



FROM OUR MOUNTAINS TO OUR LAKE

Dear Member,

By the time you read this, we will be well into the new year with spring just around the corner. With 2021, comes the promise of positive changes in our country, some of which are already unfolding on the environmental front. It is our hope that the Biden Administration will ensure federal authorizations for the mine are not fast-tracked, science will guide the permitting decisions, federal regulations protecting our environment are adhered to, and destructive rule changes aimed at gutting environmental laws and enhancing mining industry profits made under the Trump Administration are reversed.

In this newsletter, you will read about the progress our attorneys at Earthjustice have made in representing us and our Montana conservation partners in lawsuits challenging authorizations and permits for both the Rock Creek and Montanore mines. We were optimistic that we would prevail in our water quality case in front of the Montana Supreme Court, but a disappointing decision was handed down in mid-February in which the higher court reversed our prior victory in a Montana district court. You can read our perspective on why an unfavorable decision came out of this court. While, we did not prevail in this case, our determination to block construction of Phase 1 of the Rock Creek mine remains undaunted. In this newsletter, we also will explain how our ESA case aims to do just that.

We would like to ask you to continue supporting our work in 2021. As is the case for most non-profits, 2020 was a very lean year for us with public donations greatly reduced due to the pandemic. While our overhead is small, we depend on member support to carry out our work and to pay the technical and legal fees associated with our legal campaign. In short, we need you! If you haven't sent us your membership dues in a while, please consider doing so today. If you have already done so, thank you so much for your support!

Please be sure to cast your vote for our board candidates. Our board members must be elected by our membership so it is important that all our members participate in our election process. We are fortunate that so many of our board members have been involved in our organization for several years bringing a wealth of experience and knowledge along with a historical perspective to our work. We also are excited to have two new candidates who are very active in the community and will bring new energy and perspectives to our cause.

We hope that you and your family are safe and healthy, and we look forward to a time when we once again can come together as a community to celebrate our Lake and Wilderness and the progress we have made in protecting them from the mine.

For Our Lake and Wilderness,

Mary Crowe Costello
Executive Director

Water Quality/Water Rights Case Receives an Unfavorable Ruling

In 2018, the Alliance and our conservation partners challenged a decision by Montana's Department of Natural Resources and Conservation (DNRC) to grant a water use permit for the mine that would allow the company to carry out major groundwater pumping that the company's own analysis shows would permanently dewater pristine streams in the Cabinet Mountains Wilderness. This drastic dewatering would occur during Phase II of the mine (full mine construction and operation) and would be in direct violation of Montana's Water Quality Act that protects Outstanding Resource Waters (ORWs) from degradation, including water depletion. We prevailed in this case, and the water use permit issued by Montana's DNRC, which would allow wilderness streams to be dewatered, was declared void by a Montana district court.

Not unexpectedly, the mining company and DNRC appealed this decision to the Montana Supreme Court. Oral argument took place last summer during which the DNRC argued that it shouldn't have to consider degradation of Outstanding Resource Waters. At the same time, the mining company claimed that the degradation could be considered later because the mine is still going through the permitting and review process. Our legal counsel argued that none of the permitting processes for the mine would be able to prevent the water depletion that current modeling already predicts, and, furthermore, once water rights are issued, it is too late for the state to do what is called a non-degradation review. Unfortunately, in its majority opinion, Montana's high court embraced the arguments given by both the DNRC and the company.

The case focused primarily on two state laws—the Montana Water Use Act (MWUA) and the Montana Water Quality Act (MWQA). In the implementation of these laws by the DNRC and the DEQ, the state agencies have the responsibility to consider degradation of water, which includes dewatering, and the protection of the constitutional right of all Montanans to a “clean and healthful” environment. The court effectively ignored this obligation by finding that the DNRC need not concern itself with the dewatering of Outstanding Resource Waters in the wilderness, which is exactly the opposite of the lower court's ruling that DNRC should consider whether the proposed water use complies with the Montana Water Quality Act and non-degradation standards when

issuing a permit. The higher court, in its majority opinion, instead argued that the burden falls squarely on Montana DEQ to ensure implementation of the nondegradation standards of the Montana Water Quality Act, whereas the DNRC need only operate under the more narrow constraints of the Montana Water Use Act when looking at the adjudication of new water rights.

The higher court, in its agreement with the company's assertion that the degradation of wilderness waters could be revisited another day, ruled that an environmental review would be conducted after Phase I (the evaluation adit or exploration adit) is completed when the company applies for an operating permit for Phase II of the mine. The problem with this approach is that the state already issued its Record of Decision authorizing the full mine before a hydrological analysis was ever conducted. What form this review will take is unknown, but, should Phase I proceed to completion, we will need to follow the application for an operating permit for Phase II closely to ensure a thorough and transparent review is conducted. The approach that the court is taking essentially puts the cart before the horse and ultimately can lead to uninformed permitting decisions with undesirable environmental consequences.

Two of the justices got it right in the dissenting opinion. Justice Laurie McKinnon wrote: “The Court assumes our Constitution and legislature, by enacting the MWUA and MWQA, intended that the overseeing agencies, DNRC and MDEQ, were to have mutually exclusive responsibilities in their role of protecting Montanans' right to a clean and healthful environment. While dewatering of a stream or waterway is a form of “degradation” under MDEQ regulatory rules, degradation is also a concern of the MWUA, and the dewatering of ORWs by the Rock Creek Mine project is quintessentially a water quantity analysis falling squarely within the oversight of the DNRC and application of the 311 criteria. The preservation of ORWs and prevention of their dewatering is not statutorily or constitutionally committed to the exclusive oversight of one particular agency, nor should they be. Our constitutional right to a clean and healthful environment and protections against degradation and dewatering of our streams should not perilously hang on whether the Court can find protections in alternative statutory schemes.”

While we are understandably frustrated by the court's ruling, we have received unfavorable decisions before and our tool to stop the company from turning ground to begin the exploration phase lies with our Endangered Species Act case.

Save Our Cabinets is Victorious in Latest Legal Challenge

In 2017, Save Our Cabinets and our Montana conservation partners (Montana Environmental Information Center and Earthworks) filed suit in a state district court challenging the water pollution discharge permit for the Montanore mine based on violations of the law that included omission of legally required pollutant limitations and the reliance on an authorization to degrade issued in 1992 for another company's long-abandoned project.

The permit authorized the discharge of mine wastewater and storm water to streams flowing out of the Cabinet Mountains Wilderness designated as "high quality" waters. The discharges would contain metals, nutrient pollutants, sediment, and wastewater that is unacceptably warm for native fish. The affected streams included Libby, Ramsey, and Poorman Creeks, all of which are important for native bull trout. Libby Creek has been designated as "critical habitat" for bull trout under the Endangered Species Act; the very reach of Libby Creek into which the company proposes to dump its wastewater provides vital bull trout spawning habitat.

Two years later in 2019, Montana District Court Judge Kathy Seeley invalidated the water pollution permit concluding that Montana's Department of Environmental Quality (DEQ) violated multiple provisions of the federal Clean Water Act and Montana Water Quality Act in authorizing water pollution from the mine. Subsequent to this ruling, Montanore Mineral Corp (a subsidiary of Hecla Mining) and Montana DEQ challenged the lower court's finding in the Montana Supreme Court.

In a major victory for Save Our Cabinets this past November, the Montana Supreme Court ruled that Hecla Mining Company and its subsidiary Montanore Minerals Corporation cannot evade current laws by relying on decades-old pollution standards to degrade pristine streams in the Cabinet Mountains. Since the 2017 permit was not validly issued, the court ordered its revocation. The higher court's opinion stated: "We remain mindful of the fact that Montanans have a constitutional right to a clean and healthful environment. After our review of the record, we cannot find DEQ's interpretation that the 1992 BHES Order remains in effect was a "reasoned decision," and we will not defer to that



interpretation. DEQ's use of an expired 1992 BHES Order to sidestep Montana's enhanced nondegradation policy, in effect since 1993, in issuing the 2017 permit was unlawful and rightly rejected by the District Court because "Montana courts do not defer to incorrect or unlawful agency decisions."

In addition to the revocation of its state-issued discharge permit, the U.S. District Court for Montana invalidated the federal permits for the Montanore Mine in 2017 due to violations of the Endangered Species Act, Clean Water Act, and other laws.



photo: Ken Vanden Heuvel

Endangered Species Act (ESA) Case: The Rock Creek Biological Opinion is still flawed and enters a new round of challenges

In 2019, the Rock Creek Alliance, our conservation partners, and a local Indigenous band (Ksanka Kupaqa Xa'łç'in) entered into litigation challenging the failure of the Fish and Wildlife Service (FWS) to reinstate ESA consultation in its 2017 supplement to the 2006 Biological Opinion regarding the mine's impacts on grizzly bears and bull trout, along with the Forest Service's authorization for the first phase of the project (evaluation adit) that relies on the faulty determinations made by the FWS.

The need for consultation stemmed from several findings: 1.) mitigation measures begun in 2007 have failed to stem human-caused bear mortality, in spite of the fact that there is yet no mine; 2.) new data demonstrate that the mine would permanently reduce flows in bull trout habitat in Rock Creek and East Fork Bull River that already experience dangerous low-flow periods, which was not contemplated in FWS's 2006 biological opinion; and 3.) the lack of anticipated fish passage restoration at the Cabinet Gorge dam that FWS had characterized as essential to bull trout conservation in the project area.

In response to our complaint, the FWS withdrew the 2017 Biological Opinion and supplanted it with a newer supplemental one. Unfortunately, the 2019 Supplemental Biological Opinion is missing key analyses from the older opinion, and we view its issuance as an elaborate maneuver by the agencies to avoid judicial review of their ESA analyses contained in the 2017 Biological Opinion. Instead of considering the impacts to bull trout from dewatering, the wildlife agency consolidated the local bull trout populations into a much larger and more robust population that now includes Lake Pend Oreille to downplay harm from the mine to the local affected populations. This reclassification of the population was done without any scientific justification given that there is no fish passage at the Cabinet Gorge dam. At the same time, the agency dismissed the ongoing grizzly bear mortality in the project area by failing to reinstate formal consultation regarding the mine's impacts on grizzly bears.

Additionally, the 2019 Supplemental Biological Opinion violates the ESA because, unlike the 2017 Biological Opinion, it now excludes all analysis of the effects of Phase II of the project (the full mine) and looks only at Phase I. It is unlawful for the agency



to segment its review of a two-phase project and approve its commencement without considering the effects of the later stage, which will have the greatest impacts.

Importantly, the issue of the failure of human-bear conflict reduction measures as part of the Rock Creek and Montanore mitigation plans and the impacts to important at-risk bull trout populations also were visited in a challenge to the Montanore Biological Opinion brought by Save Our Cabinets. These arguments resulted in a federal court invalidating that Opinion.

In December, our Earthjustice counsel filed a motion for summary judgment in this case. Briefing continues, and the case is expected to be heard later this year.

Our goal in bringing the ESA case is not only to protect the small population of imperiled grizzly bears in the Cabinets Mountains Wilderness and the isolated, but important populations of bull trout, but to prevent Phase I, which is the evaluation adit, from moving forward. Our counsel is asking the Court to declare the 2019 Supplemental Biological Opinion and 2018 Forest Service Record of Decision unlawful and to vacate those decisions.

The Latest in the Bad Actor Case

Protecting our Lake for all generations to enjoy

photo: Bill Borders

Three years ago this spring, Montana DEQ issued an enforcement order against Hecla Mining Company and its CEO, Phillips Baker, compelling them to comply with the state's bad actor provision of the Metal Mine Reclamation Act. The bad actor provision prohibits individuals whose former companies failed to complete required mine reclamation from undertaking new mining projects in the state—unless they pay back the costs of reclamation carried out at public expense and rectify reclamation failures at their old mines.

Phillips Baker was a top official of the now bankrupt Pegasus Gold, which owned the notorious Zortman-Landusky, Basin Creek, and Beal Mountain mines in Montana. Acid mine drainage and heavy metals from those mines polluted streams and groundwater, leaving behind a toxic legacy and a large financial burden for Montana tax payers. Baker and Hecla, which is now under Baker's leadership, denied culpability and chose to fight the enforcement action. The company and Baker sued DEQ, and the state agency followed with a countersuit. The Alliance and our conservation partners, along with the Fort Belknap Indian Community and Ksanka Kupaqa Xa'tłé (Crazy Dog Society of the Kootenai Band of Indians), joined the case as intervenors on behalf of DEQ.

In December 2018, a Montana state court denied motions filed by the company for a preliminary injunction to dismiss the case brought by DEQ. Subsequently, Baker and Hecla moved to dismiss DEQ's complaint on the basis that their Idaho residency exempts them and their Montana mining projects from Montana's mining laws and the Court's jurisdiction.

In a strange interpretation, which seems to ignore the original intent of the law to hold polluters accountable, the Court, in its August 17, 2020 order, granted motions by Baker and Hecla to dismiss the case for lack of "general personal jurisdiction." In other words, the Court accepted the argument that because Baker resides in Idaho and Hecla has its corporate headquarters in Idaho, they are not subject to the Court's jurisdiction.

This latest ruling is being challenged by counsel for DEQ and counsel for Rock Creek Alliance and our Montana partners. Baker and Hecla have direct business contacts with, and property ownership in, Montana. By virtue of their heavy investment in Montana, DEQ believes the Court has "specific personal jurisdiction" over them.

In November 2020, Greg Gianforte was elected governor of Montana. He has pledged to reduce permitting times and loosen Montana's environmental regulations, and has accused state regulatory agencies of slowing economic growth, labeling them "project prevention departments." Gianforte pointed to the Montanore and Rock Creek mines as examples, falsely claiming that they don't have permits because of burdensome state regulations that have held up the projects, rather than acknowledging that the courts have revoked multiple unlawful permits.

It remains to be seen what will happen with the state's participation in litigation aimed at enforcement of the bad actor provision under this pro-mining, anti-environmental governor.



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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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