



FROM OUR MOUNTAINS TO OUR LAKE

Hope

The Legal Scene

Montana State Court: Rock Creek is Ecologically Unique

2011 was an eventful year in our legal campaign aimed at preventing construction of the mine. Decisions were rendered in both state and federal courts on issues ranging from road construction and sediment to grizzly bear habitat. As you will read, one decision effectively halted any construction activities by Revett Minerals. The other ruling perpetuates bad agency science by allowing the US Fish and Wildlife Service to continue to ignore its mandate to recover threatened and endangered species.

On July 21, 2011, Helena District Court Judge Kathy Selley issued a favorable decision in our case challenging Montana's DEQ's issuance of a general storm water permit authorizing construction of the evaluation adit (the exploratory phase of mine construction). A general storm water permit is intended for ordinary construction activities in Montana and is not intended for the magnitude of road building activities and related storm water discharges that would result from the construction of an evaluation adit.

The construction phase for the exploratory adit is predicted to generate from 400 to 1,400 tons of sediment per year destined for Rock Creek. Identified by Montana's Bull Trout Recovery Team as a key recovery stream in the Lower Clark Fork River, approximately three miles of Rock Creek have been designated as "critical habitat" for spawning, rearing, feeding, and migration. These activities would be greatly impaired from the introduction of massive amounts of sediment. Construction-generated sediment would degrade habitat and impair reproductive success by smothering and burying eggs and fry in fine materials. The increase in sediment loading from 400 tons/per year is estimated to be 46 % in the West Fork of Rock Creek, 20 % in the East Fork of Rock Creek, and 38 % overall for the entire Rock Creek watershed.

Due to its importance for bull trout, Rock Creek is considered to be "ecologically unique." Under Montana's water quality laws, construction activities that impact unique ecological resources need to go through a more extensive permitting process that allows public comment. Judge Seeley agreed that the state was in error when it used a "generic permit" that covers ordinary



Bulltrout U.S. Fish and Wildlife Service

construction activities because of the impacts to Rock Creek's fishery. As a result of her finding, the general permit was declared void and Revett was enjoined from discharging sediment related to road construction activities.

The state court's ruling requires Revett Minerals to apply for a pollution discharge permit (MPDES) that places limits on the amount of sediment that can be discharged to protect Rock Creek's native bull trout population. The mining company has decided not to apply for a permit and is appealing the lower court's decision to the Montana Supreme Court.

This will not be the first time that Revett has appealed a state court victory favorable to us. The mining company also appealed an earlier state court decision that invalidated their permit to discharge 3 million gallons of polluted wastewater into the Clark Fork River every day. The Montana Supreme Court upheld that ruling and the company lost their appeal. Our attorneys will be in court once again to defend this latest state court ruling aimed at protecting Montana's water quality.

The Ninth Circuit Court of Appeals: Bad Science Makes Bad Law

In 2010, a federal district court in Montana sided with the US Fish and Wildlife Service (Service) in its finding that the mine would not harm grizzly bears or bull trout. In its biological opinion for the Rock Creek mine, the Service authorized both the destruction of habitat and a significant increase in mortality for both species, yet it claimed the mine would not threaten recovery efforts. The

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Montana State Court: Rock Creek is Ecologically Unique

continued

Alliance appealed the federal district court's decision, and, in November 2011, the Ninth Circuit Court of Appeals in Portland issued its ruling.

In our appeal, our attorneys argued that the mine would drastically alter Rock Creek's ability to support bull trout by adversely modifying critical habitat with the introduction of massive amounts of sediment. This sediment would impede the ability of bull trout to thrive and reproduce such that the persistence of the bull trout population in Rock Creek would be at grave risk. Indeed, the Fish and Wildlife Service's own findings supported this conclusion, but trivialized the loss of this population because of the presence of other populations in the Columbia Basin. Unfortunately, the higher court's panel of three judges failed to understand the significance of the mine's impacts on bull trout recovery and designated bull trout critical habitat, in direct contrast to the state court judge in Montana who described Rock Creek as ecologically unique (see above).

The Rock Creek mine would result in the fragmentation and loss of a significant amount of grizzly bear habitat in the southern end of the Cabinet Mountains Wilderness where three of the perhaps last eight female bears in the Cabinet-Yaak Ecosystem reside. The mine would result in the direct loss of over 7,000 acres of habitat, and yet the Service is only requiring about a third of that amount of acreage to be secured as mitigation habitat. In a twisted sense of logic, the federal agency is actually claiming that the mine would improve the dire situation for the struggling small population of bears in the ecosystem because of mitigation measures that the mining company would implement such as a bear education specialist and secure garbage receptacles.

Our case in front of the Ninth Circuit was based on a challenge of the flawed science that the Service used to write its biological opinion and the mitigation measures it crafted to allow the mine to proceed in the face of irretrievable losses of both habitat and individual bears and bull trout. Unfortunately, the higher court summarily dismissed our claims without adequately considering their merits. Rather than reviewing the facts, the court unilaterally deferred to the US Fish and Wildlife Service. Blind deference is often shown to agency

decisions, which makes it all the more imperative for them to be based on sound science.

The Service and Revett Minerals are spin-doctors and, in the case of grizzlies, the higher court actually bought into the claim that the mine would be good for bears—a veritable recovery plan for Cabinet-Yaak grizzly bears. In its opinion, the Ninth Circuit stated and affirmed that: “ The mitigation plan was so robust that the Fish and Wildlife Service concluded it would in fact improve conditions over the long-term over the existing conditions, ultimately promoting the recovery of the [local] grizzly bear population.”

In truth, it is likely that the court never even looked at the mitigation plan, and, if it did so, it was a cursory examination. With the mine projected to displace bears from the southern end of the Cabinets and raise current mortality levels, which are already too high to sustain recovery, it is difficult to understand how the court could have accepted the mitigation plan had it given it a careful and unbiased analysis.

At the end of the day, bad science led to bad law and a decision that could spell doom for Cabinet-Yaak grizzly bears and bull trout in Rock Creek and the Lower Clark Fork River if the mine is ever built. The Rock Creek Alliance will continue to work to prevent the mine's construction while serving as a voice for our native fish and wildlife.

Thanks to the Guacamole Fund!

The Alliance would like to thank Tom Campbell and the Guacamole Fund for their support. We have been extremely fortunate to be a beneficiary of concert proceeds from musicians of national acclaim including Bonnie Raitt, Jackson Browne, Keb Mo', David Crosby, Graham Nash, Danny O' Keefe, and Jimmie Dale Gilmore. We are grateful to the Guacamole Fund and to all of the musicians who generously support so many environmental and social causes.

Kootenai Plans to Motorize Popular Rock Lake Trail

The Kootenai and Idaho Panhandle National Forests recently released their 2012 Draft Land Management Plans. These plans will dictate how our forests will be managed for the next decade or more, and we encourage everyone to get involved and comment.

The Draft Forest Plan for the Kootenai proposes to reclassify some of our most popular hiking trails to allow off road vehicles. One of the routes threatened with becoming motorized is the trail to Rock Lake. This trail is the most popular hiking destination to the Cabinet Mountains Wilderness. The plan proposes to allow off road vehicles to use the trail all the way to Rock Creek meadows.

The southern end of the Cabinets is already threatened by Revett's Rock Creek mine and Mine's Management's proposed Montanore mine. It's a good bet that this drastic change for the Rock Lake trail is due to a request by these mining companies for better access to their claims up the East Fork of Rock Creek.

The Forest Service is listening to the mining companies and to those who want this trail motorized. It's time they hear from us. Please help keep the Rock Lake Trail non-motorized by commenting on the proposed change. To see the 2012 Kootenai Forest Plan, go to: www.fs.usda.gov/detail/kootenai/home

Revett Minerals Lacks Mine Approvals and Permits

Revett Minerals is telling investors it will begin construction of the mine in 2013. In reality, the mining company is missing authorization to break ground and has NO permits to discharge wastewater. Here's why:

- The exploratory phase of the project was issued an improper permit by Montana DEQ, which was revoked by a Montana state court in 2011.
- In 2010, a federal district court in Missoula voided

the 2003 Record of Decision from the Forest Service authorizing construction.

- The permit to perpetually discharge 3 million gallons of mine wastewater to the Clark Fork River was revoked by the Montana Supreme Court in 2008.
- In 2006, a Montana state court invalidated the permit allowing the mine to discharge tailings seepage containing arsenic into groundwater.

Your Opportunity to Weigh in

This summer, the Forest Service is expected to release a Supplemental Final EIS (SFEIS) in response to the 2010 federal court decision that resulted from our challenge of the Record of Decision authorizing the mine. The ruling mandated the agency to address shortcomings in the mine plan related to sediment, fisheries, and water quality.

The issuance of an additional EIS will give the public an opportunity to submit comments on those aspects of the mine plan that have changed in response to the court order.

It has been several years since the public has had a say in decisions critical to protecting our water quality from the mine, so this will be an important time to weigh in.

If you would like to receive an electronic alert and aren't sure if we have your current email address, please send a request to be put on our e alert list to: info@rockcreekalliance.org.

*Rock Lake ,Tim Cady*

An Update from Save Our Cabinets

In November 2011, the US Forest Service and Montana DEQ released a Supplemental Draft EIS (SDEIS) for the proposed Montanore mine. Like the Rock Creek mine, the Montanore mine would tunnel beneath the Cabinet Mountains Wilderness to access the copper and silver ore sequestered beneath its mountains. The two mines would be less than an air mile apart.

Closely mirroring the Rock Creek mine in scope and effect, Montanore would be plagued with the same glaring environmental problems including long-term water pollution of area streams, above ground storage of millions of tons of mining waste, dewatering and contamination of wilderness lakes and streams, impacts to native fish and wildlife, and a massive industrial complex adjacent to the wilderness. Save Our Cabinets hired experts and reviewed the latest mine plan laid out in the massive three-volume EIS.

One of the most insidious aspects of the Montanore mine is the massive dewatering which would result from the excavation of an enormous mine cavity that would divert virtually all of the

groundwater in the region of the proposed mine. Ground water depletion and reduction in stream flows would occur in both the Kootenai and Clark Fork River Drainages. The East Fork of Rock Creek, the main stem of Rock Creek, and the East Fork of Bull River would be the hardest hit in the Clark Fork River Drainage. After mine closure, the east forks of both the Bull River and Rock Creek would lose an astonishing 100% of their ground water recharge! Making matters worse, groundwater levels would not be expected to improve until reaching a steady state 1,200 to 1,300 years after mining ceased, if at all. For the threatened bull trout dependent upon these streams for spawning, rearing, and feeding, any hope for recovery would be lost.

St. Paul and Rock Lake, two of the most popular hiking destinations in the wilderness, also would be heavily impacted from drastic drawdown of the area's groundwater. These subalpine wilderness lakes derive only a small amount of their water from rain and snowmelt and are heavily dependent upon

groundwater recharge. Located beneath Montanore's Rock Lake ore body, the water table surrounding Rock Lake would be lowered by as much as 1,000 feet with groundwater flows not returning to pre-mining levels for 1,000 years! St. Paul Lake, already a shallow lake, would dry up in the summer months becoming a mere pond.

Beyond the grave impacts of the Montanore mine are the inevitable cumulative impacts that would result from the permitting of both the Montanore and Rock Creek mines. Close in proximity and inescapably interconnected, the two mines would affect many of the same resources including the Clark Fork River, the Cabinet Mountains Wilderness, and threatened populations of grizzly bears and bull trout.

The compounding nature of the problems arising from these mines can be illustrated by looking at the area's bull trout fishery. Rock Creek and the East Fork of Bull River are the two most important streams for bull trout recovery in the Lower Clark Fork River "core area." In the 2006 Biological Opinion for Rock Creek, the US Fish and Wildlife Service acknowledged that the mine could wipe out the population of bull trout in Rock Creek, but rationalized its decision to allow this possibility by relying on bull trout in the East Fork of Bull River to maintain bull trout in the lower Clark Fork River. The opinion stated: "Anticipated impacts to bull trout (from the Rock Creek mine) are unlikely outside of the Rock Creek drainage and no activity is proposed in the Bull River drainage, the principal and most productive local population in the core area. Even in the unanticipated and unlikely event of extirpation of Rock Creek bull trout, Bull River fish and other local populations would remain unimpaired and would maintain the viability and functionality of the core area population."

Unfortunately for bull trout, the massive sediment predicted to fill Rock Creek from that mine's construction actually makes their extirpation "likely," and the East Fork of Bull River is no longer safe from mining. If the Montanore mine were built, the East Fork would become a barren zone for fish when the surface water critical for maintaining the stream's flow is siphoned away into the Montanore mine cavity.

Whether the mining companies and the permitting agencies admit it or not, these two massive mines are inexorably linked. Save Our Cabinets and the Rock Creek Alliance have raised this issue with the federal and state permitting agencies. At some point, the agencies will have to address cumulative impacts to the Clark Fork River Drainage, the Cabinet Mountains Wilderness, and threatened populations of bull trout and grizzly bear. By law, the

*Rock Lake ,Tim Cady*

Forest Service is required to consider "connected actions," "similar actions," and "cumulative actions" together with "direct," "indirect," and "cumulative" impacts. We will continue to force this issue with the Forest Service.



Save Our Cabinets, it is a Montana non-profit organization started by the Alliance to address the proposed Montanore mine. For more information on how you can help go to www.saveourcabinets.org



Earthjustice's Steve Machuda Committed to Protecting our Native Fish

In our last issue we profiled Roger Flynn, our pro bono attorney with Western Mining Action Project. The Alliance is also very fortunate to be represented by skilled attorneys with Earthjustice. In this issue we are profiling Steve Mashuda.

Steve is an attorney in Earthjustice's Northwest office in Seattle where he specializes in clean water and endangered species litigation.

Steve first gained an appreciation for the importance of clean water while growing up in Pittsburgh and experiencing the pollution that the Monongahela, Allegheny, and Ohio Rivers were subject to from a long history of steel making. As a child he acquired a passion for fishing, in rural northwestern Pennsylvania where there were healthy ponds filled with bluegill, sunfish, and bass.

While in college, Steve took a trip to the West and saw the mountains and forests of western landscapes for the first time. This solidified his career path in environmental law. While working towards a law degree from the Vermont Law School, Steve completed an internship in Bozeman. During that time, he fly-fished Montana's Yellowstone, Madison, and Gallatin Rivers, found his own special haunts in the back country, and enjoyed the area's stunning wildlife.

It came as no surprise that Steve returned to Montana after law school with a keen desire to help protect special places from logging, mining, pollution, and development. With a strong background in environmental law, Steve landed a position as an associate attorney for Earthjustice in their Bozeman office.



Steve Machuda of Earthjustice

After several years in Bozeman, Steve moved to Seattle and began focusing on water and fish, especially salmonids. Since that time, Steve has represented the Rock Creek Alliance in our federal litigation on behalf of bull trout. He has successfully argued that the Rock Creek Biological Opinion for bull trout is based on flawed science, resulting in federal court rulings that remanded the opinion back to the Fish and Wildlife Service on two different occasions.

The Alliance is indebted to Steve for his commitment and passion in protecting bull trout and their habitat in the Lower Clark Fork River Watershed from the Rock Creek mine.

A Tale of Abigail

For eons, bull trout have migrated from Lake Pend Oreille up the Clark Fork River to spawn in suitable tributaries. We have a tale to tell of one such fish, a bull trout, that would relive a cycle that began long before man ever wandered the shores of Lake Pend Oreille and the Clark Fork River, and long before pollution and sediment clouded many of the area's once pristine creeks, rivers, and lakes.

One fall day in the not too distant past, a bull trout quietly laid her eggs in the fine gravels of a mountain stream. Like those that came before her, she chose the cold waters of Montana's Rock Creek, one of the few remaining streams that still provides suitable habitat.

Winter would pass, the eggs would hatch, and the young fry would emerge the following spring. The young fish would remain in Rock Creek for the first few years of their lives. Some would become permanent residents, never leaving the secure waters of the stream. Others would live out their lives elsewhere, returning to Rock Creek only to spawn.

One of the fry was destined to be a traveler, and would one day soon begin a lifetime of wandering between the big waters of Lake Pend Oreille and the spawning waters of Rock Creek. Her name was Abigail and she was maturing into a young adult bull trout that would follow

A Tale of Abigail *continued*

the migratory path of her mother. Though still a young fish, Abby was to begin a journey into the unknown. She knew that perils would await, but the blood of her ancestors told her that this was the path that her life was to take. Abby was over three years old when she left the creek and entered the Clark Fork River, leaving behind the only world she had ever known and the place of her youth.

Abby would face many dangers in her travels down the Clark Fork River to a home that she had never visited, to a place that called to her through the ancestral history of her species. One day the waters would widen and deepen, and Abby would know that she was rapidly nearing her new home--the waters of Lake Pend Oreille. While Rock Creek would always play an important role in this bull trout's life, Lake Pend Oreille would be where Abigail would spend the majority of her days on this earth.

Abigail quickly made her home in the big lake, thriving in the clean cold waters. Days were full of new experiences. Abigail belonged here. Bull trout had been swimming these waters almost since the time when the glaciers receded, forming many of the lakes and streams. Her species could remember the time when all the waters ran clean, when the creeks and lakes were teeming with their ancestors. In the recent past, many of her species had been displaced because sediment had clouded the waters, filling in the fine gravels that smothered the eggs before they could hatch. As a result, bull trout like Abby were being drawn to the big waters of Lake Pend Oreille, still free of sediment.

Abby was now five years old. She had matured into a big, beautiful fish with an olive green body, fading to white on the belly, and with a back and sides covered in pale yellow and crimson spots. Abby was a fast and strong swimmer, possessing the agility of her species. At nearly 25 pounds, she had few rivals within the waters. Abby decided that it was now time to return to the creek where her life began. Like those of countless generations, Abby was to travel back up the River to spawn in the fine gravel of Rock Creek. She was to return to the creek where she had been born and raised, to lay her eggs and then venture back to her home in Lake Pend Oreille.

The years would pass quickly. The time was full of adventure, avoiding the eagles and osprey that circled overhead. Abby was a wise fish and in her prime, she knew how to escape the perils of the big water. She would survive the long cold winters and thrive during the short summer seasons.

It had now been three years since Abby first visited her spawning grounds in Rock Creek, and a few of her own offspring were beginning to make their way into Lake Pend Oreille. These young fish had followed the same path down the River that their mother had taken. Abby knew that the newcomers would quickly adapt to the new habitat, and, like her, many would thrive. Abby remembered the thrill of entering the big waters of Lake Pend Oreille for the first time and wondered where the time had gone. She envied the new arrivals, and knew that it was time for her to leave Lake Pend Oreille and make one final journey up the River to her spawning grounds. Abby was now over 8 years old, and after this trip, she would never see Rock Creek again. Toward the Clark Fork Delta she headed, making the journey up the River, and entering Rock Creek for the last time to spawn, and then make the long return trip home.

Having completed her second and final trip up the Clark Fork River to spawn, Abby would remain in the Big Lake for many more years. She had made the trip up the River twice and many of her own offspring had adopted the lake as their home. She would continue to enjoy new adventures, endure the long winters, and welcome the spring.

The years passed. Abby was no longer the young energetic fry that emerged so many years before. Abby was 12 years old and was feeling the weight of the many seasons. It seemed like only yesterday she was in her youth, swimming in the pristine waters of the creek, river, and lake. It had been a wonderful life. She would indeed miss the world she called home. She only hoped that the cycle of life for her species would continue.

One day, Abby's eyes grew dim. Abigail, the bull trout, took one last look at her world she was leaving. Like that, Abigail, the bull trout, was gone.





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PROTECTING OUR WATER AND QUALITY OF LIFE



Rock Creek Alliance is a non-profit organization formed by citizens, conservationists, and outdoor sports enthusiasts to protect our public lands and water resources from proposed mining activities within the lower Clark Fork River—Lake Pend Oreille Watershed

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