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

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

Plaintiffs,

vs.

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

Federal Defendants,

and

RC RESOURCES, INC.,

Defendant-Intervenor.

Case No.: 9:19-cv-20-M-DWM

FEDERAL DEFENDANTS' COMBINED MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In 2018, the Kootenai National Forest Supervisor issued a Record of Decision stating its intent to approve a plan of operations for the Rock Creek ore deposit that is limited to data collection and evaluation activities on National Forest System land ("Evaluation Project"). Previously, the United States Forest Service ("Forest Service") consulted with the U.S. Fish and Wildlife Service ("FWS") under Section 7(a)(2) of the Endangered Species Act ("ESA") to ensure that both the Evaluation Project and an earlier proposal to construct and operate the Rock Creek Mine were not likely to jeopardize any ESA-listed species or destroy or adversely modify critical habitat. After the Forest Service issued the 2018 Record of Decision authorizing only the limited Evaluation Project, it reinitiated consultation with FWS to reflect the change in the Forest Service's proposed action, and FWS supplemented and amended its previous biological opinions with the 2019 Biological Opinion.[1] The 2019 Biological Opinion considered the effects of the Evaluation Project, confirmed that it is not likely to jeopardize any ESA-

[1] To clarify and avoid any further confusion in this case, the United States' position on the 2019 Biological Opinion is as follows: the 2019 Biological Opinion "supplemented" prior consultations as they related to the Evaluation Project (also referred to as Phase I) and "amended" prior biological opinions to render inapplicable FWS's analysis and take statements for construction and operation of the Rock Creek Mine (also referred to as Phase II). The 2019 Biological Opinion therefore has the effect of withdrawing all prior analysis, conclusions, and take statements that do not relate specifically to the Evaluation Project, or Phase I.

listed species or destroy or adversely modify critical habitat, and replaced the previous incidental take statements with ones covering only the take reasonably certain to occur due to the Evaluation Project. FWS stated that if, in the future, the Forest Service decides to approve use and occupancy of National Forest land in connection with mining the Rock Creek deposit, the Forest Service could not rely on the past, superseded ESA determinations for the mine's construction and operation phases. That is, a new ESA consultation is legally required before any future mining-related actions may occur that may affect ESA-listed species or designated critical habitat.

Plaintiffs now take issue with the Forest Service and FWS's focus on the Evaluation Project. Presumably, Plaintiffs would have preferred that the Forest Service authorize, and FWS analyze, mining activities in the abstract well before data is gathered that will be used to inform any future mining activities. Notably, Plaintiffs generally avoid justifying that approach. They do not elaborate on why federal agencies would be legally required to speculate over future contingencies that have not been authorized. And for good reason. The Forest Service reasonably authorized the limited Evaluation Project and FWS is not required, nor is it permitted, to consider actions and effects outside the scope of the proposed action.

BACKGROUND

I. Statutory and Regulatory Background

a. The Mining Law of 1872

Congress enacted a system of self-initiated rights to mineral extraction in the Mining Law of 1872, 30 U.S.C. §§ 21-54. The Mining Law contains "an express invitation to all qualified persons to explore the lands of the United States for valuable mineral deposits." *Union Oil Co. of Cal. v. Smith*, 249 U.S. 337, 346 (1919); *accord Andrus v. Shell Oil Co.*, 446 U.S. 657, 658 (1980) (the Mining Law "provides that citizens may enter and explore the public domain, and search for minerals"). It embraces "the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States." 30 U.S.C. § 22. The Mining Law recognizes two types of self-initiated rights: (1) free access to federal land and (2) the right to establish property rights to that land.

First, Section 22 provides that "all valuable mineral deposits in lands belonging to the United States … shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase," subject to applicable regulations and laws. *Id*. In short, the Mining Law invites and authorizes U.S. citizens to enter and occupy "free and open" lands for mining purposes "under regulations prescribed by law." *Id*.

Second, the Mining Law grants miners the option to establish and protect a property right to lands explored and occupied by staking or "locating" mining claims. *Id*. §§ 23, 26, 35, 36; *see also United States v. Shumway*, 199 F.3d 1093, 1095 (9th Cir. 1999) (mining claims are "vested possessory rights" and recognized interests in real property). Miners locate a mining claim by following certain procedures, including posting notice, marking claim boundaries, recording with the county, and meeting other statutory or regulatory requirements. *Id*. at 1099. The staking of a mining claim protects the claimant against competing miners. *See, e.g.*, *Belk v. Meagher*, 104 U.S. 279, 283-84 (1881).

Ultimately, *Congress*—not the Department of the Interior or the Department of Agriculture—conferred the "right of possession and enjoyment of all the surface included within the lines of [valid mining claims]." 30 U.S.C. § 26. The Supreme Court has interpreted this statutory right as "property in the fullest sense of that term." *Wilbur v. U.S. ex rel. Krushnic*, 280 U.S. 306, 316 (1930).

b. The Organic Act of 1897 and the Forest Service's Regulations

The Organic Act of 1897 extended the rights conferred by the Mining Law to the national forests. 16 U.S.C. § 482; *Wilderness Soc'y v. Dombeck*, 168 F.3d 367, 374 (9th Cir. 1999). The Act imposes a dual mandate on the Service to protect national forests from destruction while allowing mineral exploration and mineral resource development under the Mining Law. *United States v. Weiss*, 642 F.2d

296, 299 (9th Cir. 1981) (stating that the "important interests" of mining and national forests "were intended to and can coexist"); *Okanogan Highlands All. v. Williams*, 236 F.3d 468, 478 (9th Cir. 2000) (reiterating that the Act advances "the 'important and competing interests' of preserving forests and protecting mining rights" (quoting *Weiss*, 642 F.2d at 299)). After all, national forests "are not parks set aside for nonuse, but have been established for economic reasons." *United States v. New Mexico*, 438 U.S. 696, 708 (1978) (citations omitted).

The Organic Act directs the Forest Service to "make provisions for the protection against destruction by fire and depredations upon the public forests and national forests" and to make regulations necessary "to regulate their occupancy and use and to preserve the forests thereon from destruction." 16 U.S.C. § 551. But the Act includes an express carve-out for mining, providing that the Forest Service may not "prohibit any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof," as long as the person complies with applicable rules and regulations. *Id*. § 478.

In 1974, the Forest Service promulgated surface use regulations under its Organic Act authority. 36 C.F.R. Pt. 228, Subpart A. Those regulations "set forth rules and procedures through which use of the *surface* of National Forest System lands in connection with operations authorized by" the Mining Law "shall be

conducted." *Id*. § 228.1 (emphasis added). The regulations do not, however, "provide for the management of *mineral* resources" because "the responsibility for managing such resources is in the Secretary of the Interior." *Id*. (emphasis added). They also "recognize[] that prospectors and miners have a statutory right, not mere privilege, under the 1872 mining law and the [Organic Act], to go upon and use the open public domain lands of the National Forest System for the purposes of mineral exploration, development[,] and production." 39 Fed. Reg. 31,317 (Aug. 28, 1974).

The Forest Service designed its Part 228(A) regulations to ensure that mining operations are "conducted so as to minimize adverse environmental impacts on National Forest System surface resources." 36 C.F.R. § 228.1. The regulations apply to "[a]ll functions, work, and activities in connection with prospecting, exploration, development, mining or processing of mineral resources and all uses reasonably incident thereto, including roads and other means of access on lands subject to" the regulations, "regardless of whether said operations take place on or off mining claims." *Id*. § 228.3(a); *see also id*. § 228.2.

Anyone wishing to conduct mining operations that will likely cause "significant disturbance of surface resources" must submit a proposed plan of operations to the Forest Service for approval. *Id*. § 228.4(a)(3). The regulations set out detailed requirements for a proposed plan of operations and for the Forest

Service's review of the same. *Id.* §§ 228.4(c)-(f), 228.5. They also require operations to be conducted "where feasible" to "minimize adverse environmental impacts on National Forest surface resources." *Id.* § 228.8 (listing specific resources, like air and water quality, solid waste disposal, scenic values, and fisheries and wildlife habitat). As relevant here, the regulations also impose additional requirements for operations proposed in National Forest Wilderness. *See id.* § 228.15. An operator must show in its proposed plan of operations how those requirements will be met. *Id.* § 228.4(c)(3). After the Forest Service completes its review of a proposed plan, including any required ESA analysis, it may approve the plan or notify the operator of any changes or additions required to meet the purpose of the regulations. *See id.* § 228.5(a)(1), (3).

c. The Endangered Species Act

Section 7(a)(2) of the ESA requires federal agencies ensure that any action they "authorize[], fund[], or carr[y] out … is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of designated critical habitat. 16 U.S.C. § 1536(a)(2). If the proposed action "may affect" a listed species or critical habitat the action agency must enter into formal consultation with the consulting agency (here, FWS). Formal consultation culminates when FWS issues a biological opinion assessing the likelihood of "jeopardy" to the species or "destruction or

adverse modification" of critical habitat. 50 C.F.R. § 402.14(g)-(h). If FWS determines that take is reasonably likely to occur incidental to the proposed action, it must issue an incidental take statement along with the biological opinion. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(g)(7).

The action agency may need to reinitiate consultation if it retains discretionary involvement or control over the action and: (1) the amount or extent of take in an incidental take statement is exceeded, (2) 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, (3) the action is modified in a manner that causes an effect on listed species or critical habitat not previously considered, or (4) a new species is listed or critical habitat is designated that the proposed action may affect. 50 C.F.R. § 402.16(a)(1)-(4); *see Env't. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1082 (9th Cir. 2001).

II. Factual Background

a. History of Rock Creek Mine Project Proposals

Over the past few decades, Defendant-Intervenor RC Resources and its predecessors have shown interest in developing the Rock Creek Mine, a proposed copper and silver underground mine with associated facilities that would be located in Sanders County in northwestern Montana. *See* FS_118276; FS_118282. RC Resources owns the mineral estate for the Rock Creek ore deposit beneath and

adjacent to the Cabinet Mountains Wilderness. FS_118279, FS_118359, FS_118275. The proposed mine includes certain activities, like use of National Forest System lands, that require approvals from the Forest Service and other state and federal agencies. FS_118283.

The history of the National Environmental Policy Act ("NEPA") and ESA compliance for the Rock Creek Mine proposals is long and complex. *See* Fed. Defs.' Statement of Undisputed Facts ("Defs.' Undisputed Facts") ¶¶ 10-14, 21-24, 40, 57-61. As relevant here, FWS issued a biological opinion in 2006 analyzing the effects of the proposed Rock Creek Mine on grizzly bears, bull trout, and bull trout critical habitat. USFWS_001702-002323. FWS supplemented the 2006 Biological Opinion in 2007. USFWS_002489-002657. In 2017, the Forest Service reinitiated ESA consultation and FWS issued a revised biological opinion ("2017 Biological Opinion") concluding that the full Rock Creek Mine is not likely to jeopardize bull trout or destroy or adversely modify bull trout critical habitat. Defs.' Undisputed Facts ¶ 24. In 2017, FWS also supplemented its 2006 Biological Opinion on the Rock Creek Mine's impacts to grizzly bears ("2017 Grizzly Bear Supplement") where FWS concluded that reinitiation of formal ESA consultation over impacts to grizzly bears was not required. USFWS_003252-78.

The 2006, 2007, and 2017 biological opinions and supplements analyzed the potential impacts of the *proposed* Rock Creek Mine, which RC Resources divided

into two parts: (1) the Evaluation Project (or Phase I), which involved constructing one evaluation adit and support facilities aimed at gathering information; and (2) the mining project (or Phase II), which included the development, construction, operation, and reclamation of the actual mine and mill facilities. USFWS_002988-91. As proposed, it was anticipated that mining would last 33-38 years, disturb roughly 445 acres, and produce about 10,000 tons of ore per day. USFWS_002989-90.

b. Forest Service Record of Decision and 2019 consultation

In 2018, the Forest Service issued a Record of Decision stating its intent to approve an Amended Plan of Operations for Evaluation Project activities; the Forest Service did *not* issue any decision on the separate mining project. FS_118275; FS_118279. RC Resources intends to use the evaluation adit to evaluate the ore body, obtain rock mechanics data to aid underground mine design, gather hydrologic and geochemical data, and obtain ore samples for metallurgical testing. *Id*.; FS_118283. RC Resources and the Forest Service will use this information to inform the final design and mitigation plans for the mine and evaluate potential environmental impacts, *if* RC Resources decides to pursue the mining project following the Evaluation Project. FS_118284.

The Evaluation Project will not entail any surface disturbance within the Cabinet Mountains Wilderness and "will not directly affect any wilderness

qualities or wilderness character." FS_118304; FS_118353 (providing map of Evaluation Project facilities). In total, the agencies anticipate that the Evaluation Project will disturb 19.6 acres of National Forest System and private land. USFWS_002989; FS_118281; FS_118364. Up to 131 employees and contractors are expected to be involved in the Evaluation Project, with about 40 expected to reside in the region. FS_118290; FS_118383. Unlike the former proposal for the mining project, the Evaluation Project is not expected to affect stream baseflows in the area, but may cause short-term increased sedimentation in Rock Creek. FS_118288. The 2018 Record of Decision requires RC Resources to implement an extensive mitigation package to minimize any potential impact to grizzly bears and a sediment mitigation plan specifically designed to reduce sediment yields in streams far below existing conditions. FS_118287; FS_118301.

Following the 2018 Record of Decision, the Forest Service and FWS reinitiated consultation to revise the scope of the consultation to cover *only* the action the Forest Service ultimately approved—the Evaluation Project. USFWS_041232-35. FWS thus issued a "Supplement to the Biological Opinions on the Effects of the Rock Creek Project on Bull Trout, Designated Bull Trout Critical Habitat, and Grizzly Bear" ("2019 Biological Opinion"). USFWS_041161-94; USFWS_041197-041231. The 2019 Biological Opinion "supplemented" the previous consultation documents issued in relation to the Rock Creek Mine to the

extent those documents addressed the Evaluation Project. USFWS_041199; USFWS_041209. Still, it also amends those documents to reflect that the Forest Service altered the scope of the current proposed action, which now consists *only* of the Evaluation Project. USFWS_041199-041200; USFWS_041205-08. Thus, the previous consultation documents involving mining (or Phase II) are now outside the scope of the "proposed action" subject to Section 7 consultation. The 2019 Biological Opinion thus amended the jeopardy and critical habitat determinations relating to the Rock Creek Mine's construction and operation; now, those analyses and conclusions have no prospective application, and the Forest Service must undergo a new Section 7 consultation and obtain separate jeopardy and critical habitat determinations if it ever approves those activities in the future. USFWS_041199; USFWS_041214; USFWS_041217.

Following a previous amended complaint and summary judgment briefing, the Court granted Plaintiffs' leave to file a second supplemental complaint. *See* Plaintiffs' Amended Complaint ("Am. Compl."); ECF No. 99. There, Plaintiffs allege that: (1) the Forest Service and FWS failed to reinitiate formal consultation on Rock Creek Mine's impact to grizzly bears; (2) FWS violated the ESA by structuring the 2019 Biological Opinion to consider only the Evaluation Project; and (3) the Forest Service violated the ESA by approving the Evaluation Project based on an allegedly invalid biological opinion. *See* Am. Compl. ¶¶ 88-107.

III. STANDARD OF REVIEW

The Court reviews Plaintiffs' Administrative Procedure Act ("APA") and ESA claims under the standards set forth in the APA, 5 U.S.C. §§ 701-706. *See San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601-02 (9th Cir. 2014); *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) (en banc). The APA authorizes courts to "hold unlawful and set aside" final agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this highly deferential standard, a court is "not to substitute its judgment for that of the agency" and must affirm a decision that considered the relevant factors and articulated a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted). When reviewing scientific judgments and technical analyses within the agency's expertise, this Court's review is "at its most deferential." *Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d 671, 679 (9th Cir. 2016).

ARGUMENT

Nearly four years ago, in a closely analogous case, this Court set aside a Forest Service Record of Decision to approve the Montanore Mine—a proposed underground copper and silver mine in the Cabinet Mountains Wilderness. *See Save Our Cabinets v. FWS*, 255 F.Supp.3d 1035 (D. Mont. 2017) ("*Montanore*").

The Court identified problems with FWS's analysis of the effects of future mining activities on bull trout based on extant data, and also identified concerns with FWS's evaluation of the likely effects of the grizzly bear mitigation measures on prospective grizzly bear mortality numbers.

Plaintiffs proceed here as if the Forest Service and FWS were either unaware or indifferent to the Court's holdings in *Montanore*. The record proves otherwise. Erring on the side of caution, and in accord with its regulatory mandate to "minimize adverse environmental impacts on National Forest surface resources," the Forest Service reasonably chose to limit its Record of Decision to approve a plan of operations authorizing only those activities associated with the Evaluation Project. The decision not to approve the entire mine build-out reflected the current availability of crucial information. Underground mine development occurs in rock formations that are generally hundreds to thousands of feet below the surface, hidden from view, and inaccessible other than through mine development or drilling. This inaccessibility limits the data first available to predict the specific environmental impacts of mine development. Although RC Resources and the agencies can evaluate models and estimates based on the best available information, it is impossible to obtain actual knowledge of underground conditions until underground operations are underway and RC Resources collects additional data.

The Forest Service had the authority to change the proposed action by approving only the Evaluation Project and it satisfied its ESA obligations when it consulted with FWS on the impacts of that Project. FWS similarly satisfied its ESA obligations by evaluating the effects of the Evaluation Project in its biological opinion and by reasonably concluding that the proposed action was not likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat. Should further development be proposed for authorization at some point in the future, both agencies have committed to additional ESA consultation at that time. As explained below, Plaintiffs' second and third claims fail because the Forest Service has not authorized, funded, or carried out actions to approve any future mining. Likewise, Plaintiffs' first claim fails because the Forest Service and FWS have scrutinized and rationally addressed grizzly bear mortality data in several consultations, including in the 2019 Biological Opinion.

I. Federal Defendants' ESA Section 7 consultation aligns with the scope of the Forest Service's authorized action.

The ESA requires action agencies—here, the Forest Service—to consult with FWS for any "agency action" that "may effect" a listed species or its critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a); *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 974 (9th Cir. 2003). The centerpiece of any Section 7(a)(2) consultation therefore is the "proposed action," which is "any action authorized, funded, or carried out by [a federal] agency." 16

U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02 (defining "action" to include "all activities or programs of any kind authorized, funded, or carried out … by Federal agencies," such as "the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid").

FWS, in turn, analyzes the discretionary agency action, as proposed or performed by the action agency. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666 (2007); *Karuk Tribe of Cal.*, 681 F.3d at 1011. As the Ninth Circuit has clarified, Section 7(a)(2) consultation need only be coextensive with the scope of the authorized action. *Conner v. Burford*, 848 F.2d 1441, 1457 (9th Cir. 1988) ("biological opinions must be coextensive with the agency action.").[2] Federal Defendants complied with this law; the Forest Service, in its discretion, approved the limited Evaluation Project, and FWS's ESA analyses and conclusions mirrored the scope of that authorized agency action.

a. The "agency action" subject to consultation is the Forest Service's authorization of the Evaluation Project.

[2] Other circuits have rejected this approach. *See, e.g.*, *Cooling Water Intake Structure Coal. v. EPA*, 905 F.3d 49, 73 (2d Cir. 2018) (declining to adopt rule that biological opinions must be coextensive in scope with the entire action or else violate the ESA in the context of an EPA rule under the Clean Water Act); *Defs. of Wildlife v. U.S. Dep't of Navy*, 733 F.3d 1106, 1121 (11th Cir. 2013) (same) ("the rule that biological opinions must be coextensive in scope with the 'entire action' or else violate the ESA is nowhere is to be found in the language of the ESA").

In August 2018, the Kootenai National Forest Supervisor issued a Record of Decision stating its intent to approve an amended plan of operations for an Evaluation Project associated with the proposed Rock Creek Mine. FS_118281. Contrary to Plaintiffs' characterization, the 2018 Record of Decision does not approve a multi-stage project. The Forest Service's approval was limited strictly to those activities necessary for the Evaluation Project and made clear that following completion of the Project, and based on monitoring data and analysis, the Forest Service would make a separate decision about whether to approve any subsequent mining operations. FS_118278; FS_118340-341.

The Forest Service's change was deliberate. It carefully circumscribed the plan of operations for the Evaluation Project to inform possible future mine development. The "proposed action is to implement [the Evaluation Project], which would allow for the construction of an evaluation adit into the Rock Creek deposit for purposes of collecting the necessary data to refine the final mine design." FS_118359. The Forest Service would use the gathered data to reevaluate the data assumptions and analyses contained in the Final Supplemental Environmental Impact Statement, assuming RC Resources decides to propose and pursue mining construction and operation activities at some point in the future. FS_118284 (adit information "will be used to develop and direct monitoring programs and mine designs during operations *if the project is subsequently*

approved and implemented.") (emphasis added). Activities beyond the Evaluation Project will be subject to additional ESA consultation and will undergo a separate review should the Forest Service propose to approve additional projects. USFWS_041217.

As evident from the Record of Decision, Plaintiffs misunderstand both the agency action at issue and the scope of consultation required when they allege that "Federal Defendants have unlawfully segmented their ESA analysis of the Rock Creek Mine Project." Plaintiffs' Memorandum in Support of Motion for Summary Judgment ("Pls.' Br."); ECF No. 108 at 18[3]. In 2006, 2007, and 2017, FWS issued biological opinions and supplements that analyzed the potential impacts of the proposed Rock Creek Mine that, at the time, was divided into two parts: (1) the "evaluation phase," which involved constructing one evaluation adit and support facilities aimed at gathering information; and (2) the "mining phase," which included the development, construction, operation, and reclamation of the mine and mill facilities. USFWS_002988-91. Those consultation documents considered the "proposed action" to be the Forest Service's approval for evaluation, construction, and operation activities for the proposed Rock Creek Mine. USFWS_041233. But the Forest Service later revised the "proposed action" in

[3] Page numbers refer to the original pagination and not to the ECF-generated numbering.

response to public input during the objection period. *See* Defs.' Undisputed Facts ¶ 57; USFWS_041234; FS_011635.

Based on this modification, FWS recommended reinitiation of consultation. FWS explained, and the Forest Service agreed, that the 2018 Record of Decision's approval of the Evaluation Project— and not any subsequent mining operation— rendered inapplicable analyses of project elements (i.e., mine construction, operation, and reclamation) contained in prior ESA consultations. Those actions were no longer included in the proposed action. USFWS_041233. This reinitiation resulted in the 2019 Biological Opinion, which amends the prior consultation documents to incorporate the "proposed action" as defined by the Forest Service and subject to ESA consultation as only the Evaluation Project, USFWS_041199; USFWS_041232, and clearly states that any future approval of the Rock Creek Mine's construction or operation will require a new Forest Service approval, a new consultation and jeopardy determination, and a new incidental take statement. *See* USFWS_041211 ("Phase II would be subject to future ESA consultation and review should it be proposed following evaluation and as such no potential effects from Phase II are addressed in this updated Biological Opinion."); USFWS_041199; *see also* USFWS_041234 (Forest Service acknowledging that

"[a] new decision document will be required before any activities other than those approved in the evaluation phase can be implemented").[4]

Legally, the agency action "authorized, funded, or carried out" is limited to the Forest Service's approval of a plan of operations for the Evaluation Project.

b. FWS's biological opinion was appropriately coextensive with the scope of the authorized agency action.

Plaintiffs argue that the Forest Service violated the ESA by limiting its Section 7 consultation to the Evaluation Project and by failing to analyze a different action—full mine construction, operation, and reclamation. Pls.' Br. at 18-19. But Plaintiffs' argument relies on a mistaken understanding of what agency action the Forest Service has authorized, funded, or carried out and the resulting scope of its obligation to consult with FWS. Plaintiffs cannot point to a single example in which courts have applied their reading of Section 7 to hard rock

[4] FWS's statement that it "affirms the no jeopardy and no adverse modification determinations contained in" past consultation documents, must be read in the context of that specific paragraph and the 2019 Biological Opinion as a whole, which makes it abundantly clear that FWS was affirming the no-jeopardy and no adverse modification determinations only *as applied* to the Evaluation Project—the clearly defined proposed action analyzed in that document. *See* USFWS_041217 (in the sentence before that language, explaining that FWS's conclusion was based "[u]pon review of the updated proposed action and new information" and specific to the action approved in the 2018 Record of Decision). On the same page, FWS reiterates that "[a]ctivities beyond evaluation of the Rock Creek Mine will be subject to additional [ESA] consultation, and will undergo a separate review in the future should the [Forest Service] propose to approve additional phases" and any future review would require "*separate jeopardy and adverse modification analyses specific to any future proposed actions*." USFWS_041217 (emphasis added).

mining and so wrongly analogize this case to the separate statutory and regulatory framework governing oil and gas leasing. A closer look at the case law bears out that Plaintiffs misapply the law and that the agencies' consultation here properly reflected the scope of the authorized action.

Plaintiffs first rely on *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988) to argue that FWS may not address only the action the Forest Service authorized—the Evaluation Project. In *Conner*, the court considered, in part, whether federal agencies violated the ESA when they sold oil and gas leases on National Forest land in Montana without a comprehensive biological opinion encompassing the impact of post-leasing activities to threatened or endangered species. The two biological opinions at issue each described the "action" being considered to include "not just final lease issuance but all resulting subsequent activities." *Conner*, 848 F.2d at 1453. But both biological opinions concluded that there was insufficient information pertaining to the specific location and extent of post-leasing oil and gas activities to render a comprehensive biological opinion beyond the initial lease stage. *Id*. In ruling that the agencies violated their Section 7 obligations, the court held that the agency action entailed "not only leasing but leasing and all post-leasing activities through production and abandonment." *Id*. As a result, Section 7 required that FWS consider all phases of the agency action, which included post-leasing activities, in its biological opinions. *Id*.

Unlike the agency action in *Conner*, which involved all phase of the post-leasing activities, the agency action here is well-defined to the Evaluation Project only. "The proposed action is to implement the [Evaluation] [P]roject, which will allow for the construction of an evaluation adit into the Rock Creek deposit…" FS_118279. Throughout the 2018 Record of Decision and 2019 Biological Opinion, the Forest Service and FWS make clear that the proposed action only authorizes evaluation activities and that any activities beyond that will be subject to additional ESA consultation should the Forest Service propose to approve additional projects. *See, e.g.*, FS_149107; FS_149115. Thus, the Forest Service is not taking or influencing any post-Evaluation Project actions and need not consult over those hypothetical future actions now (just as every federal agency lacks a legal obligation to consult over the full scope of possible future actions it may take under its statutory authority).

Conner's consideration of cases addressing the Outer Continental Shelf Lands Act bears out these distinctions and shows why the agencies proceeded appropriately here. *Conner* considered *Village of False Pass v. Clark*, 733 F.2d 605 (9th Cir. 1984), which involved challenges to a lease sale of federal properties with oil and gas potential off the coast of Alaska. Although the Ninth Circuit acknowledged that "agency action" is broadly construed under the ESA, it concluded that the action at issue in that case was limited to the sale of leases. 733

F.2d at 611-12. The court stressed that the Secretary of the Interior must comply with the ESA at each stage of development, *id*., and that the regulations made the Secretary's plan to assess the impact on marine life prior to each stage of oil development "a real safeguard." *Id*. at 612. The court found that the requirements of the ESA were satisfied by a biological opinion limited to the lease sale and exploration stages. "Thus, in *False Pass* … we accepted a limited biological opinion on the basis of the complementary relationship between the ESA's requirements and the segmented approach of the [Outer Continental Shelf Lands Act]." *Conner*, 848 F.2d at 1456. Likewise, *Conner* considered the D.C. Circuit's decision in *North Slope Borough v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980), which allowed a segmented approach and "incremental-step consultation" because of the statutory safeguards under the Outer Continental Shelf Lands Act.

To be clear, the Forest Service's authorization of the Evaluation Project and FWS's resulting biological opinion is not an example of an incremental-step consultation. The 2019 Biological Opinion properly evaluated the *full* scope of the authorized action; it is not limited, nor does it improperly narrow, the proposed agency action (as FWS's biological opinion did in *Conner*). But *Conner's* consideration of *False Pass* and *Andrus* illustrates that the Ninth Circuit closely tailored its inquiry to the specific facts and statutes at issue. *Conner*, *False Pass*, and *Andrus* all turned on the nuances of the applicable statutory schemes; in

Conner, the Mineral Leasing Act and in *False Pass* and *Andrus*, the Outer Continental Shelf Lands Act. And none of the cases establish Plaintiffs' preferred, sweeping "rule"—that all conceivable future agency actions must be combined into one action for purposes of a Section 7(a)(2) consultation. *See, e.g.*, *Wildearth Guardians v. EPA*, 759 F.3d 1196, 1209 (10th Cir. 2014) (ESA consultation requirement "cannot be invoked by trying to piggyback non-action on an agency action by claiming that the non-action is really part of some broader action. When an agency action has clearly defined boundaries, we must respect those boundaries.").

For these reasons, Plaintiffs' use of case law involving leasable minerals to attack FWS's consultation is erroneous and inapposite, as authorities governing such minerals and their development are fundamentally different than the authorities controlling here. Central to cases like *Conner* is a grant, by the authorizing agency, of rights to the minerals at issue and a resulting diminishment of that agency's future regulatory authority as to development of those minerals. By contrast, through the Mining Law of 1872, *Congress* authorized mineral development and provided a mechanism allowing interested parties to self-initiate mineral rights. Here, the Forest Service's decision to approve a plan of operations for the Evaluation Project in no way limits its ordinary regulatory authority over any future mining operations, including its obligation to ensure that mining

operations are conducted so as to minimize adverse environmental impacts to National Forest surface resources to the extent feasible. 36 C.F.R. §228.1; *see also* 36 C.F.R. § 228.15 (detailing additional considerations for operations in wilderness). Indeed, the Forest Service retains discretion to require changes, where feasible, to a proposed plan of operations as it deems necessary to minimize environmental impacts. *Id*. § 228.5(a)(3).

Notably, other courts have recognized agencies' ability to carefully define authorized action as the D.C. Circuit did in *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678 (D.C. Cir. 1982)—a case involving this very same mineral deposit. There, the agency action at issue was limited to the Forest Service's approval of a four-year exploratory drilling proposal. "In that case, the FWS' biological opinion detailed the effects of the four-year program and thus considered the effect of the *entire* agency action." *Conner*, 848 F.2d at 1457 (citing *Cabinet Mountains Wilderness*, 685 F.2d at 680). The D.C. Circuit underscored that its "review of the agency's action is limited to the approval of the four-year exploratory drilling proposal … [a]ny future proposals … to conduct drilling activities in the Cabinet Mountains area will require further scrutiny under … the ESA." *Cabinet Mountains Wilderness*, 685 F.2d at 687.

This is precisely the scenario here. The Forest Service has approved the development of an evaluation adit—a project estimated to take roughly five years

to complete between initial monitoring, road design and construction, and evaluation adit construction. FS_144404. The 2019 Biological Opinion makes clear that "[a]ctivities beyond evaluation of the Rock Creek Mine will be subject to additional [ESA] consultation and will undergo a separate review in the future should the [Forest Service] propose to approve additional phases." FS_149115. This review would include "an analysis of any additional information gathered during evaluation activities, and separate jeopardy and adverse modification analyses specific to any future proposed actions." *Id*. FWS also replaced the incidental take statements to eliminate coverage for take anticipated from the mine construction and operation. *See* USFWS_041217. Without this liability shield, the Forest Service will need to consult over any future proposal to approve the Rock Creek Mine or risk violating Section 7's obligation to consult and ensure against jeopardy *as well as* Section 9's prohibition on the take of listed species.

The second case Plaintiffs rely on—*Wild Fish Conservancy v. Salazar*, 628 F.3d 513 (9th Cir. 2010)—involved a Section 7 consultation for a fish hatchery that had been operating for nearly 70 years. The plaintiffs challenged FWS's decision to limit the scope of the ongoing agency action to five years, and the court agreed that FWS could not arbitrarily limit its analysis in this way. *Wild Fish Conservancy*, however, does not establish the rule that Plaintiffs claim it does. *See* Pls.' Br. at 19 (citing *Wild Fish Conservancy* for the proposition that "[a]s a rule,

biological opinions may not address 'only the first, preliminary stage in a multistage project.'" 628 F.3d at 521 [5]). Indeed, the court did not hold that that the ESA forbids FWS from considering the first, preliminary stage in a multistage project as Plaintiffs contend. The quote Plaintiffs borrow from is only part of a sentence used by the court to summarize *Conner v. Burford*. *See Wild Fish Conservancy*, 628 F.3d at 521-22 ("*Conner* rejected biological opinions addressing only the first, preliminary stage in a multistage project."). *Wild Fish Conservancy* cites *Conner* for the proposition that FWS needs to consider the entire agency action in order to properly evaluate its effects. The court explains that "[e]valuating the scope of an agency action can be significant in determining the adequacy of a biological opinion." *Id*. at 521. Unlike the hatchery in *Wild Fish Conservancy*, which had been operating for nearly 70 years, the proposed Rock Creek Mine has never been in operation. The Forest Service has merely issued a Record of

[5] Plaintiffs also rely on *Greenpeace v. National Marine Fisheries Service*, 80 F.Supp.2d 1137 (W.D. Wash. 2000) to support a similar proposition. Pls.' Br. at 20. *Greenpeace*, however, is distinguishable for at least two reasons. First, it involved an agency action under an entirely different statute governing fisheries management (i.e., the Magnuson-Stevens Act). Second, in *Greenpeace*, challenges to prior biological opinions had been stayed based on assurances from the National Marine Fisheries Service that the biological opinions would include a broad and comprehensive analysis of the full range of management measures. 80 F.Supp.2d at 1146. Thus, the court expected a more comprehensive analysis based on sworn declarations from the Service. Here, the Forest Service has properly limited its approval to the Evaluation Project and FWS properly limited the scope of its consultation to the same.

Decision approving activities associated with the Evaluation Project. Whereas in *Wild Fish Conservancy*, the hatchery was "expected to continue operating into the future," *id*. at 522, the Forest Service may never authorize any activities past the Evaluation Project.

Plaintiffs are seemingly concerned that if a biological opinion does not analyze the "entire action" at the outset then "any course of agency action could ultimately be divided into multiple small actions, none of which, in and of themselves, would cause jeopardy." Pls.' Br. at 20-21 (quoting *Am. Rivers v. U.S. Army Corps of Eng'rs*, 271 F.Supp.2d 230, 255 (D.D.C. 2003)). But Plaintiffs' concern stems from its misunderstanding of the agency action. The Evaluation Project is not a "part" of a larger agency action—it is the *entire action*. In *American Rivers*, plaintiffs challenged a biological opinion evaluating the Army Corps of Engineers' ongoing management of the Missouri River. The court found that FWS had improperly segmented its ESA consultation by limiting its analysis of measures taken by the Army Corps to a single summer, rather than considering the entire scope of the action (i.e., the long-term management of the Missouri River). But unlike *American Rivers*, where FWS improperly evaluated the effects of a single summer in an ongoing action to manage the Missouri River, FWS here evaluated a discrete action: the Evaluation Project of the Rock Creek deposit, which is clearly limited in both time and scale.

Plaintiffs argue that even if the Forest Service could define the relevant "action" as approval of the Evaluation Project,[6] it would still need to analyze the "effects" of any subsequent mining operations because they remain "reasonably certain to occur." Pls.' Br. at 24. FWS regulations require that biological opinions address "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. To be considered an effect of a proposed action, a consequence must be caused by the proposed action (i.e., the consequence would not occur but for the proposed action and is reasonably certain to occur). *Id*. § 402.17(b).

Plaintiffs argue that FWS must evaluate the effects of any future mining operations because they "'would not occur but for' the approval of [the Evaluation Project] and [are] 'reasonably certain to occur.'" Pls. Br. at 25 (citation omitted). Purely for purposes of this summary judgment motion, Federal Defendants concede *arguendo* that any future mining operations would not occur but for

[6] Plaintiffs suggest that FWS defines the agency action under review. *See, e.g.*, Pls.' Br. at 19, 23-25. Plaintiffs are wrong. The action agency (here, the Forest Service) defines the action under review for purposes of Section 7 consultation. *See* 50 C.F.R. § 402.14; *see also* Final ESA Section 7 Consultation Handbook 4-33 (1998), https://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf ("The Services can evaluate only the Federal action proposed, not the action as the Services would like to see that action modified.").

completion of the Evaluation Project. But the second prong of this two-part test is not satisfied here.

In support of their conclusion that future mining operations are "reasonably certain to occur," Plaintiffs rely heavily on the Court's language included in its order denying Federal Defendants' and Defendant-Intervenor's motions for judgment on the pleadings. ECF No. 42 at 10 (suggesting that based on Defendant-Intervenor's "long history of applying to operate the mine," and the Forest Service's "long history of approving it," future mining operations were "reasonably probable."). But "reasonably probable" is not "reasonably certain," and the Court simply did not apply the ESA regulations to the facts of this case. [7] Contrary to Plaintiffs' argument, 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 (emphasis added). Considerations for determining that a later consequence is *not* caused by the proposed action include, but is not limited to: "(1) the consequence is so remote in time from the action under consultation that it is not reasonably certain to occur," or … "(3) the consequence

[7] *Cf. Nat. Res. Def. Council v. Rodgers*, 381 F.Supp.2d 1212, 1237 (E.D. Cal. 2005) ("The court wishes to be clear, it may well be that some [operation and maintenance] activities could not be accounted for in the [biological opinion] because they were unknown. The fact that extensive O & M activities was *absolutely certain*, however, requires that the activities be analyzed under § 7.") (emphasis added).

is only reached through a lengthy causal chain that involves so many steps as to make the consequence not reasonably certain to occur." *Id*. § 402.17(b)(1), (3). A simple chronological history of prior applications and approvals is not *clear and substantial information*, based on the best scientific and commercial data available. Furthermore, any future mining would, at a minimum, not occur for several years until the Evaluation Project concludes. FS_144404. Finally, even if the Forest Service does consider approving future mining operations, RC Resources still has countless regulatory hurdles to clear in the form of securing state and local water permits, hard rock operating permits, waste disposal permits, utility agreements, and pipeline easements among other approvals—all of which remain highly *uncertain*. *See* USFWS_042627-37.

The first step in any ESA consultation is to identify the "agency action" under review. Here, the Forest Service reasonably limited that action narrowly to approval of the Evaluation Project. This approval does not make any irreversible or irretrievable commitment of resources for possible future mining. If, at a later date, the Forest Service considers approval of further development, those projects will be subject to further NEPA analysis and ESA consultation—including separate jeopardy determinations and adverse modification analyses—consistent with the scope of the authorized action. Plaintiffs may be dissatisfied with the limited reach

of the agency action here but their dissatisfaction, without more, does not expand the agencies' Section 7 obligations beyond the scope of what was authorized.

II. The Forest Service reasonably relied on the 2019 Biological Opinion to support its approval of the Evaluation Project.

In 2006, after consultation with the Forest Service, FWS issued a biological opinion on bull trout and grizzly bears for the proposed Rock Creek Mine. *See* USFWS_001702. At the time, the proposed action subject to consultation included development of an evaluation adit, a 5.5-year construction period, a 27.5-year operation/production period, and a 2-year reclamation period. USFWS_001712. FWS determined that, as proposed, the Rock Creek Mine and its cumulative effects were "not likely to jeopardize the continued existence of the listed entity of grizzly bears." USFWS_001706. That biological opinion was later challenged in litigation. *See Rock Creek All. v. U.S. Forest Serv.*, 703 F.Supp.2d 1152 (D. Mont. 2010), *aff'd in part*, 663 F.3d 439 (9th Cir. 2011). Among other things, the Court found deficiencies in the Forest Service's NEPA analysis and Record of Decision, but rejected claims challenging the biological opinion's no-jeopardy determination for bull trout and grizzly bears. *Id*. at 1170, 1181, 1199-1211.

In 2017, FWS issued a supplement to the 2006 Biological Opinion specifically on the effects of the Rock Creek Mine project to grizzly bears. *See* USFWS_003252. At the time, the proposed action remained the same as it did in 2006. *See* USFWS_002844-45. FWS considered whether reinitiation of

consultation was necessary and concluded that it was not. USFWS_003253. This decision—that reinitiation was unnecessary—effectively reaffirmed the prior determination made in 2006 that the proposed action was not likely to jeopardize grizzly bears.

In 2019, in response to public input during the objection period, the Forest Service reasonably chose to revise the proposed agency action to approve only the Evaluation Project. *See* FS_011635. The activities associated with the Evaluation Project, however, remained the same as in past consultations. USFWS_041199. Based on those past consultations and updated mortality data, FWS concluded that the 2018 Record of Decision approving evaluation activities would cause fewer impacts to listed species and critical habitat than the previous proposed action. USFWS_041217. As a result, FWS reasonably affirmed the no-jeopardy and no adverse modification determinations. *Id*. Considered in context, this determination makes sense. FWS had considered the likely effects to listed species based on a larger proposal to evaluate, operate, and reclaim the Rock Creek Mine. The Court upheld the no-jeopardy determinations based on that analysis. *See Rock Creek All.*, 703 F.Supp.2d at 1211. Now, the Forest Service has decided to pare back its authorization to just those activities associated with the Evaluation Project—activities that factored into FWS's prior no-jeopardy determinations. Absent new information suggesting that those evaluation activities are likely to jeopardize

listed species, the Forest Service reasonably relied on the 2019 Biological Opinion to support its Record of Decision.[8]

III. Federal Defendants properly considered grizzly bear mortality data and reasonably concluded that reinitiation of consultation was unnecessary.

Plaintiffs selectively cite grizzly bear mortality data to argue that it undermines FWS's analysis of the proposed mitigation package and its effects on grizzly bears. When Plaintiffs first sued, they argued that grizzly mortality data collected after the 2017 Grizzly Bear Supplement, USFWS_003252, required the agencies to reinitiate consultation. ECF No. 1 ¶ 98. FWS later issued the 2019 Biological Opinion and considered the very data Plaintiffs allege was missing. This development—the 2019 Biological Opinion and FWS's consideration of the most recent mortality data—undercuts Plaintiffs' failure to reinitiate claim in two main ways.

[8] Contrary to Plaintiffs' claims, that the reinitiation of consultation occurred *after* the Forest Service issued the Record of Decision does not render the Record of Decision invalid. Reinitiation of consultation often occurs after a decision has been rendered, or even while the action is underway. Once the agencies reinitiate consultation, ESA Section 7(d) applies to determine what actions may continue in the interim. Section 7(d) provides that, during consultation, an agency "shall not make any irreversible or irretrievable commitment of resources" that would foreclose "the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2)[.]" 16 U.S.C. § 1536(d). The provision does not require the vacatur of prior agency determinations and contemplates that actions may continue during the reinitiated consultation. And, where the results of the reinitiated consultation are consistent with the prior Section 7(a)(2) determination, the Forest Service is not legally required to reopen and reaffirm its prior determinations.

a. Plaintiffs' efforts to recast substantive challenges as "failure to reinitiate" claims have no merit.

First, Plaintiffs err in framing their claim as a "failure to reinitiate." Reinitiation claims involve arguments that events arising *after* a biological opinion (new information, new listing or critical habitat designations, and so on) require the action agency to reinitiate consultation. Here, the agencies reinitiated consultation based on the change to the proposed agency action, which culminated in the 2019 Biological Opinion. USFWS_041232. Although Plaintiffs argue that "FWS has refused to address the data that this Court ruled it must," Pls.' Br. at 27, FWS expressly considered the existing, updated grizzly mortality data in the 2019 Biological Opinion. *See* USFWS_041208 (considering preliminary information for human-caused mortality in 2018 and 2019).

FWS, in fact, analyzed precisely the data Plaintiffs claim FWS has not addressed. It compared mortality rates from before and after 2006, when RC Resources began funding a bear management specialist expected to provide just some of the benefit of the larger mitigation package required for the Evaluation Project. The annual human-caused mortality rates were lower in the decade after 2006 than they were from 1999 to 2007. USFWS_041207. FWS also referenced reports and studies on the bear management specialist's documented efforts supporting its conclusion that the position had likely decreased mortality risks for

grizzly bears in the Cabinet-Yaak Ecosystem.[9] Even if Plaintiffs argue that FWS's ESA violations stem from the 2017 Grizzly Bear Supplement alone, the Court should reject Plaintiffs' invitation to issue an advisory opinion on the contents of that document. The 2019 Biological Opinion supersedes that previous analysis and incorporates relevant portions, both by direct quote and by reference. *See* Defs.' Undisputed Facts ¶¶ 64-65. Plaintiffs ignore the fact that the 2019 Biological Opinion not only reversed the 2017 decision not to reinitiate, but also addressed the very issue that Plaintiffs allege the agency ignored in 2017.

Ultimately, rather than identify new data that FWS has allegedly overlooked, Plaintiffs disagree with *how* FWS considered the existing mortality data. Indeed, Plaintiffs concede as much when they argue that "FWS and the Forest Service failed to rationally evaluate" mortality data dating to 2007. Pls.' Br. at 30. And again when they admit that the same mortality data they invoke here was included in the Court's 2017 Montanore decision. Pls.' Br. at 33. This, despite the admission that FWS's 2017 Supplement and the 2019 Biological Opinion issued after the Court's *Montanore* opinion. Plaintiffs thus mount a thinly veiled challenge to the

[9] In 2018, this bear management specialist "fielded 109 bear conflict calls, managed and resolved dozens of human-bear conflict situations (most involving sanitation and food attractants), and provided dozens of education and outreach events." USFWS_041207 (citing Annis (2019)). The 2019 Biological Opinion notes that these types of actions have proven effective at reducing conflicts and mortality rates, and concludes that the position has likely prevented some grizzly bear mortality that would have otherwise occurred since 2006. *Id.*

2019 Biological Opinion rather than present a claim that FWS needs to reinitiate consultation to consider data that was not before it when it analyzed the Evaluation Project. And Plaintiffs reinforce this conclusion in the Amended Complaint as they allege that FWS acted arbitrarily and capriciously—not that FWS failed to consider new data or information arising *after* the 2019 Biological Opinion. *See* ECF No. 99 ¶ 96. Plaintiffs thus mount substantive challenges to agency action, not claims that require reopening agency action to consider new data.

b. Plaintiffs' substantive challenges to FWS's consideration of grizzly bear mortality data are neither legally nor factually supported.

Second, just as any "failure to reinitiate" claim fails because FWS did consider grizzly bear mortality data in the 2019 Biological Opinion, so, too, must any claim that FWS failed to consider a relevant factor when it analyzed that data. Plaintiffs tacitly acknowledge FWS's 2019 Biological Opinion that expressly considered recent mortality data in its analysis of the grizzly bear's status in the action area. *See, e.g.*, Pls.' Br. at 31 (admitting that the 2019 Biological Opinion cited and considered recent mortality data). The 2019 Biological Opinion, which incorporates portions of the 2017 Grizzly Bear Supplement applicable to the Evaluation Project, constitutes FWS's opinion on the effects of the Evaluation Project to grizzly bears.

Plaintiffs argue that neither the 2017 Grizzly Bear Supplement nor the 2019 Biological Opinion adequately consider the fact that one of the two bear

management specialists that the 2006 Biological Opinion required as part of a larger mitigation package for the full Rock Creek Mine had been in place since 2006. *See* Defs.' Undisputed Facts ¶¶ 15-16 (summarizing the dozens of measures in the 2006 mitigation package).[10] As explained in the 2017 Supplement, the 2006 Biological Opinion anticipated "a reduction in future human-caused grizzly bear mortality *rate*" in the Cabinet-Yaak based on implementing the full mitigation package. *See* Defs.' Undisputed Facts ¶ 71. The 2006 Biological Opinion anticipated that "[c]ollectively, the conservation measures are reasonably expected to prevent the loss of more than one grizzly bear over the 30-year life of the mine." USFWS_001705.[11] Although only a few proposed mitigation measures were in place before the 2017 Grizzly Bear Supplement, FWS identified multiple positive developments in the Cabinet-Yaak grizzly bear population metrics since 2006. It cited improved mortality rates for female grizzly bears since 2006. USFWS_003271; *see* USFWS_ 041603 ("The loss of females is the most critical factor affecting the trend because of their reproductive contribution to current and

[10] Plaintiffs state that a wildlife law enforcement officer is also in place. Pls.' Br. at 30. The existence of some law enforcement capacity does not mean that the "additional law enforcement" required by the mitigation package has been implemented. FS_118289.

[11] Plaintiffs erroneously claim that FWS's no-jeopardy determination relied specifically on conflict-reduction work by the bear management specialist and increased law enforcement support. Pls.' Br. at 38. To the contrary, the no-jeopardy determination turned on the expected impact of the full mitigation package. *See* Defs.' Undisputed Facts ¶¶ 17, 24, 65.

future growth."); USFWS_041836. It also cited recent reports, found in the record, containing detailed annual mortality data. USFWS_003264 (citing Kendall et al. (2016), Kasworm et al. (2017, in prep)); USFWS_035365; USFWS_035467; USFWS_035504. It pointed out that the annual percent change in the Cabinet-Yaak grizzly bear population had been improving since 2006, and the population appeared to be increasing in size in 2016 and 2017. USFWS_003262-64. This data, obtained following the hiring of one bear management specialist in 2006, aligns with FWS's expectation that the hiring of *two* bear management specialists and a law enforcement officer, combined with dozens of other measures, would lead to a reduction in human-caused mortality rates over time. USFWS_001797.

Unlike the biological opinion challenged in *Montanore*, the 2017 Grizzly Bear Supplement directly addressed whether the implemented mitigation measures are having their intended effects. *See Save Our Cabinets*, 255 F.Supp.3d at 1063 (finding that the *Montanore* biological opinion was flawed because, in part, it did not "consider[] the potential inadequacy of these proposed [mitigation] measures"). The 2017 Supplement—now incorporated in the 2019 Biological Opinion—specifically addressed known information regarding the efforts of the bear management specialist funded as part of the mitigation package, noting that the specialist "in 2015-2016 alone (in part) fielded hundreds of bear conflict calls, managed and resolved dozens of human-bear conflict situations (most involving

sanitation and food attractants), and provided dozens of education and outreach events." USFWS_003265 (citing Annis (2017)). Based on FWS's expertise in grizzly bear biology and management, including the evidence supporting the effectiveness of these precise efforts, the agency concluded that the specialist "had its intended benefit, by preventing some grizzly bear mortality that would have otherwise occurred due to management action or defense of life (as evidenced by pre-management incidents in Montana)." *Id.*; *see* USFWS_001795-96 (citing studies, reports, and experiences supporting the effectiveness of these measures).

Indeed, Plaintiffs themselves "agree with FWS that the conflict-reduction measures … likely prevented some conflicts and that mortality rates might have been even worse in the absence of such measures." Pls.' Br. at 39. Preventing even higher mortality rates between 2006 and 2017 more than satisfies the expectations for one bear management specialist position, which FWS anticipated would prevent more than one mortality over a 35-year period, when combined with a second bear management specialist and dozens of other mitigation measures. USFWS_003265.

The Forest Service's determination not to reinitiate consultation in 2017 was not arbitrary or capricious. The Forest Service considered the 2017 Supplement and separately analyzed grizzly bear data in the 2019 Biological Opinion, noting that improving trends for the Cabinet-Yaak grizzly bear population

"correspond[ed] to the time during which mitigation measures have started to be implemented." FS_011647. The Forest Service's 2018 Final Supplemental Environmental Impact Statement summarized the most recent data on the health of the Cabinet-Yaak population and noted that "[k]nown and probable human-caused mortality averaged 1.7 total bears per year and 0.2 females per year from 2011 to 2016," the most recent data available at that time. FS_009026 (citing Kasworm et al. 2017); *see also* FS_124674 (when considering population size alongside mortality, the percentage of the Cabinet-Yaak population facing human-caused mortality each year has decreased even further when compared with pre-2006 mortality rates). Observing that, since 2006, mortality rates had decreased, overall population size increased, and critical female survival rates had increased, it was reasonable for the Forest Service to not reinitiate consultation on the effectiveness of the bear management specialist in place since 2006.

Ultimately, the agencies drew a rational connection between the updated mortality data and the 2019 conclusion that no new information revealed effects of the Rock Creek Mine that may affect grizzly bears to an extent not previously considered. And of course, if the Court finds the 2017 decision not to reinitiate to be flawed, the agencies cured any error by reinitiating consultation and finalizing the 2019 Biological Opinion.

CONCLUSION

Congress designed ESA Section 7 to ensure that federal agencies do not jeopardize listed species through the actions that they authorize, fund, or carry out. The Forest Service satisfied its Section 7 obligations by consulting with FWS on the effects of the limited Evaluation Project. FWS similarly satisfied its obligations by evaluating the effects of those actions, which the Forest Service now authorizes as part of the Evaluation Project in its 2019 Biological Opinion. FWS reasonably concluded that the proposed action is not likely to jeopardize any listed species, including bull trout or grizzly bears. Should the Forest Service authorize further development following completion of the Evaluation Project, both agencies have committed to additional ESA consultation at that time. For these reasons, the Court should deny Plaintiffs' motion for summary judgment, grant Federal Defendants' cross-motion for summary judgment, and dismiss the case.

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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the attorneys of record.

/s/ Davis A. Backer
DAVIS A. BACKER

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the 10,000 word limit set by order of the Court, *see* ECF No. 101. Excluding the caption, tables of contents and authorities, signature block, and certificates of service and compliance, this brief contains 9,905 words.

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