IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. 12-0312

PUBLIC LANDS ACCESS ASSOCIATION, INC.,

Petitioner/Appellant,

v.

THE BOARD OF COUNTY COMMISSIONERS OF MADISON COUNTY, STATE OF MONTANA, AND C. TED COFFMAN, FRANK G. NELSON, and DAVID SCHULTZ, constituting members of said Commission; and ROBERT R. ZENKER, in his capacity as the County Attorney for Madison County, State of Montana,

Respondents/Appellees.

JAMES C. KENNEDY,

Respondent-Intervenor/Appellee/Cross Appellant.

On Appeal from Montana's Fifth Judicial District Court,
Madison County – Cause No. DV-29-04-43
Hon. Loren Tucker, District Judge

Property and Environment Research Center's AMICUS CURIAE BRIEF

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I. ARGUMENT

This case raises important questions about the link between secure private property rights and the provision of public goods from private land and water rights. To whit, granting public access in this case is likely to diminish the amount of fish and wildlife habitat provided by private landowners, not only on the Ruby River, but throughout Montana.

In the United States, where fish and wildlife are generally owned by the state, we depend on private landowners to provide much of the habitat. With 66 percent of all land in Montana in private ownership and an even higher percentage of riparian lands privately owned, the private provision of fish and wildlife habitat is critically important to Montana's economy and way of life. Conversely, other than on wildlife refuges and state game ranges, public land managers have little ability to directly produce or steward wildlife habitat.

The management of private lands in Montana is changing. With their focus on maximizing the economic return from their land, private owners have historically focused on crops and livestock, timber, oil and gas, residential development, and other extraction-based industries. But with the growing demand for recreational opportunities, streams, ponds, wetlands, and native vegetation have become important from the perspective of amenity production. When this demand is combined with a "land ethic" called for by the great conservationist Aldo

Leopold, private lands become an even more important provider of fish and wildlife habitat.

Because the fish and wildlife can freely migrate off private lands, the provision of habitat on private lands generates a public good that costs the public nothing. Landowners who improve habitat and thereby increase the flow off their land are not hoarding a public resource; they are augmenting and enhancing it.

Though many private landowners willingly produce this public good at no cost to the public, the erosion of private property rights reduces the incentives for many private landowners to husband fish and wildlife resources. This erosion occurs when the government forces landowners to allow strangers to wade or float through their ranches, enjoying for free the habitat the landowner has carefully stewarded, often at great expense. The United States Supreme Court has derided, and held unconstitutional, government's attempt to impose public access on a recently upgraded private body of water, turning it into a "public aquatic park" without just compensation. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-180 (1979). This penalizes the private landowner who has been a good steward and has provided habitat for publicly owned wildlife resources.

A. Property Rights and Environmental Stewardship

The essence of a free enterprise system is to harness the incentives of private owners. These incentives tie the management decisions of owners to the value of

their assets. This explains the adage that "no one washes a rental car except the rental car company."

These incentives are particularly important in the context of wildlife habitat. Landowners invest in the long-run agricultural productivity of their land because they capture the value of the crops, timber, and livestock they produce. Conversely, if they are penalized by regulations when their land produces public goods such as fish and wildlife habitat, they have little incentive to invest in habitat. This explains another adage, "shoot, shovel, and shut-up" and the findings of Lueck and Michaels[1] that private forest owners will destroy endangered species habitat if the presence of endangered species imposes a financial loss. As Lueck and Michaels explain, in North Carolina where red-cockaded woodpeckers are listed as endangered and timber harvesting is regulated on land with woodpeckers, the average age at which pine trees are harvested on land with no woodpecker colonies within a 25 mile radius is approximately 60 years; the average age on land with 25 colonies within a 25 mile radius is approximately 35 years; and the average age on land with over 400 colonies (the densest populations in North Carolina) is approximately 15 years. These data show that Endangered Species Act regulations cause landowners to harvest far sooner than the age for maximizing

[1] Lueck, Dean & Michael, Jeffrey A, 2003. "Preemptive Habitat Destruction under the Endangered Species Act," Journal of Law and Economics, University of Chicago Press, vol. 46(1), pages 27-60, April.

profits and the age for maximizing woodpecker habitat. Everyone, including the woodpeckers, lose.

The recent court ruling requiring federal permits to hunt the scimitar-horned oryx also demonstrates how interference with private property reduces the private incentive to steward endangered species populations. Though the oryx is highly endangered in Africa, it is plentiful in Texas where it was introduced to private game ranches which profit from hunting and photographic safaris, giving private landowners an incentive to invest in the species' survival. But with the regulatory burden created by the new permitting requirement and the corresponding expected drop in landowner profits, experts predict the number of oryx will fall by 50 percent in 10 years and eventually decline to none.[2]

In contrast to the disincentives of endangered species regulations, landowners steward fish and wildlife populations when they reap the benefits of that stewardship. Colorado's Ranching for Wildlife program provides an example. Through this program, private landowners with more than 12,000 contiguous deeded acres can earn transferable big game hunting permits and hunting season extensions if they complete specific habitat improvement projects for game and non-game animals and allow a specified amount of public hunting access. The

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[2] Koppel, Nathan, 2011. "Exotic Pursuit's Last Stand: Texas Ranchers Mount Legal Bid to Stop Tighter Curbs on Antelope Hunting," *Wall Street Journal*, available online at: http://online.wsj.com/article/SB10001424052702304177104577313903412037054.html.

financial benefits private landowners can earn through Ranching for Wildlife are substantial, but they are explicitly conditioned on those landowners managing their lands in ways that generate public benefits.

Whether private landowners manage their property to produce public benefits depends on whether those landowners view fish and wildlife as an asset or liability. If good stewardship generates amenity or financial values for the landowner, then fish and wildlife become an asset to the property. But if stewardship begets burdensome regulation or unfettered public access, then the liability tag can trump the asset tag, and private landowners are unlikely to produce public benefits.

B. Applications to Stream Restoration and Access

The above principles and evidence are equally applicable to the issue of stream restoration and access in Montana. Though the costs of private stream restoration often fall entirely on the private landowner, the benefits do not. To be sure, enough of the benefits must accrue to the private landowners to induce them to make the investment.[3]

In the case of streams, ponds, and other riparian habitat, these returns come from increased land values associated with amenities and from the land ethic. And

[3] Haddock, David, 2008. "Why Individuals Provide Public Goods," in Accounting for Mother Nature, Stanford University Press.

when those investments are made, additional benefits spill over to the public. Reclaimed and improved streams protect spawning areas for larger rivers as adult fish from those stream swim into public waters.

Spring creeks are an excellent example. Thompson and Benhart Creeks meander through the M Z Bar ranch in the Gallatin Valley. For years, the owners, Tom and Mary Kay Melesnick, allowed locals to fish and their cattle to wander in the creeks. In 1992, the Melesnicks realized they could better manage their cattle by rotating them through their pastures and improve the stream at the same time. Better fishing brought more requests to fish, so in 1999 they started limiting the number of fishers each day and charging a fee. The revenue generated allows the ranch to maintain the stream and keep the property full of cows instead of condos. At the same time, fish freely move to and from the East Gallatin River, a publicly accessible waterway boarding the ranch.

If the private benefits decline for any reason, we would expect the private willingness to make investments, such as those made by the Melisnicks, to decrease. Taking away the landowner's ability to exclude the public and providing free access decreases the private return to providing public benefits. Indeed, making such investments creates an attractive nuisance including increased litter, unclosed gates, increased fire potential and decreased privacy, to mention a few.

Aside from the financial disincentives, unlimited public access creates a

physical limitation on the ability of private landowners to produce public benefits. This is why the Montana Department of Fish, Wildlife, and Parks limits access to Nelson's Spring Creek, a tributary to the Yellowstone River, during the spawning season for the Yellowstone cutthroat.

Lest there be any doubt about the deleterious effect of opening access to private land and water, consider the aftermath of the Montana Supreme Court's decision in *Bitterroot Protective Ass'n v. Bitterroot Conservation Dist. (BRPA II)*, 2008 MT 377, 346 Mont. 507, 198 P.3d 219. Since the Court's ruling, anglers have been documented wading through redds thus destroying spawning habitat. Moreover, to maintain their privacy, landowners along the ditch stopped diverting water from the Bitterroot River except when it was needed for irrigation, thus eliminating any possibility that the privately reclaimed ditch would support fish habitat.

Such results underscore the fact that the issue in this case and others is access for access sake, not for a quality recreational experience. Proponents couch their arguments in phrases such as recreational heritage, but if it was recreation that they wanted, they would be supporting those landowners who provide the habitat and its concomitant public benefits. The Mitchell functioned solely as an irrigation ditch before the reclamation project was undertaken by private landowners. After reclamation, it provided more habitat, more fish and wildlife, and hence more

recreation outside the private boundaries. Now the public has access to a waterway with limited, if any, habitat and no recreational value.

The access issue started with the two cases that eroded private property rights by opening access to more than 100,000 miles of non-navigable streams: *Mont. Coalition for Stream Access v. Curran,* 210 Mont. 38, 682 P.2d 163 (1984), and *Mont. Coalition for Stream Access v. Hildreth*, 211 Mont. 29, 684 P.2d 1088 (1984). Prior to that, the beds and banks of such streams were considered the private property of riparian landowners and thus subject to trespass rules. Given the documented public benefits of private stewardship, compensation should have been paid for this taking. Like the decision in the Mitchell case, the massive taking created by opening private property to public access in the guise of public recreation penalized and discouraged private stewardship.

The only limit on public access through private property has been the lack of public access points. Ruling that all bridges on county roads are public access points will remove this limit and finalize the taking that began in the 1980s.

II. CONCLUSION

The resolution of this case will have far broader impact than whether there is access to the Ruby River at three bridges. A decision to declare this a public access point will send a clear signal to other private landowners that investing in fish or wildlife habitat risks inviting strangers into their back yards. By

consequence, such a ruling would also tend to reduce the quality and quantity of fish habitat in the Ruby River, specifically, and across the state, generally.

A decision not to expand the public access rights when landowners produce public benefits would likely have an opposite and positive effect, namely more investment in stream restoration, better and more habitat, and more public benefits produced on private lands. Indeed, rather than penalizing the private landowner for being a good steward, the State of Montana should heed the admonition of Aldo Leopold who said, "Conservation will ultimately boil down to rewarding the private landowner who conserves the public interest." Turning the private land adjacent to county bridges into public access sites will do just the opposite.

RESPECTFULLY SUBMITTED this 15th day of October, 2012.

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Certificate of Compliance

The undersigned certifies that this Brief is double-spaced in proportionally spaced 14-point Times New Roman font, has 1-inch margins, and is approximately 1,910 words according to the word count on the word processing system used to prepare this Brief.

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served, postage prepaid via first class U.S. mail on this 15th day of October, 2012 upon the following:

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