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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION

KSANKA KUPAQA XA'ŁĆIN, ROCK  
CREEK ALLIANCE, EARTHWORKS,  
MONTANA ENVIRONMENTAL  
INFORMATION CENTER, DEFENDERS OF  
WILDLIFE, SIERRA CLUB, and CENTER  
FOR BIOLOGICAL DIVERSITY;

Plaintiffs,

v.

UNITED STATES FISH AND WILDLIFE  
SERVICE; CHAD W. BENSON, Kootenai  
National Forest Supervisor; and UNITED  
STATES FOREST SERVICE;

Defendants,

And

RC RESOURCES, INC.,

Defendant-Intervenor.

CV 19-20-M-DWM

**RC RESOURCES, INC.'S  
COMBINED  
MEMORANDUM IN  
SUPPORT OF ITS CROSS-  
MOTION FOR SUMMARY  
JUDGMENT AND IN  
OPPOSITION TO  
PLAINTIFFS' MOTION  
FOR SUMMARY  
JUDGMENT**

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## INTRODUCTION

This case seeks review of the U.S. Forest Service's ("Forest") Record of Decision dated August 2018 ("Decision Record") for the Rock Creek Project ("Project"), and the 2019 "Supplement to the Biological Opinions" ("2019 Biological Opinion") that the U.S. Fish and Wildlife Service ("Service") prepared for that Project. Following decades of analysis and multiple rigorous studies, the Decision Record approves an amended plan of operations for construction of a single evaluation adit into the Rock Creek copper and silver deposit. The adit will enable the Project proponent, RC Resources, Inc. ("RC Resources"), to collect the data necessary for a robust evaluation of the Rock Creek ore body and more comprehensive evaluation of a potential mine's design and environmental effects. The adit will not disturb the surface of land within the Cabinet Mountains Wilderness (USFWS\_042228),<sup>1</sup> and is not anticipated to cause grizzly bear mortality or affect baseflow in streams supporting bull trout and their designated critical habitat. USFWS\_001812, 042211, 042212.

The Decision Record does not approve mining, and does not commit the Forest to approve future mining of the Rock Creek deposit, which will require a separate decision record and the reinitiation of consultation with the Service under the Endangered Species Act ("ESA"). Thus, mining cannot happen given the

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<sup>1</sup> Citations to the Service's and Forest's administrative records are indicated by "USFWS" and "FS," respectively, followed by the bates-stamped page number.

approvals currently in place, and will not happen without additional ESA consultation between the Service and Forest.

The 2019 Biological Opinion is based on the best available science, and studies the evaluation adit's effects on grizzly bears, bull trout, and bull trout critical habitat in compliance with the ESA. It is supported by a comprehensive terrestrial mitigation plan to insure the adit and future mining (if approved) will not likely jeopardize grizzly bears and will improve baseline conditions for grizzly bears in the Cabinet-Yaak Ecosystem ("Cabinet-Yaak"). In 2010, this Court found no flaws in the mitigation plan. *Rock Creek All. v. U.S. Forest Serv.*, 703 F. Supp. 2d 1152, 1205-11 (D. Mont. 2010). The Ninth Circuit likewise found no flaws in the mitigation plan, and affirmed this Court's judgment. *Rock Creek All. v. U.S. Fish and Wildlife Serv.*, 663 F.3d 439, 443-44 (9th Cir. 2011).

Plaintiffs' challenge to the Decision Record and 2019 Biological Opinion is based on three insupportable claims. Plaintiffs contend (Claim I) that the Service and Forest unlawfully failed to reinitiate consultation on the Project's effects to grizzly bears by ignoring relevant grizzly bear mortality data. This claim fails because the agencies thoroughly analyzed the grizzly bear mortality data for the Cabinet-Yaak, and found that baseline conditions for grizzly bears in that ecosystem have improved significantly since 2006. The improvements include a grizzly bear population trend that is increasing rather than declining, decreased



grizzly bear mortality rates particularly as to females, increased grizzly bear survival rates, and a substantially larger grizzly bear population. USFWS\_041206-08. These improvements occurred in the precise period that RC Resources and affiliates helped fund the work of a grizzly bear specialist in the Cabinet-Yaak and acquired approximately 6,000 acres of land for grizzly bear conservation. In 2018, research indicated that just partial implementation of the Project's mitigation measures prevented conflicts between grizzlies and people and helped reduce grizzly bear mortality rates, USFWS\_041207, 041208, 042179, thereby arresting the steady decline in the grizzly bear population rate of change that occurred from 1998-2006. USFWS\_003264. No reinitiation of consultation was therefore required in 2017 or 2019, as Plaintiffs contend. But even if reconsultation was required, the agencies initiated and completed consultation in 2019, with the Service finding improved grizzly bear status in the Cabinet-Yaak since 2006. USFWS\_041206-208. The record is devoid of data establishing that additional consultation is required today.

Plaintiffs' second claim contends that the Service unlawfully segmented its analysis of the Project because the 2019 Biological Opinion considered only the evaluation adit, but this claim also fails. The ESA required the Service to prepare a biological opinion analyzing the "agency action," 16 U.S.C. § 1536(b)(3)(A), which is limited to activities or programs "authorized, funded, or carried out" by

the agency. 50 C.F.R. § 402.02 (defining “action”). Because the sole activity that the Forest authorized in this case is an amended plan of operations for the evaluation adit, the Service had no duty to expand its analysis to include possible future, but currently unapproved, mining of the Rock Creek deposit. Moreover, Montana has not approved, or committed to approve, mining that deposit. USFWS\_042629-33 (no grant of Montana hard rock operating permit).

Plaintiffs’ third claim contends the Decision Record is unlawful because it is not supported by a valid biological opinion. This claim fails because the Decision Record is supported by the 2019 Biological Opinion, which analyzes the effects of the only activities (evaluation adit) that the Forest authorized and which incorporates the Service’s prior analyses of those effects. USFWS\_041209.

For these reasons, and as discussed below, the Decision Record and 2019 Biological Opinion are not arbitrary or capricious and comply with the ESA. Nor did the agencies have any duty to reinitiate consultation on grizzly bears. This Court should deny Plaintiffs’ motion for summary judgment, and grant summary judgment to RC Resources on all claims.

## **FACTS**

### **I. Project Background**

The Project is a proposed underground copper and silver exploration and mining project near Noxon in Sanders County, Montana. USFWS\_042199. RC

Resources is the Project proponent, holds the Project's principal permits, and owns the mineral estate for the Rock Creek deposit. USFWS\_042199-200, 042203.

In 2003, the Forest approved a two-phased project: evaluation adit (Phase I) and mine development/mining/reclamation (Phase II). USFWS\_012450-51. After that approval was vacated by this Court (USFWS\_042200), and following scrupulous review on remand (USFWS\_042202), the Forest limited the proposed action to evaluation activities only. USFWS\_042199, 042203. The adit would disturb approximately 10.4 surface acres of National Forest System land, would require 18-24 months for development and evaluation, and would use existing roads for access. USFWS\_002988-89, 041200, 042205.

The evaluation adit's purposes include obtaining additional data to further evaluate the Rock Creek ore deposit, advance a future mine's (if approved) design, and further assess a future mine's environmental impacts. USFWS\_042203, 042207-08. RC Resources will use the evaluation adit to collect additional rock mechanics data to aid underground mine design, supplement existing hydrologic and geochemical data and analysis, and obtain ore samples for metallurgical testing. *Id.* Up to 131 workers will work on the evaluation adit, including four employees associated with wildlife work. FS\_009261.

Following the issuance of a Supplemental Environmental Impact Statement ("Supplemental EIS") in 2018, the Forest released the Decision Record approving

an amended plan of operations for the evaluation adit. USFWS\_042200, 042205-07. The Decision Record specifies that RC Resources may not commence the adit until it submits an amended plan of operations meeting the Decision Record's requirements, obtains the Forest's signed approval of that plan, posts a joint reclamation bond to insure that both federal and state reclamation requirements are met, and implements all necessary mitigation to commence the adit.

USFWS\_042207-08. The Decision Record gives no approval for mining, and does not commit the Forest to approve mining. USFWS\_042202, 042205.

Multiple steps must occur before mining the Rock Creek deposit can occur. Those steps include, without limitation, that RC Resources must update its mine plan of operations to incorporate the data and other information that it collects from the adit, and obtain all necessary permits. Further, the Forest must review and approve the revised mine plan, update its baseline studies and modeling, analyze information for purposes of compliance with applicable law, conduct additional analysis under the National Environmental Policy Act ("NEPA"), and make a new decision regarding mining in a separate decision document.

USFWS\_042202, 042208; FS\_008660-61. Any future mining will be subject to additional ESA consultation, and will undergo separate, future review should the Forest propose its approval. USFWS\_041199.

## **II. Grizzly Bears**

### **A. The Project's Terrestrial Mitigation Plan Is Robust.**

The Service and Forest have analyzed the Project's potential impacts to grizzly bears in multiple studies including a biological assessment (1998), three biological opinions (2000, 2003, 2006), three biological opinion supplements (2007, 2017, 2019), a final EIS (2001), and the Supplemental EIS (2018). USFWS\_041199, 042258-59. Based on these studies, the agencies and RC Resources have developed a multi-faceted, scientifically-based mitigation plan to insure the Project will not likely jeopardize grizzly bears and will improve baseline conditions for grizzly bears in the Cabinet-Yaak. USFWS\_001818-19, 001821, 041207, 041215-17.

RC Resources will fund two Montana Fish, Wildlife & Parks grizzly bear specialists and one law enforcement officer over the Project's life.

USFWS\_001704-05. In addition, the Service expects a net positive impact because grizzly bear habitat that might otherwise have been lost to future development may now be conserved through mitigation lands funded by RC Resources. USFWS\_001704-06. RC Resources' mitigation plan will pay for education and outreach programs, monitoring and research of the grizzly bear population, grizzly bear-resistant garbage containers for mine employees and the public, conversion of garbage transfer stations to be grizzly bear-resistant, and

bear-resistant garbage receptacles at Forest campgrounds. *Id.*; USFWS\_001719-20. These mitigation measures represent the full complement of the types of actions that grizzly bear experts recognize as effective in reducing conflict between bears and people. USFWS\_001793. Much of this work will be implemented prior to evaluation adit construction. USFWS\_001719-20, 041214-16.

The Service's 2006 Biological Opinion analyzed the Project's effects (both phases), including the mitigation plan, on grizzly bears. USFWS\_001819. It predicted that the mitigation plan would not just maintain the status quo, but would result in improved baseline conditions for grizzly bears through a reduction of human-caused grizzly bear mortality rates, conservation of grizzly bear habitat that may otherwise have been lost to development, improved public outreach and education, lowered motorized access route densities, continued and enhanced research resulting in improved understanding of grizzly bear ecology and habitat linkage issues in the Cabinet-Yaak, and enhanced assurance that augmentation of the Cabinet-Yaak grizzly bear population will continue. USFWS\_001704-06, 001791.

The Service concluded the Project is not likely to jeopardize the continued existence of grizzly bears, USFWS\_001706, 001818-19, and found "[c]ollectively, the measures would reduce, remove, or more than offset the potential adverse effects of the proposed action." USFWS\_001819. Further, it found: "The

combination of reduced rates of human-caused mortality, augmentation of the population, and maintenance or re-establishment of habitat connectivity is expected to more than offset impacts of the mine” and “contribute to the eventual stabilization and recovery of the CYE grizzly bear population.” USFWS\_001824.

In 2007, the Service supplemented the 2006 Biological Opinion because of changed access management standards, but found the Project would affect grizzly bears in the same manner and to the same extent as analyzed in the 2006 Biological Opinion. USFWS\_002458.

In 2010, this Court denied a challenge to the 2006 Biological Opinion’s no-jeopardy determination for grizzly bears. *Rock Creek All.*, 703 F. Supp. 2d at 1207-11. The Ninth Circuit affirmed, finding the Project’s mitigation plan was “so robust” that the 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.” *Rock Creek All.*, 663 F.3d at 444.

## **B. 2017 Grizzly Bear Supplement**

In 2017, the Service released its second supplement to the 2006 Biological Opinion (“2017 Grizzly Bear Supplement”), which reviewed and updated the scientific information regarding grizzly bears, USFWS\_003253, including population and mortality data collected from studies in the Cabinet-Yaak. USFWS\_003262-65, 003271-72. Based on these data, the Service found that the

environmental baseline for grizzly bears in the Cabinet-Yaak had improved since 2007, USFWS\_03262, when a grizzly bear management specialist began work in the Cabinet-Yaak. USFWS\_034425. The improvements include an increasing positive rate of change in the Cabinet-Yaak grizzly bear population, decreased female grizzly bear mortality rates, increased grizzly bear survival rates, and a substantially larger grizzly bear population. USFWS\_003262-65, 003271.

The 2017 Grizzly Bear Supplement reported that aspects of the Project's terrestrial mitigation plan have been implemented. RC Resources and affiliates had purchased approximately 6,000 acres of land toward grizzly bear mitigation, and had helped fund a grizzly bear management specialist position for the Cabinet-Yaak since the position's creation in 2007. USFWS\_003265; *see* USFWS\_034425-26. The Service found that the bear specialist's work had its intended benefit, by preventing some grizzly bear mortality that would have otherwise occurred. USFWS\_003265.

Based on the information in the 2017 Grizzly Bear Supplement and its references, the Service concluded that reinitiation of formal consultation was not required. USFWS\_003271-72.

**C. The Forest Independently Reviewed Grizzly Bear Mortality Data.**

In October 2017, the Forest responded to objections that the Project's mitigation plan had not proven effective in reducing grizzly bear mortality. Citing



multiple studies, the Forest reviewed grizzly bear mortality and survival data for the Cabinet-Yaak, including data aggregated for periods before and through 2006, and after 2006, and found grizzly bear population and mortality trends had improved since 2007, when the bear specialist commenced work. FS\_011646-47.

In October 2018, the Forest again responded to objections regarding the effectiveness of the Project's grizzly bear mitigation, set forth its review of the relevant grizzly bear mortality data, and found the data showed improved grizzly bear status in the Cabinet-Yaak. FS\_124672-75. No reinitiation of consultation was therefore required. *Id.*

#### **D. 2019 Biological Opinion**

In 2019, due to the Forest's decision to approve only evaluation activities, the Forest and Service reinitiated consultation on the Project. USFWS\_041232. Pursuant to this reconsultation, the Service released its 2019 Biological Opinion, which updated the proposed action to include only the evaluation adit, updated grizzly bear mortality and population data in the Cabinet-Yaak, and analyzed the adit's potential effects on grizzly bears. USFWS\_041199, 041206-08. Based on the updated data, the Service found that baseline conditions for grizzly bears in the Cabinet-Yaak had continued to improve, the evaluation adit would result in less impact to grizzly bears than the previously proposed action containing both phases, and such impact was considered in the Project's 2006 Biological Opinion.

USFWS\_041217. The Service affirmed the no-jeopardy opinion for grizzly bears as to evaluation activities. *Id.*

### **III. Bull Trout**

#### **A. Background**

The listed entity for bull trout is the coterminous U.S. population.

USFWS\_003056. Within the coterminous U.S. population, the Service recognizes six bull trout recovery units, including the Columbia Headwaters Recovery Unit.

USFWS\_003007-08. The Project's action area is within the Lake Pend Oreille Core Area, which is within the Columbia Headwaters Recovery Unit.

USFWS\_003020, 032673-74.

The current organizational structure of bull trout has its roots in the 2002 Draft Bull Trout Recovery Plan, which describes an organizational hierarchy for bull trout that includes management units, core areas, and local populations.

USFWS\_017407. Core areas represent the closest approximation of a biologically functioning unit for bull trout and are used by the Service to gauge bull trout status.

USFWS\_017496. Core areas may contain multiple local populations. *Id.* Since 2002, the Service has used this or a similar hierarchy for bull trout consultation and recovery. USFWS\_045751-54.

#### **B. 2015 Recovery Plan**

The 2015 Recovery Plan establishes a strategic plan for bull trout recovery in the coterminous United States. USFWS\_032576. Like the 2002 draft Recovery

Plan, bull trout recovery under the 2015 Recovery Plan is based on a geographical hierarchical approach. USFWS\_032618. The 2015 plan subdivides the single distinct population segment of bull trout into six biologically-based recovery units, including the Columbia Headwaters Recovery Unit. USFWS\_032618-21. Each of the six bull trout recovery units is subdivided into multiple bull trout core areas, and each core area includes one or more local bull trout populations.

USFWS\_032619.

The 2015 Recovery Plan designates core areas based on the best available information, including bull trout distribution, migratory patterns, and genetics. USFWS\_032619-20. Based on the latest available science, the 2015 Recovery Plan designates 35 core areas in the Columbia Headwaters Recovery Unit, combines the former Lower Clark Fork Core Area into the Lake Pend Oreille Core Area, and eliminates the Lower Clark Fork Core Area designation.

USFWS\_032673-74, 032754.

### **C. 2017 Bull Trout Biological Opinion**

In 2017, the Service prepared its 2017 Bull Trout Biological Opinion. USFWS\_002986, 002988-95. To determine whether the Project would jeopardize the coterminous bull trout population, the 2017 Bull Trout Biological Opinion used the same classification hierarchy described in the 2015 Recovery Plan.

USFWS\_003016, 003017, 003020, 003056-57. Based on those relationships, the

2017 Biological Opinion determined that the Project is not likely to jeopardize the continued existence of bull trout. USFWS\_003056-58. The Service reasoned that adverse effects to the Rock Creek and Bull River local bull trout populations are likely. USFWS\_003057. However, the Project's overall effect on the Lake Pend Oreille Core Area would be negligible. USFWS\_003058.

Because the Project's effects on the Lake Pend Oreille Core Area population would be relatively minor, the Service concluded that the Project is not likely to appreciably reduce the reproduction, numbers, or distribution of bull trout at the scale of the Lake Pend Oreille Core Area and by extension at higher organizational levels. USFWS\_003057-58. The Service therefore concluded that the Project would not jeopardize the coterminous bull trout population. *Id.*

#### **D. 2019 Biological Opinion**

The 2019 Biological Opinion updates the Project's bull trout action area to constitute the Rock Creek watershed, since the activity that had been predicted to impact baseflow in the Bull River (mining) is no longer part of the proposed action. USFWS\_041199. The 2019 Biological Opinion also updates the incidental take statements in the 2006 and 2017 Biological Opinions to reflect the amount and extent of incidental take that is anticipated from the evaluation addit, and the reasonable and prudent measures that the Service considers necessary or appropriate to minimize such take. USFWS\_041199. The 2019 Biological

Opinion explains that future mining of the Rock Creek deposit will be subject to additional ESA consultation, and will undergo separate future review if the Forest proposes its approval. *Id.* It affirms prior no-jeopardy and no adverse modification opinions for bull trout as to evaluation activities. USFWS\_041217.

## **ARGUMENT**

### **I. Standard of Review**

This Court reviews the Service’s and Forest’s actions under the Administrative Procedure Act, which provides an agency’s decision can be set aside only upon a showing it was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Selkirk Conservation All. v. Forsgren*, 336 F.3d 944, 953 (9th Cir. 2003) (citing 5 U.S.C. § 706(2)(A)). Within this narrow review, this Court cannot substitute its judgment for that of the agencies, and must uphold their decisions so long as they “considered the relevant factors and articulated a rational connection between the facts found and the choice made.” *Id.* at 953-54 (citation omitted). Disputes involving “primarily issues of fact” must be resolved in favor of the expert agency so long as the agency’s decision is based on a reasoned evaluation of the relevant factors. *Id.* at 954. “Particularly when the analysis ‘requires a high level of technical expertise,’ this Court ‘must defer to the informed discretion of the responsible federal agencies.’” *Id.*

## **II. Statutory Background**

### **A. ESA**

ESA section 7(a)(2) requires federal agencies to insure in consultation with the appropriate wildlife agency, that “any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an ‘agency action’) is not likely to jeopardize the continued existence of any endangered species or threatened species[.]” 16 U.S.C. § 1536(a)(2). Section 7(b)(3)(A) requires at the conclusion of consultation “a written statement setting forth the Secretary’s opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat.” *Id.*

§ 1536(b)(3)(A). The ESA’s implementing regulations require agencies to reinitiate consultation if “new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered.” 50 C.F.R. § 402.16(a)(2).

### **B. Mining Regulations**

Under the 1872 General Mining Law, a private citizen may enter public lands for the purpose of prospecting and mining. 30 U.S.C. § 22. The 1897 Organic Administration Act extended the Mining Law to National Forests but authorized the Secretary of Agriculture to regulate mining activities in the National Forests to protect forest lands from destruction and depredation. 16 U.S.C. §§ 482, 551. The Act specified that prospectors and miners entering federal forest lands

“must comply with the rules and regulations covering such national forests.” *Id.* § 478. Those rules require that a miner submit a plan of operations and obtain the Forest’s approval if the proposed operations will likely cause a significant disturbance of surface resources. 36 C.F.R. §§ 228.4(a)(3), 228.5(a); *Karuk Tribe v. U.S. Forest Serv.*, 681 F.3d 1006, 1012 (9th Cir. 2012) (en banc). The plan requires detailed information, including “the approximate location and size of areas where surface resources will be disturbed” and “measures to be taken to meet the requirements for environmental protection.” 36 C.F.R. § 228.4(c).

### **III. No Basis Exists for Plaintiffs’ First Claim that the Federal Defendants Unlawfully Failed to Reinitiate Consultation on the Project’s Impacts to Grizzly Bears.**

Plaintiffs’ first claim alleging that the Service and Forest unlawfully failed to reinitiate consultation on the Project’s impacts to grizzly bears is meritless. Both agencies considered the grizzly bear mortality data that Plaintiffs contend was ignored, and found that grizzly bear status in the Cabinet-Yaak had improved substantially since 2007 when RC Resources began funding the work of a grizzly bear specialist in the Cabinet-Yaak. Both agencies also reinitiated and completed consultation in 2019, with the Service affirming the continued, improved trend in grizzly bear status and concluding that evaluation activities would not likely jeopardize grizzly bears. No error is therefore shown.

**A. The Service’s Analysis of Grizzly Bear Mortality Data Was Rational and Disclosed No Basis to Reinitiate Consultation.**

The information upon which Plaintiffs base their first claim consists of grizzly bear mortality data compiled by Service biologist Kasworm, finding that 16 known or probable human-caused mortalities occurred in the U.S. portion of the Cabinet-Yaak from 2007-2016 compared to 13 from 1997-2006. (Doc. 108, at 30-1). Based on these data, Plaintiffs contend the Project “may pose” greater mortality risks to grizzlies than the Service previously considered (Doc. 108, at 27-8), and the Service wrongfully concluded that reconsultation was not warranted. (Doc. 99, at 42). This claim fails because Plaintiffs misinterpret the effects that the Service predicted would occur from implementation of the Project’s terrestrial mitigation plan. Furthermore, the Service twice (2017 and 2019) considered the data that Plaintiffs cite and correctly found effects consistent with reduced overall grizzly bear mortality risk.

**1. The Service’s 2017 Decision not to Reinitiate Consultation on the Project’s Effects to Grizzly Bears Complied with the ESA.**

Plaintiffs’ first claim is immediately flawed because it misapprehends the effects that the Service predicted from implementation of the Project’s terrestrial mitigation plan. The Service did not predict that the mitigation plan would reduce the absolute numbers of “human-caused grizzly mortality” within the Cabinet-Yaak, as Plaintiffs contend (Doc. 108, at 29), but instead predicted it would yield



improved baseline conditions and reduced grizzly bear mortality *rates* to offset the Project's impacts. These predicted effects are identified throughout the Project's 2006 Biological Opinion. USFWS\_001821 (Project's mitigation plan "is expected to improve the current baseline conditions for grizzly bears by *reducing current and future rates* of human-caused mortality *not directly or indirectly attributable to the mine.*") (italics in original); 001821 ("no net increase in human-caused mortality rates" expected); USFWS\_001824 ("combination of reduced rates of human-caused mortality, augmentation of the population, and maintenance or re-establishment of habitat connectivity is expected to more than offset impacts of the mine").

Plaintiffs' claim is also flawed because Service biologists have examined the Cabinet-Yaak's baseline conditions since 2006, and found those conditions have improved since RC Resources and affiliates began funding a grizzly bear specialist in 2007. USFWS\_003262. The improved conditions are confirmed in the 2017 Grizzly Bear Supplement and the multiple studies upon which it relies, and are consistent with the predictions in the Project's 2006 Biological Opinion. One of those studies is a Cabinet-Yaak Research and Monitoring Progress Report dated 2017 by Kasworm ("Kasworm (2017)"). Kasworm (2017) includes the grizzly bear mortality data that Plaintiffs contend the agencies ignored and upon which Plaintiffs base their claims. USFWS\_041588-89 (Kasworm's table compiling

mortality data); Doc. 108, at 31 (Plaintiffs cite USFWS\_041588-89 as a source of their mortality data).

Kasworm (2017) examined grizzly bear mortality rates in or within 16 kilometers of the Cabinet-Yaak (including Canada) by breaking the data into periods of increase (1982-98, 2007-2016) and decrease (1999-2006) in population trend, and explained the “loss of females is the most important factor affecting the trend because of their reproductive contribution to current and future growth.”

USFWS\_041603. As explained above, 2006 is significant because it is immediately prior to the year when the bear specialist began working in the Cabinet-Yaak and is also the end date for Plaintiffs’ pre-mitigation bear mortality data. Kasworm (2017) found that the total known female grizzly bear mortality rate improved from 1.88 during 1999-2006 to 0.7 during 2007-2016, and the known human-caused female grizzly bear mortality rate improved from 1.50 during 1999-2006 to 0.5 during 2007-2016. *Id.* Kasworm (2017) credited this improvement in female mortality as “largely responsible for the improving population trend” in the Cabinet-Yaak from 2007-2016. *Id.* Likewise, mortality rates for adult and subadult grizzly bear females dropped from 0.074 and 0.26 in 2006, to 0.046 and 0.173 in 2016, respectively. USFWS\_003271. This Court has found that female grizzly survival is “the most important element for recovery of

the [Cabinet–Yaak] grizzly bear population.” *Rock Creek All.*, 703 F. Supp. 2d at 1205.

Also supporting improved baseline conditions within the Cabinet-Yaak is the increasing grizzly bear population. In 2006, the Service estimated the Cabinet-Yaak grizzly bear population at 30-40 bears. USFWS\_001729. In 2017, the Service estimated the 2016 population at approximately 55 bears, a 37.5% increase over the upper bound estimate from 2006. USFWS\_003264

Further supporting improved baseline conditions in the Cabinet-Yaak is that the “population trend has now changed from ‘declining’ to ‘increasing.’” USFWS\_003265. In 2006, the Service reported a 91% probability that the Cabinet-Yaak population was in decline. USFWS\_001730; *see Rock Creek All.*, 703 F. Supp. 2d at 1205. From 1983 to 2006, the percent annual rate of change in the Cabinet-Yaak grizzly bear population was negative 7.7%. USFWS\_003264, 041206. For 1983-2016, the finite annual rate of change in the population was positive 1.6%, and the probability that the population was stable or increasing was 66%. USFWS\_003262-63, 041206.

Also supporting the improved baseline conditions are increasing grizzly bear survival rates. Adult and subadult female survival rates in the Cabinet-Yaak recovery zone declined to 0.926 and 0.740 respectively in 2006, with human-caused mortality accounting for much of this decline. USFWS\_003263. During

2016, adult and subadult female survival in that zone increased to 0.954 and 0.827, respectively, resulting in an “improving population trend estimate since 2006.” *Id.*

Collectively, these data establish that the Cabinet-Yaak “grizzly bear population is increasing and the baseline has improved.” USFWS\_003271. The improved baseline is also consistent with the conditions that the Service predicted would occur from implementation of the Project’s mitigation plan, and they occurred in the period that RC Resources and affiliates helped fund the grizzly bear specialist’s work in the Cabinet-Yaak. Also significant is that the improved conditions occurred through only partial implementation of the Project’s mitigation plan. USFWS\_003265; FS\_124672-75. Other aspects of the mitigation package have yet to be implemented and will contribute to the mitigation’s overall effectiveness, including funding a Montana law enforcement position,<sup>2</sup> providing bear-resistant garbage containers, and securing or protecting from development 153 acres of grizzly bear habitat to compensate for the 19.6 acres of habitat affected by evaluation activities.<sup>3</sup> *Id.* The Service found “[t]he work of [the] bear management specialist has had its intended benefit, by preventing some grizzly

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<sup>2</sup> The wildlife law-enforcement officer to which Plaintiffs refer as “in place,” (Doc. 108, at 30), is not the law enforcement position that the Project’s mitigation plan would fund.

<sup>3</sup> The 153 acres of mitigation land is within the area referred to as the “constricted corridor.”

bear mortality that would have otherwise occurred[.]” USFWS\_003265. These trends have improved further, as explained below.

## **2. The 2019 Biological Opinion Establishes Continued Improvement in Grizzly Bear Status.**

In 2019, the agencies reinitiated consultation on the Project.

USFWS\_041232. Pursuant to this consultation, the Service released its 2019 Biological Opinion, which updated grizzly bear mortality and population data in the Cabinet-Yaak and analyzed the Project’s potential effects on grizzly bears.

USFWS\_041206-08. The updated information which the 2019 Biological Opinion analyzed includes an updated research report by Kasworm (“Kasworm (2018)”) (USFWS\_041674-041775). Like Kasworm (2017), Kasworm (2018) includes the grizzly bear mortality data that Plaintiffs contend the agencies ignored. *See* USFWS\_041689-91; (Doc. 108, at 31) (Plaintiffs cite to USFWS\_041689-91 as a source of their mortality data).

Kasworm (2018) examined grizzly bear mortality rates in or within 16 kilometers of the Cabinet-Yaak (including Canada) by breaking the data into periods of increase and decrease in population trend before and through 2006, and after 2006. USFWS\_041705. Based on these data, Kasworm (2018) confirmed an improving trend in grizzly bear population and mortality risk for the Cabinet-Yaak after 2006. He estimated the 2017 Cabinet-Yaak grizzly bear population at approximately 55-60 bears with a 2.1% annual growth rate and a 73% probability

that the population is stable or increasing. USFWS\_041208, 041709-10. He found the known female grizzly bear mortality rate improved from 1.88 during 1999-2006 to 0.64 during 2007-2017, and the known human-caused female grizzly bear mortality rate improved from 1.50 during 1999-2006 to 0.45 during 2007-2017. USFWS\_041207, 041705. Kasworm credited the decline in female mortality as largely responsible for the improving population trend in the Cabinet-Yaak from 2007-2017. USFWS\_041207-08, 041705. Further, Kasworm found that the annual rate of known human-caused grizzly bear mortality improved in the Cabinet-Yaak from 2.25 for 1999-2006 to 2.1 for 2007-2017. USFWS\_041207, 041705.

The 2019 Biological Opinion found that the data reported by Kasworm (2018) are consistent with the 2006 Biological Opinion's determination that the Project's mitigation plan is likely to reduce overall grizzly bear mortality risk. USFWS\_041207. To further support this conclusion, the 2019 Biological Opinion cited Proctor's 2018 study, indicating that partial implementation of the Project's mitigation measures prevented conflicts and helped reduce grizzly bear mortality rates in the Cabinet-Yaak. USFWS\_041208, 042179.

The 2019 Biological Opinion concluded that the Decision Record, which approved only evaluation activities, will result in less impact to grizzly bears than the previous proposed action (adit and mining) and such impact was considered in

the previous biological opinions. USFWS\_041217. The Service therefore affirmed its prior no-jeopardy determination as to the Project's evaluation adit. *Id.*

Given all this, Plaintiffs have failed to show that the Project's mitigation plan is not delivering its anticipated benefits. They have isolated the mortality data they deem favorable from the entire data package, and assert error based on a small subset of the data. This isolation of facts is improper. *Rock Creek All.*, 703 F. Supp. 2d at 1211 (rejecting attempt to isolate a single aspect of the Project's mitigation plan). Plaintiffs also do not cite expert opinion to support their speculation that the Project's mitigation plan is ineffective. More fundamentally, Plaintiffs have not established that their purportedly new information reveals effects that were not already considered in the earlier 2006 Biological Opinion. *See* 50 C.F.R. § 402.16(a)(2). The Service predicted that implementation of the Project's mitigation plan would improve baseline conditions, and this improvement occurred through only partial implementation of the plan.

Plaintiffs contend that the Service is relying on mere "opinion" to support "mitigation effectiveness" (Doc. 108, at 35), but the data belies this contention. Through improved female grizzly mortality rates, an average of one female bear mortality is prevented per year. USFWS\_041705. Moreover, from 2007 to 2017, with only partial implementation of the Project's mitigation plan, the Cabinet-Yaak grizzly population increased from an estimated 30-40 bears to 55-60 bears.

USFWS\_001729, 041208. These improvements by themselves show that the Service's opinion on mitigation efficacy is fact-based and provide significant cushion if unexpected grizzly bear mortality occurs during adit construction.

No basis further exists for Plaintiffs' claim that the "data FWS cited from the 2018 Kasworm report do not rationally reflect the efficacy of mine mitigation measures implemented since 2007." (Doc. 108, at 36). To support this claim, Plaintiffs provide their own bear mortality analysis that excludes "human-caused mortalities in Canada," asserting "FWS cannot credibly claim [those bears] are affected by mitigation measures implemented in Montana." (Doc. 108, at 36) (emphasis in original). But under Plaintiffs' reasoning, the analysis of the mitigation plan's effectiveness should also exclude bear mortalities in Idaho, since the bear specialist's area of responsibility is limited to lands in Montana.

USFWS\_034427, 041294. When the Canadian and Idaho mortalities are excluded from the calculations, the data show improvement in human-caused grizzly bear mortalities between 1997-2006 (13 mortalities) and 2007-2016 (12 mortalities).

*Compare* USFWS\_041690-91 with Plaintiffs' calculations at (Doc. 108, at 31).

Further, if Canadian and Idaho mortalities are excluded from the calculations, the data show improved annual human-caused mortality rates in the post-2007 period with a rate of 1.6 bears/year for 1999-2006 compared to 1.1 bears/year for 2007-



2017.<sup>4</sup> Plaintiffs' mortality analysis is also unpersuasive because the Service relied heavily on the data for female grizzly bear mortality to support its conclusion that the proposed mitigation is "likely to reduce overall mortality risk."

USFWS\_041207-08. Those data show that the rates of known female grizzly mortality and known human-caused female grizzly mortality improved

significantly between 1999-2006 and 2007-2017 whether or not Canadian and Idaho mortalities are removed from the calculations. *See* USFWS\_041689-91.

"The loss of females is the most critical factor affecting the trend because of their reproductive contribution to current and future growth." USFWS\_041705.

Plaintiffs cite Kendall's 2016 research article, but it does not help them. (Doc. 108, at 28). While Kendall reports that reducing grizzly bear mortality is important to assisting bear recovery (USFWS\_041833), she also reports that the "mean annual rate of change of the Cabinet-Yaak populations has steadily increased since its low point (1983-2006 . . . as a result of increasing female survival rates," USFWS\_041835, that a "decrease in human-caused mortality during the past decade reversed a severe population decline," USFWS\_041836,

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<sup>4</sup> The mortality data for 2018-2019 do not materially change the above result. (Doc. 108, at 31). Sixteen human-caused grizzly bear mortalities occurred in the Montana portion of the Cabinet-Yaak from 2007 through November 20, 2019 (USFWS\_041208, 041305), which averages to 1.2 bears per year. That rate is significantly less than the human-caused mortality rate (1.6) for 1999-2006. The female grizzly and two cubs upon which Plaintiffs rely for their calculations (Doc. 108, at 31) apparently died outside Montana. USFWS\_041305.

and that bear specialists’ activities “have been effective in reducing human-bear conflicts and mortality.” *Id.* Plaintiffs’ conspicuously do not cite Proctor’s 2018 study, as his research supports the efficacy of grizzly bear specialists in the Cabinet-Yaak. USFWS\_041207, 042179 (detecting “significant decrease” in mortality trend within northwest Montana portion of Cabinet-Yaak and increase in grizzly bear population after hiring grizzly bear conflict specialist).

The cases that Plaintiffs cite do not support agency error. In *Save Our Cabinets v. U.S. Fish and Wildlife Serv.*, 255 F. Supp. 3d 1035, 1063 (D. Mont. 2017), this Court found error because of the Service’s “blanket reliance” on the Montanore Mine’s terrestrial mitigation plan and its failure to consider the “potential inadequacy” of the proposed mitigation measures. Not so here. The Service compared grizzly bear mortality and population data for the periods 1999-2006 and 2007-2016 and found an improved baseline and increasing bear population after the bear specialist was hired in 2007. USFWS\_003271. These improved conditions are consistent with the effects that the 2006 Biological Opinion predicted would occur from the mitigation plan’s implementation. As explained by Kasworm, “Declines in the mortality rate on private lands beginning in 2007 correspond to and may be the result of the initiation of the MFWP bear management specialist position.” USFWS\_041605. The analysis and “net improvement for grizzly bears” that the Court found lacking in *Save Our Cabinets*,

255 F. Supp. 3d at 1062, are present here. Moreover, unlike *Save Our Cabinets*, where the Service's jeopardy analysis was based on an environmental baseline that included the Rock Creek Mine, FS\_021536, the Montanore Mine is not in the Project's environmental baseline. USFWS\_003425. Nor have additional new mines been permitted and added to the Project's baseline. USFWS\_041206-08 (no mention of new mines).

*Ctr. for Biological Diversity v. Bureau of Land Management*, 698 F.3d 1101, 1115 (9th Cir. 2012) does not support Plaintiffs because the promised conservation measures have succeeded, not failed. *Sierra Club v. Marsh*, 816 F.2d 1376, 1388-89 (9th Cir. 1987) is inapposite because no failure to perform mitigation has occurred. Moreover, much of the mitigation that RC Resources has performed to benefit grizzlies in the Cabinet-Yaak was not required when the work was performed. The Project's mitigation plan required that RC Resources fund for the life of the mine a bear specialist prior to commencing the evaluation audit. USFWS\_001719. No such funding was therefore required between 2007 and the present.

For the above reasons, the Service's 2017 decision not to reinstitute consultation on grizzly bears was not arbitrary or capricious. Likewise, the 2019 Biological Opinion's analysis of bear mortality data is rational and complies with the ESA. Each document examined the track record for the Project's mitigation

measures, and found evidence they are succeeding. Because the Service “considered the relevant factors and articulated a rational connection between the facts found and the choice made,” both documents should be upheld. The record is devoid of data or other information establishing that additional consultation is required today.

**B. The Forest’s Analysis of Grizzly Bear Mortality Data Was Rational and Disclosed No Basis to Reinitiate Consultation.**

Contrary to Plaintiffs’ assertions (Doc. 108, at 40), the Forest’s Decision Record was rational and lawful. Responding to objections that the Project’s terrestrial mitigation plan had proven ineffective, the Forest examined grizzly bear mortality data for the Cabinet-Yaak, including data aggregated for periods before and through 2006, and after 2006. Citing multiple studies, the Forest found grizzly bear population and mortality trends had improved since 2007, when mitigation commenced. FS\_011646-47. The Forest’s 2018 Supplemental EIS reached a similar conclusion. FS\_009026. In October 2018, the Forest responded to Plaintiffs’ 60-day notice of intent to sue, and explained why reconsultation on the mortality data identified by Plaintiffs was unnecessary. FS\_124672-75.

Based on the above, Plaintiffs’ assertion that the Forest ignored the mortality data and violated the ESA is incorrect. The Decision Record was based on both the Forest’s independent review of the mortality data and the Service’s analysis in the 2017 Grizzly Bear Supplement. Based on those analyses, the Forest found that

reconsultation on grizzly bears was not required. The 2019 Biological Opinion reaffirmed that the Project's terrestrial mitigation plan was succeeding, as contemplated by the agencies. The Forest's review therefore complied with the ESA. Its Decision Record should be affirmed.

**IV. The 2019 Biological Opinion Analyzed the Relevant Action and Its Effects, and Did Not Unlawfully Segment the Project's ESA Analysis.**

Plaintiffs' second claim contends the Service unlawfully segmented its analysis of the Project because it considered "only Phase I" and therefore "failed to analyze the full scope of the relevant action and/or its effect[s]." (Doc. 99, at 44). This claim fails because the relevant action for purposes of the Service's ESA analysis was the Forest's approval of a plan of operations for the evaluation adit, and the Service analyzed the full scope of the adit and its effects. The Service was therefore not required to study future mining that might arise.

At the outset, the Forest had no duty to consult with the Service on the Project's unapproved mining phase. ESA section 7 requires that federal agencies consult to "insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species[.]" 16 U.S.C. § 1536(a)(2). Consistent with section 7's definition limiting "agency action" to actions "authorized, funded, or carried out," ESA's

implementing regulations define “action,” in pertinent part, as “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agency[es],” including the granting of permits. 50 C.F.R. § 402.02. Thus, “the test [for the duty to consult] under the ESA is whether the agency *authorizes*, funds, or carries out the activity, at least in part.” *Karuk Tribe*, 681 F.3d at 1023 (emphasis added).

Here, the Project’s unapproved mining phase does not fit within the ESA’s definition of “agency action” because the Forest has not authorized mining. As Plaintiffs admit (Doc. 108, at 22), the sole “action” that the Decision Record authorizes is an amended plan of operations for the evaluation adit.

USFWS\_042205-07. The Decision Record gives no approval for mining, and makes no commitment to approve mining. USFWS\_042202, 042205. No approval for mining could exist because the Deputy Regional Forester instructed the Forest Supervisor “to issue a final ROD that will approve only Phase I[.]” FS\_011635, 011657. If mining is ever approved, it must be preceded by, at minimum: (i) the evaluation adit, (ii) analysis of the data there generated, FS\_011635-36, (iii) approval of an updated plan of operations; (iv) additional NEPA analysis, USFWS\_042208; and (v) the reinitiation of ESA consultation, USFWS\_041207, and will require a future decision in a separate decision document. USFWS\_042202. Because the agency action consisted only of

evaluation activities, the Forest was not required to consult with the Service on mining before approving the evaluation activities. *Western Watersheds Project v. Matejko*, 468 F.3d 1099, 1111 (9th Cir. 2006) (no duty to consult because BLM did not take affirmative action authorizing, funding, or carrying out challenged activity); *see Karuk Tribe*, 681 F.3d at 1011, 1024 (Forest had duty to consult because it “approve[d]” a Notice of Intent and “affirmatively decide[d]” to allow mining to proceed).

Furthermore, the Service had no duty to analyze mining in the 2019 Biological Opinion. Biological opinions must contain “the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the *agency action* affects the species or its critical habitat.” 16 U.S.C. §1536(b)(3)(A) (emphasis added). Here, that action is approval of a plan of operations for the evaluation adit, as explained in the 2019 Biological Opinion. USFWS\_041199, 041216-17. The Service therefore had no duty to set forth its opinion detailing how construction or operation of an unapproved Rock Creek Mine affects grizzlies or bull trout. *See Ctr. for Biological Diversity v. U.S. Fish and Wildlife Serv.*, 807 F.3d 1031, 1047 (9th Cir. 2015) (no error in excluding groundwater pumping from biological opinion where pumping was not “authorized, funded, or carried out” by Federal agency); *Village of False Pass v. Clark*, 733 F.2d 605, 608-12 (9th Cir. 1984) (biological opinion limited to lease sale stage for oil and gas leases under

Outer Continental Shelf Lands Act did not violate ESA where agency approval was required prior to commencing each new development stage, the stages were “separate and distinct” and would each involve separate ESA review, and agency could halt further developer action prior to each successive stage).

*Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678 (D.C. Cir. 1982) provides further compelling authority that the ESA did not here require review of unapproved mining. In *Peterson*, the plaintiff challenged Forest approval of a plan of operations for exploratory mineral drilling in the Cabinet Mountains Wilderness. The Service prepared a biological opinion outlining measures to avoid jeopardizing grizzly bears, and the Forest adopted the Service’s plan. The court “emphasize[d]” that its “review of the agency’s action is limited to the approval of the four-year exploratory drilling proposal.” *Id.* at 687. Further, it found that the Forest and Service “expressly limited their findings” to the drilling program. *Id.* The court held that the Forest’s “action was reasonable and supported by the record,” and that the Forest’s findings that grizzlies were not likely to be jeopardized by the drilling project were not arbitrary or capricious. *Id.* No ESA review of mining was required.

To support their segmentation claim, Plaintiffs broadly assert that biological opinions may not address “only the first, preliminary stage in a multistage project” and must analyze the effect of the entire “agency action.” (Doc. 108, at 19-20).



These assertions fail because the evaluation adit is the entire “agency action” in this proceeding, as explained above, and is fully analyzed in the 2019 Biological Opinion. The cases upon which Plaintiffs rely do not show otherwise.

Plaintiffs’ principal case, *Conner v. Burford*, 848 F.2d 1441, 1443-44 (9th Cir. 1988), concerned oil and gas leasing programs that encompassed a wide range of interrelated steps, starting with lease issuance and including post-leasing development and production. There was no dispute in *Conner* that the agency action encompassed multiple stages because each biological opinion specified that the “action” being considered “includes not just final lease issuance but all resulting subsequent activities.” *Id.* at 1453. The decisive issue in *Conner* was therefore not whether the “agency action” incorporated post-leasing activities (it expressly did), but whether the Service was required to analyze those activities given “insufficient information available to render a comprehensive biological opinion.” *Id.* at 1452. Unlike *Conner*, the “agency action” here is expressly limited to a single activity, the evaluation adit, as specified in the Decision Record and the 2019 Biological Opinion. USFWS\_041199, 041216-7, 042205-07. Further, unlike *Conner*, additional activity (mining) cannot and will not occur absent an updated plan of operations, a new decision record, renewed ESA

consultation, and obtaining all necessary state permits.<sup>5</sup> The Organic Act’s implementing regulations safeguard this result by requiring Forest approval before mining can occur. 36 C.F.R. §§ 228.4(a)(3), 228.5(a); *Karuk Tribe*, 681 F.3d at 1012. The Service therefore analyzed the effect of the entire Rock Creek “agency action.” *Conner* does not hold otherwise.

Plaintiffs’ second case, *Wild Fish Conservancy v. Salazar*, 628 F.3d 513 (9th Cir. 2010), is also inapposite. There, the court ruled that the Service violated the ESA because its analysis of the effects of a hatchery’s continued operations was segmented into 5-year windows, but the hatchery had been operating for 70 years and there was no indication that it would cease operations at any time in the future. 628 F.3d at 521-24. Thus, unlike the Rock Creek evaluation adit, *Salazar* addressed the “artificial division of a continuing operation into short terms,” and was concerned that such division “can undermine the consulting agency’s ability to determine accurately the species’ likelihood of survival and recover[y].” *Id.* at 522. The risk addressed in *Salazar* does not exist here. The Project’s evaluation adit is not a continuing action (USFWS\_001712, 041200); accordingly, there will not be “impact, in each of several subdivided periods of operation that, in cumulation, have an undeniably appreciable impact.” *Salazar*, 628 F.3d at 523.

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<sup>5</sup> For example, while Montana has issued an exploration license to RC Resources for evaluation adit construction, it has not issued a hard rock operating permit authorizing mining of the Rock Creek deposit. USFWS\_042631.

There is also no risk that the adit will lead to the gradual destruction of bull trout or grizzlies. The adit is “not anticipated to affect baseflow in the Rock Creek or Bull River watersheds,” and Phase I’s “sediment mitigation plan will result in a net decrease in the amount of sediment delivered to Rock Creek.” USFWS\_041209, 041210-11. Increases in sediment delivery to Rock Creek will be short-term with short-term effects on bull trout. USFWS\_041209, 041210, 041218-19. The Service does not anticipate “any [grizzly bear] mortalities associated with the Rock Creek evaluation.” USFWS\_041226. Monitoring is incorporated into the Project to evaluate the adit’s effects on both species. USFWS\_041215, 041220-24, 041226-27. Moreover, no approval of mining can occur until the Service and Forest reinitiate consultation. USFWS\_041211, 041217. *Salazar* therefore does not require a biological opinion evaluating possible, future mining of the Rock Creek deposit.

The additional cases that Plaintiffs cite do not support their claims. *Greenpeace v. National Marine Fisheries Serv.*, 80 F. Supp. 2d 1137 (W.D. Wash. 2000) is inapposite because the Fisheries Service limited to one year its analysis of “overall” fisheries management plans that by law covered a comprehensive federal management program, and had informed the court it would provide a “broad and comprehensive analysis” of those plans. 80 F. Supp. 2d at 1444-47. *Am. Rivers v. U.S. Army Corps of Eng’rs*, 271 F. Supp. 2d 230 (D.D.C. 2003) does not support

Plaintiffs because the court’s segmentation analysis did not address the question of how to define the agency action, but instead focused on analyzing the effects of the action, once defined.

Plaintiffs contend that the 2019 Biological Opinion inexplicably “reversed” the Service’s prior “approach of analyzing the full Project Plan,” (Doc. 108, at 19, 21-2), but this contention also fails. “Agencies are entitled to change their minds,” provided they “articulat[e] a satisfactory explanation for [their] action.” *Defenders of Wildlife v. Zinke*, 856 F.3d 1248, 1262 (9th Cir. 2017). Here, the agencies explained why they limited their analysis to the evaluation adit. The Deputy Regional Forester instructed the Forest Supervisor “to issue a final ROD that will approve only Phase I project activities” because of uncertainty in the data, FS\_011635, 011657, and the Forest Supervisor complied with that instruction. USFWS\_042202, 042205. Relying on the Forest’s narrowed Decision Record, the Service focused its ESA analysis on evaluation activities and explained why it did so. USFWS\_041199, 041211 (2019 Biological Opinion explaining it did not consider mining’s effects “[s]ince Phase II is not approved by the KNF or proposed for approval at this time[.]”), 041216-17. The agencies’ decisions were not arbitrary or capricious.<sup>6</sup>

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<sup>6</sup> Contrary to Plaintiffs’ assertions that the meaning of “agency action” is determined as a matter of law by the court (Doc. 108, at 22), the Ninth Circuit specifies that the Service’s decision to limit its analysis in a biological opinion will

The context for the Forest's decision to limit its Decision Record to evaluation activities does not show unlawful segmentation (*see* Doc. 108, at 23), but demonstrates commitment to environmental protection. The Deputy Regional Forester explained that the inaccessibility of underground rock formations limits the availability of subsurface data, which creates uncertainty in evaluating environmental impacts to groundwater prior to mining. FS\_011635. He also explained that proceeding with the evaluation adit would reduce that uncertainty and allow an informed decision. *Id.* Due to the importance of collecting the data, he directed the Forest to approve only the evaluation adit. *Id.*

Plaintiffs' assertions that the Forest's modeling predicted violations of Montana's non-degradation standards are conjecture. (Doc. 108, at 23). The table (FS\_014194) that Plaintiffs present as proof of degradation misuses data, is unreproducible from the data contained in the Project's Supplemental EIS, and shows results contradicted by that EIS and the peer reviewed Hydrometrics 2014 report (FS\_019009-156) upon which the Supplemental EIS relies. Plaintiffs' table appears to use some data presented in Hydrometrics 2014, Appendix B, which cautions: "Output for specific locations on streams, particularly higher up in the drainages [all segments listed in Plaintiffs' table] has a high degree of uncertainty and should not be used to quantify predicted changes in base flow at specific

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be upheld unless "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Conner*, 848 F.2d at 1453; *see Salazar*, 628 F.3d at 525.

locations.” FS\_046168. Plaintiffs’ self-produced “proof” table appears to use the data in a manner not supported by Hydrometrics 2014. Hydrometrics 2014 was peer reviewed by the Forest’s internal experts, an independent third party consultant, and the Environmental Protection Agency. FS\_019522-3, 019489-93, 010979. It does not support Plaintiffs’ self-produced and self-serving analysis while contradicting their assertions regarding both the magnitude and timing of potential changes to surface water baseflow. FS\_046094.

Plaintiffs also attempt to re-define what ARM 17.30.715(1)(a) classifies as nonsignificant changes in water quality: “activities that would increase or decrease *the mean monthly flow of a surface water* by less than 15 percent or *the seven-day ten-year low flow* by less than 10 percent.” (emphasis added). ARM 17.30.715(1)(a) shows that nonsignificance determinations are based on changes to either mean monthly flow or seven-day ten-year low flow; however, Plaintiffs do not establish impacts to either of these flow characteristics. Instead, they equate potential baseflow changes with degradation. The 2015 Montanore Joint FEIS demonstrates that stream baseflow estimates are lower than seven-day ten-year low flow estimates. FS\_115391. Thus, even if Plaintiffs could use headwater stream baseflow data from Hydrometrics 2014, such data are insufficient to establish a significant change in water quality in the absence of data on the mean monthly flow or seven-day ten-year low flow for the stream segments Plaintiffs claim will

be degraded. Because Plaintiffs have not produce such data, their assertions of unlawful degradation are speculation and do not show that the Forest “sidestep[ped] an apparent violation” of federal or state law.

Plaintiffs are incorrect that the Service was required to analyze mining’s “effects” pursuant to 50 C.F.R. § 402.02, which defines “effects of the action.” Section 402.02 limits the “effects” that the Service analyzes in a biological opinion to “all consequences to listed species or critical habitat that are *caused by* the proposed action, including the consequences of other activities that are *caused by* the proposed action.” 50 C.F.R. § 402.02 (emphasis added). A consequence is caused by the proposed action (here, the evaluation adit), “if it would not occur but for the proposed action *and it is reasonably certain to occur.*” *Id.* (emphasis added). “A conclusion of reasonably certain to occur must be based on clear and substantial information, using the best scientific and commercial data available,” 50 C.F.R. § 402.17(a), and must have a “degree of certitude.” 84 Fed. Reg. 44976, 44977 (2019). Factors to consider in evaluating whether an activity is reasonably certain to occur include “economic, administrative, and legal requirements necessary for the activity to go forward.” 50 C.F.R. § 402.17(a)(3).

The Rock Creek Mine and its consequences are not “reasonably certain to occur.” Mining can occur only if the evaluation adit confirms favorable geologic and hydrologic conditions for that activity. Those conditions are not reasonable

certain, because of the “inherent level of uncertainty” in underground mining.

FS\_011635. But even if those conditions are established, both the Forest and State of Montana must grant all necessary approvals for the mine. These approvals are not reasonably certain. The Deputy Regional Forester instructed that the responsible official shall not approve mining “until the information generated during Phase I can be evaluated and a determination whether additional analysis is required is made.” FS\_011635. This information will include data to refine the 3D groundwater model to quantify mining’s effects to streamflow and wilderness lakes. FS\_011638. Based on the data and the resulting analysis, the Forest may decline mining’s approval. 36 C.F.R. § 228.5(a); *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv.*, 378 F.3d 1059, 1071 (9th Cir. 2004) (agency afforded “presumption of regularity”). Further, Montana has not issued all permits necessary for mining, including a hard rock operating permit. USFWS\_042629-33. These permits may be denied, which would preclude mining.<sup>7</sup> *Park County Env’tl Council v. Montana Dep’t of Env’tl Quality*, 2020 MT 303, ¶ 34, 477 P.3d 288 (even if “exploration yields discoveries,” Montana “DEQ will still have the final say before any future mining activities go forward”). This Court’s finding that implementation of Phase II mining is “reasonably probable” (Doc. 42, at 10)

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<sup>7</sup> For example, to mine the Rock Creek deposit, RC Resources must apply for and secure a Montana hard rock operating permit that will require a detailed application and updated mine plan. MCA § 82-4-335(5). The merits of the application will depend on data collected from the evaluation adit.



does not change this result, as “reasonably certain” is a higher threshold than “reasonably probable,” the Court did not consider the uncertainty of obtaining Montana-issued permits in its analysis, and the Court was applying a “relaxed standard” in its standing inquiry. Mining the Rock Creek deposit is therefore not reasonably certain, and did not require analysis in the 2019 Biological Opinion.

This Court should reject Plaintiffs’ second claim, and grant summary judgment to RC Resources.

**V. The Decision Record Did Not Rely on an Unlawful Biological Opinion.**

Plaintiffs’ third claim alleges that the Decision Record is unlawful because it is not supported by a valid biological opinion. (Doc. 99, at 44-45; Doc. 108, at 26). This claim fails because the Decision Record is supported by the 2019 Biological Opinion, which fully analyzed the effects of the only activities (evaluation adit) that the Forest approved and which incorporates the analysis of those effects from the Service’s prior biological opinions. USFWS\_041209. The Forest had no duty to consult with the Service on unapproved mining, as explained in section IV, above. Likewise, the 2019 Biological Opinion complied fully with the ESA, as set forth in section IV. The Decision Record is lawful and should be affirmed. *Zinke*, 856 F.3d at 1265 (action agency permissibly relied on biological opinion that was neither legally nor factually flawed).

## VI. Remedies

Whether agency action should be vacated depends on how serious the agency's errors are "and the disruptive consequences of an interim change that may itself be changed." *California Cmty's. Against Toxics v. U.S. Env't'l Prot. Agency*, 688 F.3d 989, 992 (9th Cir, 2012). Here, no errors occurred in the agencies' planning documents. However, if this Court finds error, the documents should be remanded without vacatur.

The alleged error underlying Plaintiffs' first claim is that the Service and Forest wrongfully failed to reinitiate consultation on grizzly bears. If this Court finds error, the agencies will likely be able to cure it on remand by reconsidering the relevant grizzly bear mortality data, and explaining more explicitly why the data do not identify effects not already considered by the agencies. No vacatur of the Decision Record or 2019 Biological Opinion should be ordered. *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 151 (D.C. Cir. 1993) (declining to vacate because there was "at least a serious possibility that the [agency would] be able to substantiate its decision on remand.").

No vacatur of the 2019 Biological Opinion should be ordered if the Court upholds Plaintiffs' second claim. Any such finding would be based on the Service's alleged error in not analyzing the effects of Phase II mining. This alleged error can be fixed on remand, and mining would not occur during the

remand period. Mining has not been approved, an updated plan of operations to mine has not been submitted, and mining can only be approved after the updated plan of operations is submitted and after additional ESA consultation.

The Decision Record should not be vacated if the Court upholds Plaintiffs' third claim, which is based on the 2019 Biological Opinion's alleged failure "to analyze the full scope of the relevant action and/or its effect[s]." (Doc. 99, at 45). Again, the alleged error can be fixed on remand, and mining would not occur during the remand period.

No order should issue that enjoins the evaluation adit's implementation, as Plaintiffs have not demonstrated that irreparable harm is likely in the absence of an injunction. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 818 (9th Cir. 2018). With respect to Claim I, Plaintiffs' contention that the "Project may pose greater mortality threats to grizzly bears" does not demonstrate likely irreparable harm. (Doc. 108, at 27-8). The alleged harm that underlies Plaintiffs' remaining claims arises from mining, which has not been approved *and can only be approved after additional consultation*. Evaluation activities should be allowed to proceed.

## CONCLUSION

This Court should grant RC Resources' Cross-Motion for Summary Judgment and deny Plaintiffs' Motion for Summary Judgment.

DATED: January 22, 2021.

/s/Robert Tuchman

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Local Rule 7.1(d)(2)(E), the undersigned certifies that the foregoing brief is 9,973 words (as counted by Microsoft Word), excluding caption, certificates of service and compliance, table of contents and authorities, and exhibit index.

/s/ Robert Tuchman

Robert Tuchman

**CERTIFICATE OF SERVICE**

I hereby certify that on January 22, 2021, I filed the foregoing **RC Resources Inc.'s Combined Memorandum in Support of Its Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment** with the Clerk of the Court using the CM/ECF system which will cause a copy to be served on counsel of record.

/s/ Robert Tuchman

Robert Tuchman