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GUARANTEED RIGHT OF ACCESS TO PRIVATE INHOLDERS OF LAND WITHIN NATIONAL FOREST

ENVIRONMENTAL LAW: The Alaska National Interest Lands Conservation Act of 1980 entitles a Montana landowner to a permit allowing construction of an access road across a national forest because § 1323(a) of the Act provides for access to private inholdings within the entire national forest system. *Montana Wilderness Association v. United States Forest Service*, 655 F.2d 951 (9th Cir. 1981).

Burlington Northern, Inc. is an inholder of certain lands within the Gallatin National Forest in Montana.¹ The forest includes the protected wilderness areas of Buck Creek and Yellow Mules drainages.² Burlington Northern applied for a permit from the United States Forest Service to construct an access road across portions of the national forest, including the protected wilderness areas, to harvest timber on Burlington Northern's land. The Montana Wilderness Association, the Wilderness Society, and a neighboring landowner (hereinafter collectively referred to as Montana Wilderness) contested the permit. They argued that the proposed road building and logging would disqualify the area as protected wilderness. The Forest Service granted the permit over the objections of Montana Wilderness.

Montana Wilderness filed suit against the Forest Service in the United States District Court for the District of Montana.³ Prior to a preliminary injunction hearing, the Forest Service suspended the permit and submitted the question of Burlington Northern's right of access to the United States Attorney General. Burlington Northern offered three theories in support of a right of access to its inholdings: (1) an implied easement; (2) an easement by necessity, and (3) guaranteed access under the Forest Service Organic Administration Act of 1897.⁴ The Attorney General suggested

1. Burlington Northern acquired the land from Northern Pacific Railroad, which had acquired the land under the Northern Pacific Land Grant of 1864. The Act granted odd-numbered square sections of land to the railroad; the even-numbered sections were retained by the United States. The resultant checkerboard ownership pattern makes it impossible to reach the private land without crossing the surrounding federal land. Thus, each private square is considered an "inholding."

2. These areas are protected by the Montana Wilderness Study Act of 1977, 16 U.S.C. § 1132 (1977), as *potential* wilderness areas.

3. Also named as defendants were The United States Forest Service Chief, John McGuire; Lewis Hawkes, Gallatin National Forest Supervisor; United States Fish and Wildlife Service; Harry Willoughby, its regional director; Burlington Northern, Inc.; and Bob Bergland, Secretary of Agriculture. The National Forest Products Association was an intervening defendant-appellee.

4. 16 U.S.C. § 478 (1897).

that an implied easement might exist under the Northern Pacific Land Grant of 1864, but that Burlington Northern had no easement by necessity nor any right of access under the Forest Service Organic Administration Act. The Forest Service subsequently reissued the permit under the implied easement right of the 1864 land grant.

The parties then filed cross-motions for summary judgment. The district court granted a partial summary judgment in favor of the defendants which upheld the issuance and validity of the permit. Montana Wilderness appealed to the Ninth Circuit Court of Appeals.⁶

The Ninth Circuit addressed the issue of whether the Alaska National Interest Lands Conservation Act of 1980 (Act),⁷ passed during the pendency of this appeal, establishes an independent basis supporting the grant of the summary judgment. The appellees contended that § 1323(a)⁸ of the Act guarantees access to private land within any national forest in the United States.

Section 1323(a) provides for access to private land surrounded by "the National Forest System." Section 1323(b) provides for access to private lands within "public lands managed by the Secretary [of the Interior]."⁹ The Ninth Circuit found that subsection (b) clearly applied only to Alaskan lands because "public lands" was defined in § 102(3) of the Act as lands "situated in Alaska." Nonetheless, no section of the Act defines the "National Forest System" as used in subsection (a). The court found that Congress, in previous legislation, had defined National Forest System as "all national forest lands . . . of the United States."¹⁰ Determination of Burlington Northern's right of access, therefore, centered on whether this nationwide definition of National Forest System applied to § 1323(a) of the Act, an act otherwise decidedly limited to Alaska.

5. Op. Att'y Gen., slip op. at 1 (June 23, 1980).

6. The district court designated the partial summary judgment as final, and therefore appealable, under Fed.R.Civ.P. 54(b). 496 F.Supp. 880 (D.Mont. 1980).

7. 16 U.S.C. §§ 3101-3233 (1980).

8. Section 1323(a) reads:

Notwithstanding any other provisions of law, and subject to such terms and conditions as the Secretary of Agriculture may prescribe, the Secretary shall provide such access to nonfederally owned land within the boundaries of the National Forest System as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof: *provided*, that such owner comply with rules and regulations applicable to ingress and egress to or from the National Forest System.

9. Section 1323(b) reads:

Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of the Interior may prescribe, the Secretary shall provide such access to non-federally owned land surrounded by public lands managed by the Secretary under the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701-82) as the Secretary deems adequate to secure to the owner the responsible use and enjoyment thereof: *Provided*, that such owner comply with rules and regulations applicable to access across public lands.

10. 16 U.S.C. § 1609(a) (1974).

The Ninth Circuit held § 1323(a) to apply to inholdings within all national forests and affirmed the partial summary judgment, thereby allowing Burlington Northern to construct the access road. The court noted that the "natural interpretation" of § 1323(a) seemingly warranted a finding that the section was limited to Alaska, as were the companion subsection and the Act as a whole. However, because Congress had previously supplied a definition of National Forest System contrary to the apparent interpretation of the Act, the court turned to legislative history to determine the intended scope of § 1323(a). The court found "a clearly expressed legislative intent" to apply § 1323(a) nationwide in a "surprisingly sparse" and "ambiguous" legislative history.¹¹

Congressional discussion on § 1323 is noticeably lacking in light of the nationwide implications of subsection (b). Although the Senate extensively discussed the Act, committee reports only briefly refer to § 1323. The first expression of intent to apply § 1323 nationwide came eight days after the passage of the Act, when Senator Melcher, the author of the section, indicated that he understood the section to have nationwide applicability.¹²

In determining that § 1323(a) of the Act applies to all national forests, the Ninth Circuit relied primarily upon Congressional discussion of a similar act, the Colorado Wilderness Act (Colorado Act). The Colorado Act was passed three weeks after the Alaska National Interest Lands Conservation Act. A joint conference committee declined to insert an inholder access provision in the Colorado Act because "similar language [had] already been passed in Section 1323 of the Alaska National Interest Lands Conservation Act."¹³ The court gave this subsequent conference report of the Colorado Act significant weight in the determination of the scope of § 1323. More importantly, the court noted that the conferees considering the Colorado Act had intimate knowledge of the Alaskan Act and had carefully considered the issue of access to private inholdings.¹⁴

The Ninth Circuit's opinion evidences a desire to settle inholder access questions. The court noted that if subsection (a) were not given nationwide applicability, Burlington Northern, as well as other similarly situated inholders, might have no opportunity to enjoy its inholdings because "the protected status of the federal land may remove the Secretary of Agriculture's usual discretion to grant access over Forest Service land."¹⁵ An inholder's only recourse "would be the eventual exchange of its inholdings

11. 655 F.2d 951, 955 (9th Cir. 1981).

12. 126 CONG. REC. S14,770-71 (daily ed. November 20, 1980).

13. H.R. REP. NO. 1521, 96th Cong., 2d Sess. (1980).

14. 655 F.2d 951, 957 (9th Cir. 1981).

15. 655 F.2d 951, 953 (9th Cir. 1981).

for other federal land of its inholdings value.”¹⁶ The court apparently has determined to guarantee a private owner of lands within any national forest the use and enjoyment of his inholdings through ensured access under the Act.

The court notes that its construction of § 1323 will not completely solve inholder access questions relating to Forest Service land.¹⁷ Admittedly, some tension may remain between § 1323(a) and other Congressional legislation regarding inholder access.¹⁸ Notwithstanding these minor tensions, the Ninth Circuit, through its construction of § 1323(a), has provided a viable method of acquiring inholder access for innumerable private landowners.

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16. *Id.*

17. 655 F.2d 951, 957 (9th Cir. 1981).

18. *See* 16 U.S.C. § 1134(a) (1978).