

## **Judge rebuffs Rock Creek mine approval**

*By MICHAEL JAMISON of the Missoulian*  
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KALISPELL - A controversial plan to mine beneath the Cabinet Mountains Wilderness was pulled off the table Wednesday, with a court ruling that federal wildlife officials put grizzly bears and bull trout at risk when they approved the mine.

"I think the federal regulators did a quickly on this," said Trout Creek resident Peter Lupsha. "They bent reality because of rising metals prices. What the court did is to re-establish the reality on the ground, the facts that the government had sloughed over."

Lupsha lives not far from the site of the proposed Rock Creek mine, in the lower Clark Fork River basin near Noxon. As approved, the mine would have burrowed beneath the Cabinet Mountains Wilderness, yielding an estimated 10,000 tons of copper and silver ore per day for 35 years.

Opponents - including environmentalists, politicians and business leaders in both Montana and Idaho - worried that the mine would degrade wildlife habitat and water quality. The plan was to build many miles of roads in the Cabinets, as well as railroad stations, pipelines, power lines, a tailings treatment plant and other infrastructure on more than 1,500 acres.

"Teddy Roosevelt used to hunt these mountains," Lupsha said, "and hunters today still hunt these mountains. I'd like to see my grandchildren do the same."

Wednesday's ruling by U.S. District Court Judge Donald Molloy of Missoula is good news for those grandchildren, Lupsha said.

Molloy wrote in his opinion that the U.S. Fish and Wildlife Service - charged with overseeing implementation of the Endangered Species Act - did not adequately address the possible harm the mine could pose to grizzly bears and bull trout.

Representatives for mine operator Revett Silver Co. were not available for comment on the ruling late Wednesday.

The debate over the Rock Creek mine heated up in the late 1990s, when Kootenai National Forest officials determined the mine was "likely to affect" species protected by the Endangered Species Act. That decision triggered a review by the Fish and Wildlife Service, which issued a biological opinion in 2000.

The agency concluded then that the mine would "jeopardize" grizzly bears, unless special measures were taken to protect the small population that calls the Cabinets home.

But the opinion went on to approve the mining plan, and a coalition of opponents sued. In 2001, the court sent the USFWS back to the drawing board, and in 2003 the agency issued a new biological opinion.

That time, the agency said a scaled-down version of the mine posed "no jeopardy" to grizzlies, even though it would displace the area's 15 or so bears from an estimated 7,000 acres of habitat, and result in at least some bear mortalities. Nor would the mine jeopardize bull trout, according to the agency, despite a plan to pour in excess of 3 million gallons of wastewater per day into the Clark Fork River.

Again, a lawsuit was filed - this time by the nonprofit, public-interest law firm Earthjustice on behalf of the Rock Creek Alliance, Cabinet Resource Group, Natural Resources Defense Council, Sierra Club, Trout Unlimited, Idaho Council of Trout Unlimited, Pacific Rivers Council, EARTHWORKS/Mineral Policy Center and Alliance for the Wild Rockies.

The debate attracted national attention, and last year jewelry retailer Tiffany and Co. entered the fray, running an advertisement in the Washington Post opposing the silver and copper mine.

"It's had a lot of attention," Lupsha said. "That's the kind of place it is."

In the most recent suit, opponents asked the court to again set aside the USFWS biological opinion and to reverse the agency's approval until endangered species concerns are adequately addressed. They asked that additional information be admitted into the record, including previous opinions and scientific studies that seemed to contradict the USFWS approval.

Molloy agreed that much of the additional information should be part of the decision-making process, although he emphasized the agency's discretion to interpret that information.

"Deciding this issue is quite difficult," Molloy wrote, "because deference is due the agency, and they have decided that the apparent risk is worth taking."

Nevertheless, he wrote, the agency must be able to justify and defend its conclusions, which, with regard to grizzlies and bull trout, it could not.

"Given the clear possibility that bears are at least not increasing," he wrote, "contemplating the loss of additional bears related to the mine is not rational."

The agency's position that "the proposed Rock Creek mine will not jeopardize the Cabinet-Yaak grizzly bear population is arbitrary and capricious," Molloy wrote.

As for bull trout, Molloy noted that the USFWS itself has concluded "the current status of the species is marginal."

The agency has in the past stressed the need to keep subpopulations intact in order to maintain the larger Columbia River Basin bull trout population. But too often, Molloy wrote, the agency has failed to take a big-picture look at the cumulative effects of development throughout the region.

The current USFWS biological opinion, he wrote, "fails to explain satisfactorily why so many projects, all stating the hazard of the loss of subpopulations, have been approved despite the very risk of lost subpopulations."

The 2003 biological opinion that enabled the Kootenai National Forest to approve the mine should be set aside, Molloy ruled, and the USFWS should yet again consider the matter.

An amended biological opinion could take more than a year to develop, but no one expects the delay to signal an end to the debate.

"You and I will be old, old men, and they'll still be fighting over this," Lupsha said. "That's the way it works. But you have to hang in there. It's about quality of life, about what we choose to leave to our grandchildren."

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