person would seem emphasise the rational argument for access, rather than the cognitive one based on goodwill.*

*Landowners consistently said that they would rather deal with either the individuals involved, or at least individuals who represent the user fraternity face-to-face.*

- **Who initiates the negotiation, and how?**

*Users invariably initiate such a negotiation in the context of some prior history with the landowner. The opening line can convey a lot about the intentions of the parties, either real or imagined. Care should be taken that the initiation of a negotiation is a properly considered and honest reflection of the party's intentions/aspirations.*

- **With what stated goals is the negotiation initiated?**

*Landowners, when asked about substantive issues to a negotiation or about tools to help negotiation, often feel more comfortable if adequate information about the intentions of users and their activities on the property is provided at the outset. This helps to frame their understanding and for them to relate to requests for access*

### **What are the issues over which they are negotiating?**

- **In what context does the negotiation arise?**

*Before rushing headlong into a negotiation, it is helpful to articulate a history and map the relationships concerned. Consider the broader context of the issues at hand rather than just a request for access.*

*Try and ascertain the landowner's disposition. Could the negotiation be helped or hindered considering either good or bad relationships that the landowner may have with other stakeholders. Some landowners may be otherwise preoccupied by issues outside of the access ambit (for example, harvest season).*

- **What are the substantive issues over which they are negotiating?**

*It helps to articulate a clear list of issues at hand. This is a scoping exercise, and all parties will immediately feel more comfortable with the process if it is apparent that the complete set of concerns are being given attention. In conflict negotiations, Anstey (1993) suggests giving respect and legitimacy to these by giving all parties some opportunity for expression*

*before caucusing and summing a list of issues for action. This moves exchanges of arguments into searches for proposals and solutions.*

- **What is the nature of these issues?**

*The need for negotiation may be borne out of interests in resources or as the consequence of communication barriers or misunderstandings. Do the parties perhaps have different values, or perceptions about the values and uses of land? Are there issues of principle at stake, such as issues of recognition or legitimacy?*

*The manner of negotiation needs to adequately cater for the potentially varying nature of issues as perceived by each party*

- **What are the underlying needs and interests which may inform the positions of the parties?**

*The seminal article 'Getting to Yes' (Fisher & Ury, 1981) encourages negotiators to separate people from the problem, and to focus on interests, not positions. (Refer Section 2.3.4)*

- **What perceptions do the parties hold of the negotiation and each other?**

*If in doubt, ask them! This can be a great way to open productive channels of dialogue.*

- **What perceptions do the parties hold about power relatives in the relationship?**

*Again, ask them! Everyone is concerned about changes in influence and control, particularly with respect to land that is very often the subject of many generations' custodianship, or significant investment.*

- **What perceptions do the parties hold about existing mechanisms to handle conflict?**

*Anstey (1993) offers us a good introduction to the Interests-Right-Power model of negotiation. He argues that negotiations can take one of three forms:*

*Interests – based on negotiation, mutual adjustment and joint problem-solving*

*Rights – based on adjudication by external parties, arbitration, often courts*

*Power – based on coercion; physical ploys including physical denial of access, civil disobedience, even violence.*

*The approach chosen by any party will reflect the tactics that party believes will achieve the best results for the party.*

*Discuss these openly between the parties, allay fears. Emphasise the desire to focus on gentlemen's agreements as many landowners put it – or agreements based strictly on goodwill.*

### **What preparations are made prior to the commencement of the negotiation?**

- **Do any of the parties need support?**

*A negotiation may hinge around some essential support that one or more party needs in order to negotiate effectively. Many landowners expressed interest in having access to information, particularly around the proposed activities, and the environmental impact these might have. There may potentially be language barriers.*

- **Are there any time frames relevant to the negotiation?**

*It is essential to see access to mountain areas as an evolving process, with a strong time element, and facilitators should resist the urge to push for immediate resolution.*

*The American Access Fund (2006) urges negotiators to 'keep the door open'. Very often the solution to a conflict can be a temporary closure, either to allow the environment to recuperate or to let personal perceptions settle. In the worst case, keep the door open for a recommencement of negotiations in the future.*

- **What is the substantive history of the negotiation or relationship?**

*Create a diary of events, articulating where each substantive issue may have been or become pertinent in the past.*

- **What is the history of relations between the parties?**

*Particularly from the users' side, but occasionally from the landowners' side, there may be more history to the relationship than one might first imagine. Take the time to consult widely and understand the dynamic from the other party's point of view before commencing a negotiation.*

### **In what manner is the negotiation being expressed?**

- **What is the style of the negotiation?**

*This might be described as either adversarial, cooperative or indifferent?*

*A frank acknowledgement of this might guide the commencement of the negotiations, especially if an individual making the negotiation on behalf of users is new to the situation.*

- **Are there any established behavioural ground rules?**

*These might include acting with integrity, transparency of information, compliance, respect, civility, and so on.*

- **If the negotiation or agreement were to break down, why could it break down?**

*Negotiators would do well if they have a clear perception of these, before commencing such a negotiation.*

**Outcome:**

○ ***How is the agreement recorded?***

*This might be as word-of-mouth; it may be unwritten but codified as knowledge by an institution such as the MCSA; or it could be in writing.*

○ ***Where is it housed? Or who is the custodian of this?***

*Whether the agreement is written or unwritten, it should be stored with an owner or in a place that the parties can reference. In the case of informal agreements, the agreement requires, the agreement requires a custodian. This might be the landowner, an institution or an individual. If a member of the user fraternity wishes to find out about the agreement, where do they go? If the landowner wishes to change the understanding, who must be notified? Where is the master copy kept? The answer might be in someone's head!*

Responses from interviews in relation to the issue of where the agreement should be housed suggest that such access agreements, whether written or informal must be stored with an owner or in a place that the parties can reference. In the case of informal agreement, the agreement requires a custodian.

○ ***Does the agreement contain provisions on implementation?***

*Many agreements around substantive issues can adversely affect the relationships if there is too much room for interpretation or improvisation. An agreement should openly acknowledge the fundamental logistics associated with an access arrangement, rather than allow misaligned expectations to collide and strain the relationship.*

*A common model for ensuring that resolutions for implementation are effective is the SMART model. That is, the objectives in an outcome should be:*

*S: Specific*

*M: Measurable*

*A: Attainable*

*R: Relevant*

*T: Time-based*

○ ***Does the agreement contain provisions on monitoring, feedback or periods of review?***

*Few agreements, especially not those made less formally, provide for monitoring, feedback or periods of review. While landowners are invariably entitled to enforce immediate review,*

*efforts to maintain the agreement and the associated relationships can often be overlooked until an agreement has already gone sour. The Milner case-site offers a good example of how periods of review can be used to the benefit of both parties. A landowner might restrict access (either in terms of numbers or allowed activities) until the users have proved themselves or the negotiated activity has proven unproblematic. Equally, in times of either strained relationships or undue impact on the environment, access to an area can be proactively, temporarily closed in order to maintain long-term access. The UIAA Access Commission, whose full committee meets once a year, asks members from various regions to make a state-of-the-nation report for their area at each meeting.*

○ **Does the agreement contain provisions on dispute resolution?**

*Small disputes are inevitable, as are the infrequent individuals who spoil it for everyone. An agreement might be more resilient if there is an agreed protocol for solving conflict. It is vital that any concerns are dealt with substantially rather than as a strain on relationships*

## Appendix 2.2 Cognitive biases and intangible motivators in negotiation

| Cognitive Bias                              | Commentary                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
|---------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Irrational escalation of commitment:</b> | This is when participants of a negotiation maintain commitment to a course of action even when that commitment constitutes irrational behaviour. They will often seek supporting evidence for their stance and ignore disconfirming evidence. This desire for consistency is often exacerbated by a desire to save face and to maintain an impression of expertise or control in front of others.                                                                                        |
| <b>Mythical fixed-pie beliefs</b>           | This is the belief that for everything gain by one party, exactly the same is lost by the other. It disregards the potential for mutually beneficial trade-offs. Participants focusing on values are less likely to see any problem in fixed-pie terms.                                                                                                                                                                                                                                  |
| <b>Anchoring and adjustment</b>             | This cognitive bias is related to the effect of the standard, anchor or benchmark off of which all subsequently measured, irrespective of the merit of such an initial position.                                                                                                                                                                                                                                                                                                         |
| <b>Framing</b>                              | Framing refers to the perception that the parties hold about the subject of a negotiation. Different parties may place different values on different aspects. Positive framing frames the proposal as a gain, while negative framing frames the proposal as a loss. Negotiations in which the outcomes are negatively framed tend to produce fewer concessions, reach fewer agreements and perceive outcomes as less fair than negotiations in which the outcomes are positively framed. |
| <b>Availability of information</b>          | Parties in a negotiation may make judgement based on information that is accessible and readily available to them. One prominent data-point can outweigh many that are recalled less readily.                                                                                                                                                                                                                                                                                            |
| <b>The winner's curse</b>                   | This is the discomfort created by a settlement in a negotiation that comes too easily. The proposer who's proposal is accepted too readily might believe that the accepting party knows something that they don't.                                                                                                                                                                                                                                                                       |
| <b>Overconfidence</b>                       | This is a negotiator's belief that their ability to be correct is better than is really is. It is the so called s "90% of drivers believe that they are better than average" syndrome. It can lead to negotiators supporting positions that are inappropriate, or lead them to discount the validity of the judgment of others. Of course neither results is healthy for a negotiation scenario.                                                                                         |
| <b>The law of small numbers</b>             | This is the tendency to draw conclusions from small sample sizes. If a party's experience is limited in either time or scope, the tendency is to extrapolate prior experience onto future negotiations.                                                                                                                                                                                                                                                                                  |
| <b>Self-serving biases</b>                  | People often seek to explain another person's behaviour, typically over-estimating the role of internal factors (the here and now associated with the negotiation) and to under-estimate the role of external factors (outside the realm of the negotiation) on that person behaviour.                                                                                                                                                                                                   |
| <b>Endowment effect</b>                     | This is the tendency to overvalue something you own or can offer in a negotiation.                                                                                                                                                                                                                                                                                                                                                                                                       |
| <b>Ignoring other's cognitions</b>          | When negotiators ignore another party's perceptions, they are likely to formulate solutions and propositions that won't be accepted, or which will have to be reiterated further before resolution. How can one know the other party's perceptions? ASK!                                                                                                                                                                                                                                 |
| <b>Reactive devaluation</b>                 | This is the emotively driven tendency to dislike a proposal by virtue that another party made it. Allowing another party to believe that it formulated a particular solution may make it all the more attractive to them!                                                                                                                                                                                                                                                                |

|                              |                                                           |
|------------------------------|-----------------------------------------------------------|
| <b>Intangible Motivators</b> | The need to 'look good' to the people one is representing |
|                              | The fear of setting precedents in the negotiation         |
|                              | Defending a principle or a set of beliefs                 |

## Appendix 2.3 Substantive concerns identified by the research

| Category                                     | Issue                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
|----------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Environmental</b>                         | <ul style="list-style-type: none"> <li>• Carrying capacity of the land <ul style="list-style-type: none"> <li>– Environmental capacity and/or resilience (<i>medium</i>)</li> <li>– User numbers (<i>medium</i>)</li> </ul> </li> <li>• Ambiance – anthropocentric perception of pristine-ness <ul style="list-style-type: none"> <li>– Natural environment (<i>high</i>)</li> <li>– Any human sign – rocks rearranged etc (<i>medium</i>)</li> </ul> </li> <li>• Litter <ul style="list-style-type: none"> <li>– General (<i>high</i>)</li> <li>– Cigarettes (<i>low</i>)</li> <li>– Toilet paper (<i>low</i>)</li> </ul> </li> <li>• Fauna <ul style="list-style-type: none"> <li>– Scaring off of wildlife (leopards) (<i>low</i>)</li> </ul> </li> <li>• Flora <ul style="list-style-type: none"> <li>– Trampling (<i>high</i>)</li> </ul> </li> <li>• Paths <ul style="list-style-type: none"> <li>– Condition, erosion and maintenance (<i>medium</i>)</li> </ul> </li> <li>• Heritage <ul style="list-style-type: none"> <li>– Preservation of archeological features i.e. bushman paintings (<i>low</i>)</li> </ul> </li> </ul> |
| <b>Fire</b>                                  | <ul style="list-style-type: none"> <li>– Damage to property (<i>medium</i>)</li> <li>– Liability to neighbours (<i>high</i>)</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| <b>Privacy</b>                               | <ul style="list-style-type: none"> <li>– That users should be respectful of landowner's wishes, and obey rules (<i>high</i>)</li> <li>– Of homestead (<i>low</i>)</li> <li>– Of paying guests in the case of tourism related properties (<i>medium</i>)</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| <b>Burden of custodianship</b>               | <ul style="list-style-type: none"> <li>– Parking and vehicle security – liability or administrative hassle (<i>low</i>)</li> <li>– Liability for landowner's dogs (they bite!) (<i>low</i>)</li> <li>– Liability (legal) to hikers and climbers for injury sustained on the premises (<i>medium</i>)</li> <li>– Liability (moral – worry and hassle) to users for injury (<i>medium</i>)</li> <li>– Hours of any disturbance (<i>low</i>)</li> <li>– Gates to be kept closed (security and livestock control) (<i>medium</i>)</li> <li>– Security (indirect, not from users directly) (<i>medium</i>)</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| <b>Burden of administering the agreement</b> | <ul style="list-style-type: none"> <li>– Time and effort (<i>low</i>)</li> <li>– Level of organization / orderliness (<i>medium</i>)</li> <li>– Setting of precedent (<i>high</i>)</li> <li>– Relationships with neighbours - that users should respect neighbours equally and not cause any problems between landowners by virtue of the access agreement (<i>high</i>)</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| <b>User profile</b>                          | <ul style="list-style-type: none"> <li>– User's rationale for wanting access (<i>medium</i>)</li> <li>– Whether users share an affinity for the land / passion for conservation (<i>high</i>)</li> <li>– That users are adequately prepared (commonsense?) Is supervision required? (<i>medium</i>)</li> <li>– No dogs or mountain bikes (<i>low</i>)</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| <b>Water Resources</b>                       | <ul style="list-style-type: none"> <li>– Quality for drinking or agriculture (<i>low</i>)</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |

## Appendix 2.4      Some common control mechanisms

|                 | Control Mechanism                                                                                                                                                                         | Advantages                                                                                                                                                                                              | Disadvantages                                                                                                                                                                                                          |
|-----------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Price</b>    | <ul style="list-style-type: none"> <li>• Fee for access</li> </ul>                                                                                                                        | <ul style="list-style-type: none"> <li>• Economic Incentive</li> <li>• Act of payment provides opportunity to highlight protocol</li> </ul>                                                             | <ul style="list-style-type: none"> <li>• Clumsy link to quantity</li> <li>• Increased landowner responsibility</li> <li>• Fails to properly segment users</li> <li>• Erodes goodwill nature of an agreement</li> </ul> |
| <b>Quantity</b> | <ul style="list-style-type: none"> <li>• Booking or permitting system</li> <li>• The 'experienced-leader' model</li> </ul>                                                                | <ul style="list-style-type: none"> <li>• Controls numbers in absolute terms</li> <li>• Creates chain of responsibility between parties</li> <li>• Provides opportunity to highlight protocol</li> </ul> | <ul style="list-style-type: none"> <li>• Ignores impact-per-user</li> <li>• Potentially undue administration</li> </ul>                                                                                                |
| <b>Quality</b>  | <ul style="list-style-type: none"> <li>• Distance to walk</li> <li>• Amenities or lack thereof</li> <li>• Regulated climbing or hiking ethic</li> <li>• Partial access/closure</li> </ul> | <ul style="list-style-type: none"> <li>• Typically means maintaining the 'wild' nature of the area</li> <li>• Effective at segmenting users</li> </ul>                                                  | <ul style="list-style-type: none"> <li>• May avert some very worthwhile activities</li> </ul>                                                                                                                          |

## Appendix 2.5 Rational motivators for landowners to allow access

| Normative Motivators                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | Cognitive Motivators                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"> <li>• <b>Pure normative motivators:</b> <ul style="list-style-type: none"> <li>– “Just because”</li> <li>– “It’s a beautiful thing and it’s good to let other people enjoy it too”</li> <li>– “It would be selfish if I just kept everybody out”</li> </ul> </li> <li>• Pride and perceptions of identity <ul style="list-style-type: none"> <li>– Ownership and control</li> <li>– Environmental custodian</li> <li>– Identity security</li> </ul> </li> <li>• Social interaction with interesting people <ul style="list-style-type: none"> <li>– “I like to meet interesting people”</li> </ul> </li> <li>• Opportunity to share the land with like-minded people</li> <li>• Progression in the sport of climbing</li> </ul> | <ul style="list-style-type: none"> <li>• <b>Pure cognitive/rational motivators:</b> <ul style="list-style-type: none"> <li>– What’s in it for me?</li> <li>– I don’t see why I should have to [allow access]</li> </ul> </li> <li>• Legal <ul style="list-style-type: none"> <li>– To fulfil a legal obligation to provide access</li> <li>– To pre-empt any potential future legal obligations</li> <li>– “I believe that one is legally better advised to give some limited and controlled access, rather than none, as I believe that increasingly the courts are favoring the public (viz the Knysna Heads)” (Landowner)</li> </ul> </li> <li>• Economic <ul style="list-style-type: none"> <li>– A means to ‘market’ other (economic) facilities such as accommodation</li> <li>– Revenue from access fees</li> </ul> </li> <li>• Security / Company <ul style="list-style-type: none"> <li>– Security provided by passing traffic (of the right individuals)</li> <li>– Capacity to monitor what is happening on the wider extent of the property (users to report-back)</li> </ul> </li> <li>• Ecological interest: <ul style="list-style-type: none"> <li>– Information about the fauna, flora and recreational activities on the property</li> </ul> </li> </ul> |

Often-cited motivators for allowing access.

Note: Groupings as either normative or cognitive are indicative, but not absolute.

Source: Landowner, and user-expert interviews