Senate Bill 236
April 3, 2017
Presented by Rebecca Dockter
House Judiciary Committee

Mr. Chairman and committee members, I am Rebecca Dockter, Chief Legal Counsel for the Montana Department of Fish, Wildlife and Parks (FWP). I am here today on behalf of the administration in opposition to Senate Bill 236.

FWP is here because of its res ponsibility, found in its mission, to "provide for the stewardship of the fish, wildlife, parks, and recreational resources of Montana while contributing to the quality of life for present and future generations." This duty to the people of Montana means that FWP must point out the risks posed by SB 236. It also means standing up for the powerful protections in the current constitution, which do not need to be fixed.

The effort to enshrine the "right to hunt, fish and trap" into Montana's constitution risks numerous and grave consequences. These risks can be narrowed down to a few categories. First, the state will face certain risk of increased litigation. Second, that litigation could result in overturning reasonable regulations and laws that this legislature, the department, and the Fish and Wildlife Commission have enacted to protect Montana's fish and wildlife resources; the very resources that support hunting, fishing and trapping. And third, if these risks are realized, they will foundationally change the state's management – its funding, its favor for residents, and the very fabric of our fish and wildlife harvest heritage. At that point, it will be too late; the damage will have been done.

First, SB 236 would create a constitutional right for every individual hunter, angler and trapper. On the surface, this looks enticing, but it also creates the right to challenge in court any law, regulation or rule that could affect that right. In truth, it's an attorney's dream. Unfortunately, FWP would be spending countless dollars defending state laws and regulations in court, rather than actually managing fish and wildlife.

In other states that have a right enshrined in their constitutions, there are numerous examples of litigation that provide a colorful insight into the challenges we can expect. Regarding the right to fish, one angler challenged his conviction for trespass on a closed aqueduct where 9 people lost their lives due to unsafe fishing conditions. Another challenge was on an angler's ability to utilize a closed domestic water supply reservoir for fishing. A challenger invoking his right to hunt claimed his felony violation of fish and game law was unconstitutional because it allowed revocation of his licenses upon conviction. In another twist, the fish and game agency argued that because of the constitutional right to fish, the agency application for minimum instream water flows should be treated with more favor than other water users because of the right to fish protected in the constitution. In yet another case, an individual claimed to have the right to operate a sporting clay facility without zoning or ordinances, under the protection of a constitutional right to hunt. In many other cases, regulations have been challenged – a restriction on the take of striped bass, a prohibition on the use of gillnetting, the use of scuba gear to fish for shellfish, even the need for a

license to hunt in the first place. These real examples of litigation are only a few of the numerous ways individuals will challenge laws that regulate a constitutional right in even the most reasonable ways. Most Montanans want to continue to allow this legislature, the department, and the commission to determine how to manage fish and wildlife, not the courts.

In some of these cases, the challengers won. The closure of the domestic water supply reservoir was not allowed because it infringed upon the individual's right to fish. Not only was the state ordered to keep the reservoir open to fishing, it had to ensure a public fishing program was in place and keep the reservoir at full pool to ensure fish were abundant. With the sporting clays facility, the court found that the right to hunt did not apply because the shooting was at an inanimate object, and not hunting per se. But what if it was an establishment that allowed hunting? Some may call that a game farm. Are we prepared to protect game farms under the right to hunt?

While in other cases the state regulation was upheld, the point illustrates the certain risk we take on by leaving it to the courts to determine our fish and wildlife management, to say nothing of the costs of litigation. Of the 14 states that have such a right, only 4: Rhode Island, Tennessee, Idaho, and Virginia, have had the right long enough to see challenges considered in court. The other 10 states have no indication yet on how courts will rule.

Finally, if even one of these risks is realized, it may present grave outcomes that cannot be undone, absent another attempt at changing the constitution. The real damage could be to upset the favorable treatment residents have enjoyed – in pricing and in their chances for special drawings. It stands to reason that if a court requires the department to equalize resident and nonresident licenses, prices will land somewhere in the middle, with nonresidents getting many more tags and a huge price cut, and residents getting a gigantic price increase. Are we really prepared to take that risk?

Other destructive outcomes involve the inability to enforce safety regulations, bag limits, and laws that call for loss of privileges, because they infringe on a constitutional right. In addition, a court could weigh the constitutional hunting, fishing and trapping right more heavily than water rights or private property rights. While SB 236 attempts to address private property issues, the decision is not up to the department or commission, or any legislator. Rather, the courts would have to determine whether the language in SB 236 protects the property and water rights that would be pitted against the right to hunt, fish and trap. Again, is this worth the risk?

In each of these cases or any case, we have to ask ourselves: Is it worth the risk? Alternatively, we can only be certain of a few things. The proof is in the pudding: Montana's current Constitution will continue to provide protection for our harvest heritage. The language in Article IX, Section 7 is incredibly powerful in its simple, clear, and broad scope when it 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." The appropriate protections are already enshrined in the Montana Constitution.

We can also be certain that Montana's harvest heritage contains a history of hunting, fishing and trapping. This heritage can be found in journals of famous explorers, history books, oral stories, and 200 years of literary and media accounts of these traditions. By way of history, tradition, and practice--hunting, fishing, and trapping are forever preserved in our constitution.

We can further be certain the department will continue to champion current constitutional protections for hunting, fishing and trapping--even as others may so readily discard them. In the early 2000's, the department played an integral part in enshrining the current protections. The department has been instrumental for over 100 years in ensuring that reasonable regulations protect the fish and wildlife that support hunting, fishing and trapping. Indeed, Director Williams has already committed to convening a group of stakeholders to study the current language and make recommendations for modifications to address any shortcomings. Inclusiveness, time, and study will ensure we get it right.

Unfortunately, we cannot be certain of avoiding the risks posed by SB 236. If even one of them is realized, it will be too late. The damage will have been done.

For these reasons, the administration opposes SB 236. Thank you for your time today.