

HB 455 unnecessarily seeks to establish a public trust doctrine for fish and terrestrial game animals. While environmental ambitions for expansion of the doctrine are many, the doctrine's proper application are traditionally few and relate primarily to ownership and authorized use submerged lands and navigable waters.

Unfortunately, as many thousands of private property owners nationwide have realized during the past 38 years, environmentalists have used the public trust doctrine in courts to defeat fundamental rights guaranteed under our constitution. Such would be the case in Montana if HB 455 is adopted. As our history already reveals, we do not need a new and radical doctrine to protect wildlife.

In 1967, the Montana Supreme Court recognized the State's sovereign authority to regulate wildlife as part of its inherent constitutional police power. *State ex rel Nepstad v. Danielson*, 149 Mont. 438, 427 P.2d 689. In 1968, the Court held that the legislature may impose such terms and conditions as it sees fit on wildlife regulation, as long as the fundamental constitutional rights of individuals are not infringed. *Visser v. Fish and Game Comm.*, 150 Mont. 525, 531, 437 P.2d 373.

In 1972, delegates to the Montana Constitutional Convention considered three separate proposals to establish versions of public trust doctrines, but rejected all of them. Delegate Proposal No. 2, introduced by Delegate Barthelson, would have provided in pertinent part:

The public has the right to the recreational use of such waters and their beds and banks to the high water mark regardless of whether the waters are navigable and regardless of whether the beds and banks are privately owned. Mont. Const. Conv. Vol. 1, p. 76 (emphasis supplied).

This proposal was rejected however. Moreover, Delegate C.B. McNeill expressly stated that the majority's proposal adopted in its stead, now embodied at Mont. Const. art. IX, Sec. 3(3), *did not* confer access right upon the public:

The section deals with the ownership of the water, subject to appropriation for beneficial uses. **It is not the intent and the language does not grant access rights or trespass rights.** That specific question was considered in a separate proposal of Delegate Berthelson's; that is, the recreational use to the high-water mark. **That proposal has been introduced in the last several legislatures, is highly controversial, and for that matter and for that reason, it was not included here.** So this section deals just with the ownership of water and not with any access rights. Mont. Const. Conv. Debate, Verbatim Transcript pp. 1305-1306 (emphasis supplied).

The Natural Resources and Agriculture Committee also rejected two other public trust doctrine proposals: Delegate Proposal No. 12 by Delegate Cate, and Delegate Proposal No. 162, by Delegate Cross. There can be little doubt that the majority viewed the public

trust doctrine as "radical" and that in any event attempts to adopt the public trust doctrine in Montana were overwhelmingly and expressly rejected. *See Committee's Report, Appendix B, Proposals Considered by Committee, Mont. Const. Conv. Vol. II, pp. 564-565.* As the Committee stated in its Comments on the Majority Proposal.

In 1977, in a U.S. Supreme Court case involving a state's authority to regulate wildlife, Justice Thurgood Marshall referred to the public trust doctrine as a "19th century legal fiction." *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265.

Despite this black and white record, in 1984 the Montana Supreme Court essentially gave effect to the rejected delegate proposal No. 2, effecting what some legal scholars have called the greatest uncompensated taking in the history of the northwest. An estimated 64,000 miles of streams and sloughs existing on private land were opened to public occupation without due process or just compensation paid to the landowners. The Court continues to perpetuate its original judicial takings based on a vague public trust theory. The Legislature cannot entrust the Court to have the final say on management of so called public trust assets.

HB 455 needlessly injects uncertainty into well settled rules recognizing the paramount importance of an individual's constitutionally protected private property rights by purporting to subject such paramount rights to a public trust for fish and wildlife.

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