Senate Bill 236
February 16, 2017
Presented by Rebecca Dockter
Senate Fish and Game 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.

With all due respect, SB 236 is a solution in search of a problem. The Montana Constitution should be championed for its protections already afforded to Montana's hunters, anglers and trappers, and it should not be altered absent an overwhelming need to do so. The Montana Constitution currently states, at Article IX, Section 7: "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." This language is not broken.

SB 236 is an attempt to enshrine protections for trapping in constitutional language that we believe are already there. The beauty of the current Montana constitutional language is that, by way of history, tradition, and practice, it already welcomes trapping into its protections. The power is in the simple, clear and broad scope of the terms "harvest" and "heritage." Given that the public soundly rejected an initiative in November to prohibit trapping on public lands, and that the current language is all-encompassing, a change to the constitution risks too much in answer to what few perceive is a problem.

The risks to passing SB 236 are numerous and go beyond the department, but can be narrowed down to these: First, the state and the Fish and Wildlife Commission could face litigation for almost every management action taken. Second, basic management actions may be deemed unconstitutional by the courts as infringing upon an individual's fundamental right to hunt, fish and trap. And third, the three legislative exceptions allowed at Section 2, lines 21-26 of the bill do not come close to capturing all of the activities necessary for fish and wildlife management and conservation, but in fact serve to tie the hands of the legislature.

First, SB 236 would create a fundamental right to hunt, fish and trap for every individual hunter, angler and trapper. On the surface that looks enticing, but it enables grave consequences. The creation of a fundamental right also creates in every individual the right to challenge, in court, any law, regulation, or policy that could affect that right. In truth, it's an attorney's dream. Because of that fundamental right, and because of the individual right to challenge every management action, the courts would be repeatedly asked to be the ultimate arbiter as to whether management actions are constitutional. FWP would spend hunting and fishing license dollars defending in court the state's ability to manage fish and wildlife rather than actually managing that fish and wildlife. Rather, most Montanans want to continue to allow this legislature, the department, and the commission, each acting within their inclusive public processes, to determine how to manage fish and wildlife, not the courts.

Next, SB 236 raises the potential that laws being proposed or already in existence would be deemed unconstitutional. Because the right is "essential to pursuing life's basic necessities," the courts must apply the highest bar to test any law, regulation, or policy that could affect that right. Application of this standard means the department would have to demonstrate a "compelling state

interest" that is narrowly tailored to effectuate that interest, and that interest only. In other words, the fundamental right created by SB 236 would be valued equal in the eyes of the law to the right to free speech, the right to freely associate, the right to a vocation, the right to procreate, the right of privacy, etc. There are numerous laws and regulations currently on the books that would not meet this high bar. Many of them are long standing and fundamental to the world class fish and wildlife opportunities Montanans and others now enjoy.

For example, currently you have a bill before this legislature, SB 172, that would prohibit a parent who is 6 months late on paying child support from buying a hunting, fishing or trapping license until they pay their child support. This law could very well be found unconstitutional because it infringes upon the fundamental right of a person to hunt, fish and trap—even though there may be great legislative interest in so persuading parents to pay their child support. Similarly, there could be a challenge to any current law that limits the take of elk, deer, moose, sheep, etc. because it infringes upon a fundamental right to hunt. In addition, any current law, the violation of which results in the loss of a hunting, fishing and trapping license, could be deemed an unconstitutional infringement upon the fundamental right. These enforcement laws have been an effective deterrent to persons who aren't affected by paying a fine. These are just a few of many, many examples currently found in statute that courts may be compelled to find unconstitutional under this bill.

Finally, Section 1, lines 21-26 attempts to outline the only statutory allowances for fish and wildlife management and conservation. While these allowances may be an effort to list the management actions that pass constitutional muster, the short list is far from complete. For example, the language allowing fish and wildlife management and conservation to "only" be subjected to statutes that "scientifically manage fish and wildlife populations" (line 22) does not account for laws that guide principles of fair chase, societal values, safety concerns like hunter orange or hunter pink, closed seasons, waste of game prohibitions, and other matters that have little to do with scientific management of populations. In addition, SB 236's language allowing for fish and wildlife management and conservation to "only" be subjected to statutes which "provide that public hunting, fishing and trapping … are the preferred means and methods of controlling and harvesting fish and wildlife" does not take into consideration other methods necessary for management. For example, the quick and immediate removal of invasive species, the removal of an unwanted introduced species like feral hogs, and the trapping of species for educational purposes do not fit into the "preferred method."

Title 87, the title dedicated to fish and wildlife management, is replete with examples of management and conservation that simply do not fit into the narrow categories created in SB 236. Instead, the effect of SB 236 will be to constitutionally bind the hands of not only the legislature, but of the department and the commission as well.

In short, SB 236 is not only unnecessary, but counterproductive and dangerous to both legislative and executive prerogative. The beauty of the "harvest heritage" language currently found in the Montana Constitution is in both its clear simplicity and its broad sweep and application. It already provides the strongest protections for hunting, fishing, and yes, trapping.

For these reasons, the administration opposes SB 236. Thank you for the opportunity to appear before you today.