Federal Constitutional Issues Affecting Access to Public and Private Resources

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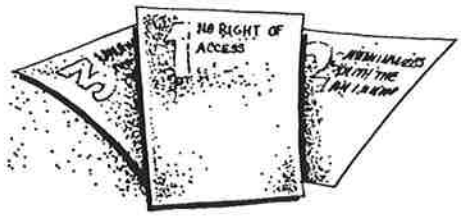

A discussion of three positions. (1) The Federal Constitution provides no right of access. (2) The Federal Constitution authorizes both the state and federal governments to provide for access. (3) The Federal Constitution imposes express limits on the purposes for providing access.

Montana has been extensively involved with several issues dealing with federal constitutional law as of late, which raise an assortment of constitutional law questions.

Let me state my position in a nutshell. Basically, there are three propositions that I will mention, and then I will briefly expand on these.

First of all, the Federal Constitution provides no right of access. I do not think anyone who is arguing the interest in access can look to the Constitution and say they have a federal constitutional right.

Secondly, I think it is clear that the Federal Constitution authorized both the state and federal governments, and also the local governments, to provide for access. The Constitution does not say anything about access. It does say that the federal government can do an assortment of things, articulated in an article on Section 8 of the Constitution. It does not say much about what states can do; it says virtually nothing about what states can do in an affirmative sense. It obviously is interpreted to mean that the states can exercise police power, and they obviously have a lot of authority, and among them is a constitutional matter to provide access. The question is how do the states go about doing this?

My third general proposition would be that the Federal Constitution imposes express limits on the purposes for which government can provide access, and the means which can be used by state, federal, and local governments to provide access.

In defining what the Federal Constitution says, we can take the Attorney General's point of view, which agrees with what the U.S. Supreme Court says the Constitution means. If you read through this, he is not wrong. But we all know that as dynamic as the courts have been on this issue, they are subject to change.

My interpretation of the Constitution is based on what I read the Supreme Court of the United States has said the Constitution means. As I stated, it is clear that there is no constitutional right of access. In particular, it is clear that the public trust doctrine is not rooted in the Federal Constitution.

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The Federal Constitution authorized federal and state governments to provide access in several ways. State, federal, and local governments can go out and buy access. That is one alternative. The government can go out and regulate for access without compensation. That is the heart and soul of the constitutional issue that we face with respect to the access issue and federal constitutional law. There is no question that government has the authority to acquire access so long as they are acquiring access for public use. The public use provision of the Constitution has been so broadly interpreted by the U.S. Supreme Court in a recent Hawaii decision that I would have to say that the public use limitation is no limitation at all. The public use limitation as the Supreme Court interpreted in this Hawaii case is that if the legislature says it is a public use, it is a public use; total deference to what the state legislature decides. So, if that is not a limit, although I would argue it should be, the limit then is this: if it is for public use, which is anything the legislature says, then all the government has to do is compensate for it, if it is a taking of private property. And if there is not private property, then you do not have to compensate because there was not any private property there in the first place. That, I think, is the real core question.

Now there is pending before the Supreme Court of Montana a well-known case which has been argued on the "takings" question with respect to the earlier decisions on the public trust doctrine. That question can be interpreted either under the Montana Constitution or the Federal Constitution. I assume the Court will address both. In terms of federal constitutional law, I think that what the "takings clause" means is that in total is a little different than what the "public use clause" means.

There are certain limits. It is clear the government cannot acquire and occupy a piece of private land to provide access without compensation. I do not think there is any question this is a taking of private property. This is where the public use doctrine comes in. The public use doctrine says by definition that there is no taking because there was no right to be taken. Public use is a mechanism that defines the boundaries of private property rights and as soon as we say there is a public right of access pursuant to the Public Trust Doctrine, I think we have eliminated the takings question.

Apparently, the Montana Supreme Court does not agree with that because I

understand that is the question they are considering. It is puzzling to me as a matter of theory how the Public Trust Doctrine authorized this access, but that the takings question is yet to be answered. That is the reason I am a critic of the modern application of the Public Trust Doctrine because I think it circumvents the Constitution as far as the language of the Montana Supreme Court.

Also, I wanted to mention that there is a case pending in the U.S. Supreme Court on the question of access: *Nolland vs. California Coastal Commission*. The issue as it was resolved by the California Court of Appeals is not directly addressed to the takings question. It is hard to know on what basis the U.S. Supreme Court will render it's decision. The case involves a private landowner who lives in an old house of 1,000 square feet on the California coast. He wants to build a new house. He went to the Coastal Commission for the necessary permits. He was told that since his house will be larger than 1,600 square feet, this is considered new construction by California law. If it was reconstruction, he would be fine; but new construction right of way must be dedicated for access to the coast. The owner and his wife believe that this is a taking of private property. The Supreme Court will resolve this, but they are known for resolving tough issues like this on some other ground by avoiding it.

There are many questions, but the central one deals with private property in the federal constitutional sense. (IRWA)

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