The Myth of a Public Trust Doctrine for Wildlife

Is a public trust doctrine for wildlife the law in Montana?

No. The public trust doctrine for wildlife does not exist in the Montana Constitution, state statute, administrative rule, or case law. It is a legal theory from the 1970s that has never been seriously applied as law.[1]

The 1972 constitutional convention debated two proposals to create a public trust for wildlife and wildlife habitat, but ultimately rejected them.[2]

Do Montanans' Constitutional rights to hunt and fish supersede property rights?

No. Article IX, Section 7 of the Montana Constitution states: "The opportunity to harvest wild fish and wild game animals is a heritage that shall forever be preserved to the individual citizens of the state *and does not create a right to trespass on private property or diminution of other private rights*." (emphasis added).

What is the public trust doctrine?

"The public trust doctrine has its origins in English law and was later applied in the North American colonies as well as part of the common law by the individual states after the American Revolution. Historically, the public trust doctrine guaranteed a public right to commercial navigation and fishing on navigable waters…Courts have declined to extend the public trust doctrine to upland wildlife and their habitat…

"The rights guaranteed by the public trust doctrine are understood to have existed from time immemorial. As a result, judicial expansions of the doctrine have the effect of curtailing vested private property rights. Takings claims…are thus circumvented because the private rights are, by definition, subject to the theoretically preexisting public rights."[3]

Leftist advocates have argued that the public trust doctrine should be expanded to apply to wildlife in order to supersede property rights. A public trust doctrine for wildlife could establish a public right to trespass on private property, and jeopardize ranchers' rights to be compensated for damage caused by predators and big game animals, for example.

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[1] "Why liberating the public trust doctrine is bad for the public," James Huffman, *Environmental Law,* 2015.

[2] Proposal No. 12 (Jerome Cate) and Proposal No. 162 (Louise Cross). See Constitutional Convention Tr. Vol 1, pages 96 and 308-309 respectively.

[3] "The limits of the public trust doctrine," James Huffman, 2019, https://www.perc.org/2019/06/19/the-limits-of-the-public-trust-doctrine/

What are the implications of expanding the public trust doctrine to wildlife?

"Applying the public trust doctrine to wildlife or its habitat would have major implications. For one, it would effectively create a public easement on private property in the same way the common law recognizes a public easement over and on privately owned submerged and riparian lands on navigable waters. Such a shift in the law would upset long-settled expectations, result in a massive taking of private property, and create a powerful disincentive for private wildlife conservation initiatives."

Creating a public trust doctrine for wildlife would also circumvent the legislature's and executive's role in management and establish judicial control over wildlife. If wildlife are held in trust for the public, the state has an obligation to protect that trust. Activists will shop for sympathetic judges to attempt to compel their favored policies. For example, a judge could find that legislation allowing for trapping to reduce the number of predators violated the "public trust" even if the legislation would be a valid use of the state's police powers.

Are wildlife owned by the public?

"The assertion that the public trust doctrine applies—or should apply—to wildlife rests on shaky legal ground. A familiar argument in favor of applying the public trust doctrine to wildlife has been that states own wildlife on behalf of the public. But the argument is founded on a mistaken understanding of the law relating to ownership of wildlife. Under the common law, wildlife is considered *res nullius*—meaning it is unowned until it is captured and reduced to private possession. Thus, living wildlife species are neither owned by the state nor by private individuals…

"The states' authority with respect to wildlife derives from their police power, not ownership, and is therefore limited by the constitutional enumeration of federal powers and the constitutional protections of private property. Clearly, states can regulate the hunting of wildlife, including on private lands, but they cannot impose regulations that would result in an unconstitutional taking of those lands. Correspondingly, private landowners can prohibit and permit access to their lands by hunters…

"It is well settled that state governments…have authority to regulate the taking of wildlife on private lands. These powers are exercised at the discretion of state legislatures (subject to the limitations) of due process, equal protection, and just compensation for takings of private property…An extension of the public trust doctrine to upland wildlife would establish senior public rights and thus render takings objections moot."[4]

"Conservation will ultimately boil down to rewarding the private landowner who conserves the public interest." -- Aldo Leopold, 1934

[4] Ibid