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# "PUBLIC TRUST" AS A CONSTITUTIONAL PROVISION IN MONTANA

by **Bill Leaphart**

## *INTRODUCTION*

In January of 1972 the Montana Constitutional Convention will convene to write a new constitution for the state of Montana. If the present constitution is any indication of longevity, a new constitution may govern the people of this state for another 82 years. Montana is thus afforded the opportunity to become one of, if not the most progressive state in the field of constitutional guarantees for its environment.

Modern man is coming to the realization that he is living in a finite environment; that he can no longer despoil the country, move west and leave the residue behind. As a result, there has been an explosion in ecological values. People now value surroundings which are conducive to health and beauty as well as to material wealth. It has become imperative that we face the reality of air and water pollution and combat it with positive, preventative law.

Punitive and remedial measures, although necessary, are by their nature "after the fact" and concentrate on restoring that which has already been damaged. Unless we supplement the punitive and remedial measures with some "protective" law, we are doing nothing to protect the environment until after the damage is done; we are resigning ourselves to picking up the pieces. Obviously the more rational approach is to exercise some foresight; to adopt a positive, preventative policy whereby we ensure that the air, water, and public lands are initially used in the public interest. Such an approach will not only protect our resources and welfare but will also eliminate the expense of punishing the offenders and repairing the damage.

This comment is in the form of a proposal to the Montana Constitutional Convention. It deals with the ancient doctrine of "public trust", a doctrine which has considerable potential in the field of environmental protection. This proposal is premised upon the assumption that modern reality demands that (1) We abandon any hope that individual man on his own initiative will recognize the folly of polluting the environment and reform his ways accordingly; (2) We recognize the inadequacy of administrative agencies whose power is too discretionary and susceptible to being influenced by the very people who are supposedly being controlled; and (3) We recognize that "remedial" and "punitive" measures alone are entirely inadequate to deal with the pollution problem.

It is the objective of this comment to demonstrate that such a policy can be accomplished best by incorporating the age-old doctrine of public trust into the new constitution and applying it to the air, water, and

public lands. As will be developed, the idea of public trust is now in use in Montana, both in the present constitution and statutory law, but it needs to be expanded and strengthened in terms of scope and enforcement.

### *THE HISTORY OF PUBLIC TRUST IN ROME AND ENGLAND*

The concept of public trust dates back to the early Roman law and to the English common law. In its inception, public trust was applied to the navigable waters, primarily the sea. In England, according to Lord Hale, the King was the acknowledged owner of the seashore.<sup>1</sup> The King's interest in the seashore, however, was an interest limited by the rights of the public, and any grantee of the Crown could take only such a limited interest as the King had.<sup>2</sup> Ports, creeks, and havens were the subjects of public right; in none of these places, therefore, could the public right be waived, although there might be a grant of the soil; but such a grant must be considered as subject to that public right which cannot be disturbed.<sup>3</sup>

It is not known for sure whether the public right of fishing and traveling upon the sea was reserved by the people when they vested the rest of the property of the sea in the King; whether it was a public grant from the King or whether it was one of those natural and necessary rights, which like the air has ever been free and unquestioned in enjoyment. Lord Hale concludes, however, that the origin of the right is immaterial because in the end the conclusion is the same: "that such right of fishing has immemorially belonged to, and been enjoyed by the public, and that, in point of title, it is admitted to be held and enjoyed by common right, i.e. by the common law, and custom of the realm."<sup>4</sup>

Prior to its use in England, the public trust doctrine was employed in the Roman Empire to guarantee that perpetual use of common properties was dedicated to the public.<sup>5</sup>

Professor Joseph Sax, in an examination of the English and Roman precedents, concludes that the doctrine rests upon three related principles: first, that certain interests, such as air and the sea, have such importance to the citizenry as a whole that it would be unwise to make them the subject of private ownership; secondly, that these interests partake so much of the bounty of nature, rather than of individual enterprise, that they should be made freely available to the entire citizenry without regard to economic status; and finally, that it is a principle

<sup>1</sup>S. MOORE, *HISTORY OF LAW OF THE FORESHORE AND SEASHORE*, 446 (3rd ed. 1888), quoting from *Bundell v. Caterall*, 5 B.&Ald. 268 (1821).

<sup>2</sup>*Id.*

<sup>3</sup>MOORE, *supra* note 1 at 436, quoting from *Attorney v. Parmeter*, 10 Price 378.

<sup>4</sup>*Id.* at 710.

<sup>5</sup>J. SAX, *DEFENDING THE ENVIRONMENT*, 163 (1971); *The Public Trust Doctrine in Natural Resource Law*, 68 MICH. L. REV. 471 (1970).

purpose of government to promote the interests of the general public rather than to redistribute public goods from broad public uses to restricted private benefit.

### 19TH CENTURY SUPREME COURT DECISIONS

The concept of public trust as developed in the Roman Empire and in the common law of England was adopted in the 19th Century United States to a very limited extent. It was rarely used, and then applied only to navigable waters and shorelands.

In 1842, the United States Supreme Court acknowledged the existence of the public trust doctrine as it was employed in England.<sup>6</sup> The case involved underwater land which had been granted to the Duke of York by Charles II. The Court reasoned that since the King of England originally held the land in trust for the English nation, it would not be presumed that he intended to relinquish any portion of the public domain.<sup>7</sup> The Court's conclusion was that the title in the Duke of York was subject to the same public trust as was imposed upon his grantor, Charles II. The navigable water and land thereunder was entrusted to the Duke of York for the common benefit.<sup>8</sup> The Duke was thus unable to treat the land as private property and parcel it out for his own individual emolument.<sup>9</sup>

In 1894, the United States Supreme Court in the case of *Shively v. Bowlby*, recognized that under the common law, title and dominion to the sea and rivers rested in the Crown as representative of the nation and for the public benefit.<sup>10</sup> The Court then imposed this same common law trust upon the United States in saying "the common law of England upon this subject at the time of the emigration of our ancestors is the law of this country, except so far as it has been modified."<sup>11</sup>

Two years prior to the *Shively* case the United States Supreme Court decided the most famous of American public trust cases, *Illinois Central Railroad v. Illinois*.<sup>12</sup> In 1869, the Illinois legislature deeded more than 1000 acres (a mile of shore and a mile out from the shoreline) of Lake Michigan's coast — now Chicago's central business district — to the railroad. This grant of property was challenged as being contrary to the interests of the people. The Court rejected the railroad's contention that a duly consummated grant of property could not be set aside and held that the challenge was of merit. The Court found that the state holds title to the land under the navigable waters of Lake Michigan: ". . . It is a title held in trust for the people of the state that they may enjoy the navigation of the waters . . . free from obstruction or

<sup>6</sup>*Martin v. Waddell*, 41 U.S. 367 (1842).

<sup>7</sup>*Id.* at 411.

<sup>8</sup>*Id.*

<sup>9</sup>*Id.* at 413.

<sup>10</sup>152 U.S. 1, 11 (1894).

<sup>11</sup>*Id.* at 14.

<sup>12</sup>146 U.S. 387 (1892).

interference of private parties."<sup>13</sup> Such a relinquishing of control over these lands, was, the Court felt, inconsistent with the exercise of the public trust:

The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.<sup>14</sup>

Public trusts cannot be placed entirely beyond the control of the state and any grant, such as the one made by the Illinois legislature, is necessarily revocable, "and the exercise of the trust by which the property was held by the state can be resumed at any time."<sup>15</sup>

The *Illinois Central Railroad* decision is a landmark decision in the field of public trust. The United States Supreme Court unequivocally held that the title to land under navigable waters is held by the state subject to a public trust and cannot be relinquished to a private enterprise at the expense of the people. This case is the springboard from which the more modern decisions have made use of this ancient doctrine.<sup>16</sup>

#### "PUBLIC TRUST" IN THE 20TH CENTURY

The public trust doctrine has been rarely used in 20th Century United States. Only the state courts of Wisconsin and Massachusetts have employed the doctrine to protect their resources.

Wisconsin has three decisions which make use of the doctrine either directly or indirectly. In 1927, a case similar to the *Illinois Central* case arose. The Wisconsin state legislature had granted shore property along Lake Michigan to a private steel company. In the resulting case of *Milwaukee v. State*, the Wisconsin Supreme Court recognized that there was a trust reposed in the state and that the state was required not only to preserve the trust but also to promote it.<sup>17</sup> However, the court said:

It is not the law that the state must forever be quiescent in the administration of the trust doctrine to the extent of leaving the shores of Lake Michigan in all instances in the same condition and contour as they existed prior to the advent of civilization.<sup>18</sup>

Consequently, the grant to the steel company was found to be within the scope of the trust. Public navigation was being enhanced and the private gains were merely incidental to procurement of the public interest. The above case, when read with the two later Wisconsin cases,<sup>19</sup>

<sup>13</sup>*Id.* at 452.

<sup>14</sup>*Id.* at 453.

<sup>15</sup>*Id.* at 455.

<sup>16</sup>See *infra* at 178-80 for comparison with state court decisions.

<sup>17</sup>193 Wis. 423, 214 N.W. 820, 830 (1927).

<sup>18</sup>*Id.*

<sup>19</sup>*State of Wisconsin v. Public Service Commission*, 275 Wis. 112, 81 N.W.2d 71 (1957); *Muench v. Public Service Commission*, 261 Wis. 492, 53 N.W.2d 514 (1952).

suggests that Wisconsin will, when dealing with navigable water, require a weighing of those benefits which accrue to the public by leaving the water in its natural state against those benefits which will result from the building of a dam<sup>20</sup> or from dredging and filling.<sup>21</sup> No change, however, will be allowed in the navigable waters unless the public benefits derived from such alteration exceed the benefits presently existing.

For example, in the *Wisconsin v. Public Service Commission* case, the court said that a permit allowing the city of Madison to dredge and fill part of Lake Winga was not in violation of the trust. The court reasoned that the improved bathing and parking benefits outweighed the negligible uses of the land and water if left as it was.<sup>22</sup>

In the state of Massachusetts, the public trust has been interpreted to mean that a use of public land is not to be diverted to another inconsistent use without explicit legislation to that end.<sup>23</sup> In that case, private citizens obtained a writ of mandamus invalidating a lease of 4,000 acres of rural park land upon which an aerial tramway and ski resort were to be constructed. The court could find no grant of power to permit use of public lands for what was, in part, a commercial venture for private profit.<sup>24</sup> In the absence of explicit legislation, it is presumed that the state does not intend to divert trust properties in such a manner as to lessen public uses.<sup>25</sup> The case of *Robbins v. Department of Public Works* involved an attempted transfer of land from a metropolitan district commission to the Department of Public Works. The case reaffirms the above proposition concerning inconsistent uses and further requires that "the legislature should express not merely the public will for the new use, but its willingness to surrender or forgo the existing use."<sup>26</sup>

The concept of public trust as employed by the state courts in Wisconsin and Massachusetts is not as demanding a trust as that employed by the United States Supreme Court cases. This is due to the difference in fact situations confronting the courts. The earlier United States Supreme Court cases<sup>27</sup> suggest that, via the public trust doctrine, the people have an *absolute* interest in the land or water which cannot be unconditionally conveyed under any circumstances. On the other hand, the state courts of Wisconsin and Massachusetts interpret the doctrine as requiring a *balancing* of interests. If a new use by a public enterprise will enhance the public benefit of the land or water, then such a use is within the scope of the trust.

<sup>20</sup>*Muench v. Public Service Commission*, *supra* note 19.

<sup>21</sup>*Wisconsin v. Public Service Commission*, *supra* note 19.

<sup>22</sup>*Id.*

<sup>23</sup>*Gould v. Greylock Reservation Commission*, 350 Mass. 410, 215 N.E.2d 114, 121 (1966).

<sup>24</sup>*Id.* at 126.

<sup>25</sup>*Id.*

<sup>26</sup>355 Mass. 328, 244 N.E.2d 577, 580 (1969).

<sup>27</sup>*Martin v. Waddell*, *supra* note 6; *Shively v. Bowlby*, *supra* note 10; *Illinois Central Railroad v. Illinois*, *supra* note 12.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Although the public trust concept appears rarely in federal case law, it appears with even less frequency and force in state constitutions and statutory provisions.

The constitution of the state of Virginia makes a very limited use of the trust concept and applies it only to the natural oyster beds in that state.<sup>28</sup> The state of Washington has a constitutional provision which establishes harbor lines and provides that the water beyond such lines shall be reserved forever for landing wharves, streets, and other conveniences of navigation. This provision in effect sets up a public trust for navigation without specifically mentioning trust, *per se*.<sup>29</sup>

The two newest states, Alaska and Hawaii, have constitutional provisions which closely approximate the trust concept. Section 1 of Article VIII of the Alaska Constitution states: "It is the policy of the state to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest." Section 3 of the same Article provides: "Wherever occurring in their natural state, fish, wildlife, and water are reserved to the people for common use."

Article X of the Hawaii constitution reads: "The legislature shall promote conservation, development and utilization of agricultural resources, and fish, mineral, forests, water, land, game and other natural resources."<sup>30</sup>

### MONTANA

Article 17 of the Montana constitution explicitly makes use of the trust doctrine for protecting public lands. Section 1 reads:

All lands of the state that have been, or that may hereafter be granted to the state by congress, and all lands acquired by gift or grant or devise, from any person or corporation, shall be public lands of the state, and shall be held in trust for the people, to be disposed of as hereafter provided, for the respective purposes for which they have been or may be granted, donated or devised; . . . (Emphasis added)

Montana has enacted a number of statutes which lend substance, albeit a limited substance, to the idea of trust. Chapter 9 of Title 81 of the Revised Codes of Montana 1947<sup>31</sup> deals with the sale of state lands. R.C.M. 1947 Section 81-901 states that lands classified as timberland shall not be subject to sale, although the timber thereon may be sold. R.C.M. 1947 Section 81-902 states that all coal, oil, oil shale, gas, phosphate, sodium and other mineral deposits, except sand, gravel, building stone and brick clay are reserved from sale except upon a rental and

<sup>28</sup>VA. CONST. art. XIII, § 175.

<sup>29</sup>WASH. CONST. art. XV, § 1.

<sup>30</sup>HAWAII CONST. art. X, § 1.

<sup>31</sup>REVISED CODES OF MONTANA, §§ 81-900's (1947) [hereinafter R.C.M. 1947.].

royalty basis. R.C.M. 1947 Section 81-903 reserves from sale, all state lands bordering on navigable streams and all state land bordering on navigable lakes. R.C.M. 1947 Section 81-2301 provides that all abandoned beds of navigable streams and lakes and all islands in such streams belong to the state of Montana to be held in trust for the benefit of the public schools of the state. In 1967, the Montana State Legislature passed a revenue oriented statute to the effect that:

It is in the best interest and to the great advantage of the state of Montana to seek the highest development of state-owned lands in order that they might be placed to their highest and best use and thereby derive greater revenue for the support of the common schools, . . .<sup>31</sup>

In the 1971 session of the Montana legislature, the idea of a trust in relation to the environment was reaffirmed. Just as importantly, this assembly recognized that every individual has a right to a healthful environment. As passed, House Bill 66, known as the "Environmental Policy Act" (hereinafter E.P.A.), states that:

The purpose of this act is to declare a state policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the state; and to establish an environmental quality council.<sup>32</sup>

The Act goes on in Part (a) of Section 3 to state that, "it is the continuing responsibility of the state of Montana to fulfill the responsibilities of each generation as *trustee* of the environment for succeeding generations."<sup>34</sup> (Emphasis added) Part (b) of Section 3 provides:

The legislative assembly recognizes that each person shall be entitled to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.<sup>35</sup>

Section 8 of the E.P.A. establishes an Environmental Quality Council which has authority to compile studies, conduct investigations, and make recommendations to the governor and to the legislature.<sup>36</sup> The

<sup>31</sup>R.C.M. 1947, § 81-2401.

<sup>32</sup>R.C.M. 1947, § 69-6502.

<sup>34</sup>R.C.M. 1947, § 69-6503(a)(1), *accord* 42 U.S.C. 4331(b)(1) which reads: "In order to carry out the policy set forth in this act . . . it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations."

<sup>35</sup>R.C.M. 1947, § 69-6503(b), *accord* 42 U.S.C. 4331(c) which reads: "The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment."

<sup>36</sup>R.C.M. 1947, § 69-6514, *accord* 42 U.S.C. 4344, which enumerates the duties and functions of the Council on Environmental Quality. Briefly, these functions are: (1) To advise and assist in the preparation of an environmental quality report. (2) To gather information concerning the conditions and trends in the quality of the environment. (3) To appraise the various activities of the Federal Government in light of the policy set forth in this Act. (4) To recommend to the President policies to



only power the Council has is to investigate books and records of any department or agency of the state<sup>37</sup> and to compel attendance of witnesses at the Council hearings.<sup>38</sup> Once the Council holds its hearings, makes its findings and evaluations, it is powerless to do anything other than recommend that action be taken by the governor or the legislature.

It is urged by this author that while the E.P.A. embodies a commendable statement of policy, the Act is entirely too discretionary. After making its studies, the Council merely recommends to another arm of the government and then hopes that action will result. The people of Montana need more than recommendations; they need something which will compel compliance with the policy propounded by the E.P.A. Without any compulsory language, the "enjoyable harmony between man and his environment" is nothing more than an lofty ideal and the Environmental Quality Council would appear to exist merely to appease the environmentalists.

The Montana E.P.A. does employ some useful language which needs to be put in a non-discretionary context. For example, the section recognizing that each person is entitled to a healthful environment should be adopted on the constitutional level. The right to a healthful environment, as recognized by the E.P.A., is certainly no less fundamental than our constitutionally protected rights to freedom of speech, press and religion and must be put on a par with those rights. Not only must the right to a healthful environment be constitutionally *recognized*, but it must also be constitutionally *protected*. The mere recognition of an individual's right to a healthful environment is meaningless if no means of enforcing that right are afforded to the individual. If an enforcement provision is not included in the new constitution, the citizens of Montana might well resign themselves to a future of mere lip service to their supposed right to a "healthful environment" because chances are slim that statutory enforcement provisions will be enacted.

The political realities of the pollution problem are such that legislative bills which actually confer power on someone or some agency to do something about pollution are destined to be rejected.<sup>39</sup> The major polluters are the larger business enterprises which can afford to cam-

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foster and promote the improvement of the environment. (5) To conduct investigations relating to environmental quality. (6) To document and define changes in the environment. (7) To report at least once each year to the President on the condition of the environment. (8) To furnish studies with respect to matters of policy and legislation as the President may request.

<sup>37</sup>R.C.M. 1947, § 69-6515, accord 42 U.S.C. 4344.

<sup>38</sup>R.C.M. 1947, § 69-6516, accord 42 U.S.C. 4344.

<sup>39</sup>Senate Bill No. 98 of the 1971 Session of the Montana Legislature, if passed, would have provided for actions for declaratory and equitable relief for protection of the air, water, and other natural resources and the public trust therein. House Bill No. 507 of the 1971 Montana Legislature, if passed, would have secured citizens a right of action to protect the natural resources of the state and to insure enforcement of regulations to protect the natural environment.

paigned and to lobby during the legislative process. The individual citizen whose right to a "healthful environment" is at stake, does not have the financial resources with which to campaign and lobby. His interests appear minimal when compared to the cries of economic destruction put forth by businesses who are confronted with the specter of clean air and water standards.

The right to a healthful environment is so fundamental and so basic that it should be constitutionally provided for and constitutionally protected. The citizens of Montana should not have to resort to the caprices of the political arena, pitting themselves against the monied interests in order to insure their health and well-being.

In summary, then, it is apparent that Montana, through its present constitution and statutes, is making use of the trust concept for environmental purposes. The tenor of the statutes passed prior to the Montana E.P.A. is basically negative, i.e. these statutes merely state that certain lands and resources are not to be sold but are to be held in "trust". Not until 1971, in the Montana E.P.A., did the phrase "being held in trust" come to have any meaning other than "shall not be sold". The Montana E.P.A. finally introduced the affirmative policy of promoting a healthful environment for the citizens of today and for future generations.

Even with the Montana E.P.A., the trust policy in this state remains inadequate to afford the needed protection. It is imperative that the new constitution give lasting substance to this idea of trust by (1) generally stating the nature of the trust, its goals and ideals; (2) making the trust applicable to water and air as well as public lands; and (3) providing the individual as well as the state a means of enforcing the trust.

The Montana E.P.A. touches upon the first two constitutional deficiencies mentioned above by stating an affirmative policy which concerns the *whole* environment. The E.P.A., however, does not touch the third deficiency, enforcement, although it does take the additional step of explicitly recognizing the individual's entitlement to a healthful environment.

Public trust has been and should be employed on the constitutional level in Montana. The individual's right to a healthful environment, however, has thus far only been acknowledged on the statutory level. This right, too, deserves constitutional recognition. In the following constitutional proposal, these two ideas are integrated in an attempt to afford a broad and adequate protection to Montana's natural heritage.

#### PROPOSAL FOR THE NEW CONSTITUTION

- (1) Each person has a right to a healthful environment and each person has a responsibility to contribute to the preservation and enhancement of the environment.

(2) The use of the air, water and public lands shall be a privilege granted only in the public interest and with regulations imposed by authorized agencies.

(3) It is the policy of the state of Montana to hold in trust for the people and to conserve the air, water, public lands and other natural resources by purchase, by withdrawal from use or by regulation; to provide, or to assist the counties and municipalities in providing facilities for recreation; to establish and maintain parks, forests, wilderness areas and prairies; to improve streams and other waters; to insure the purity of the air and water; to control the erosion of soils; and to do all else necessary for the protection of the natural heritage.

(4) The attorney general, any political subdivision of the state, any agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may maintain an action in the district court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against the state, any political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction.

The first section of the proposal is taken from Section Three, Part (b) of the 1971 Montana E.P.A. and part (c) of its Federal counterpart.<sup>40</sup> Both the state and the federal E.P.A. use the wording "entitled to a healthful environment". This is replaced in the proposal with the word "right" since constitutional language should be more affirmative than the policy statement of the E.P.A. The first proposal confers both a right and a duty upon the individual person. Each person must bear the responsibility of preserving the environment as a part of his right to a healthful environment. The determination of what does and does not constitute a "healthful environment" would be left to a specialized department such as the Environmental Quality Council or the Board of Health. Presumably this section will be interpreted to mean that no one will be allowed to discharge any quantity of foreign substance into the air or water if such substance proves injurious to animal and plant life.

The second section was composed in an attempt to incorporate the Alaska and Hawaii constitutions<sup>41</sup> with the three principles outlined by Professor Sax as being the historical basis of the public trust doctrine.<sup>42</sup> Air and water are of such prime importance to each individual that they should not be made subjects of private ownership. When the air and water are used by private enterprises, which they must be, the use should be subject to regulations which insure that the welfare of the individual citizen is not being sacrificed for the economic gain of a private business.

The third section is the basic trust provision setting forth the affirmative policy of conserving and insuring the purity of the environ-

<sup>40</sup>See *supra* note 35.

<sup>41</sup>ALASKA CONST. art. VIII, § 1; HAWAII CONST. art. X, § 1 *supra* note 30 and accompanying text.

<sup>42</sup>Sax, *supra* note 5 and accompanying text.

ment.<sup>43</sup> Although the proposal provides that the state can bring this policy to bear by "purchase" or by "withdrawal", this does not work to the exclusion of private industry. This proposal merely subjects the users to appropriate regulation. Such regulation would probably come from existing agencies such as the Board of Health, The Water Resources Board, and the State Soil Conservation Committee.

The fourth section is taken from a Michigan Act<sup>44</sup> passed in 1971 which allows any arm of the state government or any person to maintain an action against any other arm of the state or any other person in order to protect the public trust from impairment or destruction.<sup>45</sup> With the adoption of this section, the "entitlement to a healthful environment" would become a substantive right rather than the mere token it now is.

The passage of the fourth section would not subject private businesses to a barrage of unjustified law suits by individual persons. This provision could easily be followed up by statutory law which could allow the defendant to show, by way of an affirmative defense, that there is no feasible and prudent alternative to defendant's conduct and that such conduct is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction.<sup>46</sup>

These four sections, if accepted by the Convention, would hopefully be placed in one article of the new constitution. For purposes of continuity and simplicity, it would be best to have the right and the remedy located together as well as to have the policy and the means of effectuating the policy together. However, certain parts of the proposal might arguably be placed in separate articles of the constitution. For example, the first proposal might be placed in the bill of rights.

### CONCLUSION

The public trust concept is not foreign to the state of Montana for two reasons. First, the concept derives from the common law of England and Montana is a common law state. Secondly, Montana employs the concept in its present constitution. Although the Montana courts have not utilized the doctrine, it has been developed by the United States Supreme Court and the state courts of Massachusetts and Wisconsin.

<sup>43</sup>This is essentially the present policy of the Montana Environmental Policy Act contained in R.C.M. 1947, §§ 69-6501 through 69-6517.

<sup>44</sup>Michigan Statutes Annotated § 14.528(202).

<sup>45</sup>This provision is not entirely new. Other states have, or are considering similar provisions, as is the federal government. See SAX, *supra* note 5 at 247, n. 1. A bill modeled after the Michigan law was introduced in the United States Senate (S. 3575, Senators Philip Hart and George McGovern) and in the House of Representatives (H.R. 16436, Representative Morris Udall) on March 10, 1970. Bills have also been introduced in a number of other states, including New York, Massachusetts, Colorado, Pennsylvania, and Tennessee. Similar bills were introduced in the 1971 Montana Legislature, and all defeated, as H.B. 33, H.B. 507, S.B. 98, S.B. 276.

<sup>46</sup>Michigan Statutes Annotated § 14.528(203).

Although an argument might be made that there exists a discrepancy between the doctrine as used by the United States Supreme Court<sup>47</sup> and the doctrine as used by the state courts,<sup>48</sup> the two approaches are compatible. The United States Supreme Court interprets the doctrine to mean that the people have an absolute interest in navigable water and the lands under them. This absolute interest cannot be alienated — the state cannot totally abdicate its trust responsibilities by unconditionally granting the trust property to private interests. The state courts, confronted with the problem of what is a permissible use of public lands rather than complete alienation thereof, found, that in light of the public interest, trust property can only be used by private parties if there is a balancing of interests whereby the public benefits accruing from the new use exceed those of the existing uses.

Although public trust has been recognized by the United States Supreme Court, Montana is now faced with the need and opportunity to reaffirm the doctrine. The United States Supreme Court, in employing the doctrine, relied on the English Common law — not the United States Constitution. Considering the lack of constitutional foundation and the relative antiquity of the Supreme Court cases,<sup>49</sup> it is apparent that public trust needs to be reaffirmed and revitalized if it is to be used in the solution of modern problems.

It is clear that the doctrine of public trust should be adopted by the Montana Constitutional Convention; the splendor of Montana's natural heritage deserves to be "held in trust for the people."

<sup>47</sup>See *supra* notes 6, 10, and 12 and accompanying text.

<sup>48</sup>See *supra* notes 17, 19, and 23 and accompanying text.

<sup>49</sup>*Martin v. Waddell*, (1842) *supra* note 6; *Shively v. Bowlby*, (1894) *supra* note 10; *Illinois Central Railway v. Illinois*, (1892) *supra* note 12.