

By Carolyn Raffensperger

## Background Level No Excuse To Pollute

Norman Maclean wrote in *A River Runs Through It* that “when one of us referred to ‘the big river’ the other knew it was the Big Blackfoot. It isn’t the biggest river we fished, but it is the most powerful, and per pound, so are its fish.” The Montana Supreme Court has just written a sequel to Maclean’s elegiac masterpiece. In a stunning decision, the court struck down the Montana law that exempted a goldmine from review of water quality standards under Montana law. The court then went on to rule that the state constitution’s provisions guaranteeing citizens the fundamental right to a “clean and healthful environment” prohibit the Seven-Up Pete Joint Venture gold mining industry from pumping water with high levels of arsenic into the Blackfoot River even though the chemical, which is not only toxic but a carcinogen, would have been at background levels within 4,000 feet of the discharge point.

“Our constitution does not require that dead fish float on the surface of our state’s rivers and streams before its farsighted environmental protections can be invoked,” the court said.

The state’s constitution has three interlocking provisions that formed the basis for the decision. The first declares that “all persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment.” The second says that “the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.” And the third states that “the legislature shall pro-

vide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.”

All three were at issue in *Montana Environmental Information Center; Clark Fork-Pend Oreille Coalition; and Women’s Voice for the Earth v. Department of Environmental Quality and Seven-Up Pete Joint Venture*.

The plaintiffs challenged a state decision to amend Seven-Up Pete’s application for a massive open-pit gold mine at the confluence of the Blackfoot and Landers Fork. Both rivers contain “high quality waters” under Montana law, provide habitat for fish and wildlife including key habitat for bull trout, a species which qualifies for listing as an endangered species.

In 1995 the state Department of Environmental Quality had amended the company’s mineral exploration license to allow for discharge of groundwater with higher levels of arsenic and zinc into the aquifers of the two rivers. The rivers were to serve as mixing zones in order to dilute the discharged groundwater to a level where the waters were in compliance with state law.

A four month test ensued. Levels of arsenic in the waters at the wellheads ranged from .016 to .056 milligrams per liter. The Montana water quality standard established to protect public health is set at .018 milligrams per liter. But monitoring wells 4,000 feet downstream were at background levels, leading the company to claim that plaintiffs’ right to a clean and healthful environment had not been violated. Since there was no threatened injury, plaintiffs did not have standing to challenge the constitutionality of the state’s action, they said.

The court has ruled otherwise. Late last year, it decided that the right to a clean and healthful environment is a fundamental right. Accordingly, any statute or rule which challenges that right must be strictly scrutinized. In order to survive strict scrutiny, the state must establish a compelling state interest and any action must be closely tailored to effectuate that interest and it must be the “least onerous path” taken to meet the state’s objective.

The court then examined the debate at the 1972 Constitutional Convention to determine the issue of standing. The court’s opinion hinges on the word “healthful” in the first provision cited earlier. Several of the delegates objected to adding the word “healthful” because it would allow bad actors to degrade the environment to the point where health was at issue. That is, it “would permit those who would pollute our environment to parade in some doctors who could say that if a person can walk around with four pounds of arsenic in his lungs or SO<sub>2</sub> gas in his lungs and wasn’t dead, that that would be a healthful environment.” Another delegate argued that “if all we have is a survivable environment, then we’ve lost the battle.” In the end “healthful” was included with the understanding that the constitutional provision would not only require environmental maintenance but improvement.

The delegates directed the legislature to provide remedies to prevent degradation. Built into the protections was an understanding that plaintiffs would have a right to sue or seek injunctive relief before damage occurs. Delegates did not want to build in provisions for monetary damages after the air or water was polluted but, rather, provide precautionary remedies.

The Montana court granted standing to the plaintiffs to defend the river, not just for the health of the plaintiffs, but for the sake of the river itself and for future generations, as provided for in the second and third provisions.

Maclean ends his story by saying, “Eventually, all things merge into one, and a river runs through it. The river was cut by the world’s great flood and runs over rocks from the basement of time. On some of the rocks are timeless raindrops. Under the rocks are the words, and some of the words are theirs.” By looking under the rocks for the words, the justices of the Montana Supreme Court have ensured that, in their state at least, the right to a “clean and healthful environment” remains undiluted.

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