

SYNOPSIS**2021 MT 44: DA 19-0484, CLARK FORK COALITION, ROCK CREEK ALLIANCE, EARTHWORKS, AND MONTANA ENVIRONMENTAL INFORMATION CENTER v. MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION.**¹

The Montana Supreme Court upheld a decision of the Montana Department of Natural Resources and Conservation (DNRC) granting a water use permit regarding proposed Phase 2 of the Rock Creek Mine Project (RCMP) in Montana's Cabinet Mountains Range near Noxon, Montana. The permit would authorize the proposed mining operation to annually appropriate up to 857 acre-feet of groundwater that will flow into the proposed RCMP Phase 2 underground mining tunnels and works, to be constructed and in operation for 30-plus years, if and when the operator obtains all other necessary federal and state permits, including a Montana Metal Mine Reclamation Act (MMRA) operating permit.

On judicial review, the District Court ruled that DNRC erroneously failed, on the asserted objections of the petitioner environmental groups, to review the proposed water use for compliance with Montana Water Quality Act (MWQA) water quality nondegradation standards as applied to the groundwater table depletion that will necessarily occur as a result of inflow into the proposed Phase 2 mining tunnels and works. The Montana Supreme Court ruled, however, that the applicable MWUA provisions required review for MWQA standards compliance only upon an MDEQ objection, which was not present here. On the ground that the MMRA operating permit application process would independently trigger advance MDEQ review of the proposed water use for compliance with applicable MWQA standards, the Supreme Court further rejected the objectors' fall-back assertion that the MWUA thus violated their right under the Montana Constitution to a clean and healthful environment by denying them the opportunity for

¹ This synopsis is for public convenience only. It is not part of the Court's Opinion and may not be cited as precedent.

advance MWQA compliance review by DNRC as part of the MWUA beneficial water use permitting process. The Supreme Court ruling effectively affirmed the correctness of the 2018 DNRC decision based on the limited scope of the MWUA.

Two members of the Court dissented. Outstanding Resource Waters (ORWs) within the federally designated Cabinet Mountain Wilderness Area are statutorily protected against dewatering under federal and state law. It was undisputed that the issuance of the DNRC's water permit for the Rock Creek Mine project would deplete one or more specifically identified and protected ORWs. The Montana Legislature has mandated that both the DNRC and the MDEQ have the responsibility to enforce these protections. Based on the plain language of § 85-2-311, MCA, the statute authorizing the DNRC to issue water permits, the DNRC was required to consider the impact of dewatering on these protected ORWs before it issued a water permit which would deplete a federally and state protected stream. The DNRC did not consider the impact on ORWs, despite having evidence these protected waters would be depleted. The dissent would affirm the District Court's decision that the impact on ORWs must be considered by the DNRC before issuance of a water permit.