

Paul J. Lopach
Robert Tuchman
BRYAN CAVE LEIGHTON PAISNER LLP
1700 Lincoln Street, Suite 4100
Denver, CO 80203-4541
Telephone: (303) 861-7000
Facsimile: (303) 866-0200
Email: paul.lopach@bclplaw.com
Email: robert.tuchman@bclplaw.com
*Counsel for Defendant-Intervenor
RC Resources, Inc.*

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
REPLY IN SUPPORT OF
ITS CROSS-MOTION FOR
SUMMARY JUDGMENT**

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INTRODUCTION

Plaintiffs' claim that the U.S. Forest Service ("Forest") and U.S. Fish and Wildlife Service ("Service") are taking a "full-speed ahead, damn-the-torpedoes approach" to the Rock Creek Project ("Project") is insupportable. For decades, both agencies have exhaustively analyzed the Project's potential environmental effects on grizzly bears, bull trout, and other resources. USFWS_042258-59, 042982-97, 043195-204. Relying on the best available science, both agencies have developed unprecedented measures to mitigate those effects. USFWS_041201-03, 041215-16. These collective efforts demonstrate a conservative science-based approach to Project review, and not a willful disregard of the environment.

Despite these efforts, the inaccessibility of underground rock formations has limited the collection of subsurface data and created uncertainty in evaluating a potential Rock Creek mine's effects to groundwater and related resources. FS_011635. Given this uncertainty, the Forest excluded mining from its agency action and approved only an amended plan of operations for evaluation activities. USFWS_042202, 042205. The single evaluation adit will enable the agencies to obtain the necessary hydrologic, geologic, and geochemical data to better understand and model a mine's potential effects, supplement existing studies, and make a more informed future decision on whether to approve mining. FS_011635;

USFWS_042207-08. This approach implements the “policy of institutionalized caution” that Plaintiffs advocate, and should be allowed to proceed.

Importantly, the evaluation adit does not threaten the resources of concern to Plaintiffs. The adit is not anticipated to cause grizzly bear mortality or affect baseflow in streams supporting bull trout and their designated critical habitat.

USFWS_041226, 042211, 042212. Data show that grizzly bear status in the Cabinet-Yaak Ecosystem (“Cabinet-Yaak”) has improved significantly since 2007 when a portion of the mitigation measures required for the evaluation adit were implemented. USFWS_041206-08. The efficacy of the mitigation is supported by published research. USFWS_041836 (Kendall); USFWS_042179 (Proctor).

For these reasons, and as discussed below, there is no basis for Plaintiffs’ claim that the agencies are here proceeding recklessly and violating the Endangered Species Act (“ESA”). This Court should deny Plaintiffs’ motion for summary judgment, and grant summary judgment to RC Resources on all claims.

ARGUMENT

I. 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’ Reply (Doc. 117) fails to rebut the pivotal facts that undermine Plaintiffs’ first claim. The Service analyzed the grizzly bear mortality data upon which Plaintiffs rely for that claim. Furthermore, as established by multiple

metrics and published research, grizzly bear status in the Cabinet-Yaak has improved significantly since 2007 when a bear specialist partially funded by RC Resources commenced work in that ecosystem. 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, and are consistent with the Service's prior findings that the Project's mitigation measures "are likely to reduce overall mortality risk." USFWS_041207. Because Plaintiffs cannot rebut these facts, and others, as discussed below, they have not established that the Project's mitigation plan is not working as anticipated and will inadequately protect grizzly bears. No reinitiation of consultation is therefore required. 50 C.F.R. § 402.16(a)(2) (reconsultation required when "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.").

A. The Service Did Not Disregard the Mortality Data Upon Which Plaintiffs Base Their First Claim.

Contrary to Plaintiffs' contentions (Doc. 117, at 15-6), the Service analyzed the grizzly bear mortality data upon which Plaintiffs base their first claim. The mortality data reflect grizzly bear deaths in the Cabinet-Yaak during "pre- and post-2007 periods," with the Plaintiffs choosing 2007 because it is the year when the bear specialist commenced work in the Cabinet-Yaak. (Doc. 117, at 17 n.1);

USFWS_034425. The data are contained primarily in Cabinet-Yaak progress reports prepared by Service biologist Kasworm. (Doc. 108, at 31) (specifying Plaintiffs relied on USFWS_041588-89 (Kasworm 2017) and USFWS_041689-91 (Kasworm 2018)).

Kasworm analyzed the bear mortality data that Plaintiffs identify, and found a sharp decrease in female grizzly bear mortality rates in the Cabinet-Yaak *after* the bear specialist commenced work. USFWS_041602-03, 041704-05.

Kasworm's analysis was based on the same data tables Plaintiffs reference in their opening brief (Doc. 108, at 31). USFWS_041588-89, 041689-91. The 2019 Biological Opinion further analyzed the same mortality data, incorporated portions of Kasworm's analysis, and used the metrics that the Service deemed appropriate to evaluate overall grizzly bear mortality risk. USFWS_041206-08. Moreover, the 2019 Biological Opinion compared bear mortality in the periods 1982-1998, 1999-2006, and 2007-2017. USFWS_041207-08.

At bottom, Plaintiffs' contention that the Service "never considered the data Plaintiffs invoke," (Doc. 117, at 16), reduces to their disagreement with the metrics the Service used to analyze the mortality data. Plaintiffs compare total bear mortality in the periods 1997-2006 and 2007-2016 (Doc. 108, at 31), and insist (without expert opinion or other authority) that their method is the correct approach. (Doc 117, at 16). The Service engaged in a broader inquiry by focusing

on multiple science-based criteria to assess the Cabinet-Yaak grizzly bear population, including population trend, mortality rates (particularly as to females), survival rates, and population size. USFWS_041207-08. The Service also explained why female mortality rates are important to its analysis: “the loss of females is the most critical factor affecting the population trend because of their reproductive contribution to current and future growth.” USFWS_041207; USFWS_041603 (Kasworm explaining “it is important to consider the rate of female mortality”).

Plaintiffs’ disagreement with the metrics that the Service used to evaluate grizzly bear status provides no basis to find agency error. The Service’s choice of metrics is a scientific determination that implicates its expertise, and is grounded in sound science. Its choice is entitled to deference, and should not be questioned on the basis of Plaintiffs’ contrary, unsupported lay opinion. *Selkirk Conservation All. v. Forsgren*, 336 F.3d 944, 954 (9th Cir. 2003) (“Particularly when the analysis ‘requires a high level of technical expertise,’ this Court ‘must defer to the informed discretion of the responsible federal agencies.’”); *Rock Creek All. v. U.S. Forest Serv.*, 703 F. Supp. 2d 1152, 1204-05 (D. Mont. 2010) (Court defers to Service’s consolidation of bull trout core areas). Plaintiffs’ contention that the Service disregarded the data upon which Plaintiffs rely for their first claim is incorrect, and should be rejected.

B. The Service's Analysis of Grizzly Bear Mortality Data Was Rational and Disclosed No Basis to Reinitiate Consultation.

Plaintiffs have not supported their contention that the Project's terrestrial mitigation measures are "inadequate," and will not sufficiently protect grizzlies from the Project's effects. (Doc. 117, at 16). Baseline conditions for grizzlies in the Cabinet-Yaak have improved significantly since 2007 when the bear specialist commenced work. USFWS_003262-65, 041206-08. Comparing 1999-2006 with 2007-2017, the known female grizzly bear mortality rate decreased from 1.88 to 0.64, and the known human-caused female grizzly bear mortality rate decreased from 1.50 to 0.45. USFWS_041207. In 2006, the Cabinet-Yaak grizzly bear population was decreasing by 7.7% per year. USFWS_041206. In 2019, the Cabinet-Yaak grizzly bear population was growing at an estimated rate of 2.1% per year with a "73% probability of the population being stable or increasing[.]" USFWS_041208. The 2017 Grizzly Bear Supplement depicts the steadily increasing population rate of change for native grizzlies in the Cabinet-Yaak after the bear specialist commenced work. USFWS_003264. Furthermore, the Cabinet-Yaak grizzly bear population increased from an estimated 30-40 bears in 2006 to approximately 55-60 bears in 2019, USFWS_041206, 041208, with the Service reporting the "decline of female mortality is largely responsible for the improving population trend from 2007-2017." USFWS_041207-08. These

improvements are consistent with the Service's prior predictions.

USFWS_003264-65, 041206-07.

Plaintiffs challenge these findings, but their efforts are unavailing. They rest their case on an alleged slight increase in total grizzly bear mortality between 1997-2006 and 2007-2016, but rely on flawed analysis to produce that increase. (Doc. 99, at 41). As explained in RC Resources' opening brief (Doc. 110, at 26), Plaintiffs exclude from their mortality totals grizzlies dying in Canada within 16 kilometers of the international border, asserting mitigation measures implemented in Montana would not affect those deaths. But under Plaintiffs' reasoning, the analysis of mitigation effectiveness should also exclude bears dying in the Idaho portion of the Cabinet-Yaak since the bear specialist's area of responsibility is limited to 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 Plaintiffs' self-selected time periods: 1997-2006 (13 mortalities)¹ and 2007-2016 (12 mortalities). *Compare* USFWS_041690-91 with Plaintiffs' calculations at (Doc. 108, at 31).

Plaintiffs' challenge should also be rejected because they ignore critical data that undermines their claim. Their Reply is silent on the sharp improvement in

¹ This total excludes bear #128 that died more than ten miles outside the recovery zone. USFWS_041690-91. Including that bear would increase the total mortality for 1997-2006 in the Montana portion of the Cabinet-Yaak to 14 bears.

female grizzly bear mortality rates after 2007. As set forth above, the “known human-caused female mortality rate” decreased by over one bear per year (1.50 to 0.45) between 1999-2006 and 2007-2017. USFWS_041207 (emphasis in original). These decreasing rates undermine Plaintiffs’ claim that “mitigation measures to address the Project’s greatest threat to grizzlies are inadequate[.]” (Doc. 117, at 16, 23). They also show that Plaintiffs are cherry picking the data in an effort to prove their case. Plaintiffs selectively focus on self-manufactured raw increases in bear mortalities and mortality rates when it suits them, but disregard the mortality rates and other metrics that refute their claims.

Plaintiffs ignore scientific studies that debunk their claim. In her study published 2015-2016, Kendall (U.S. Geological Survey) reported 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, and that bear specialists’ activities “have been effective in reducing human-bear conflicts and mortality.” *Id.* Plaintiffs’ Reply does not mention Kendall’s work. Nor does it mention Proctor’s 2018 study, which supports the efficacy of grizzly bear specialists in the Cabinet-Yaak. USFWS_041207, 042179-80 (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).

Plaintiffs' claim that the 2019 Biological Opinion "irrationally relies" on grizzly bear mortality data from Canada does not help Plaintiffs' case. (Doc. 117, at 20). First, Kasworm explained why his calculations included bears known to have died within 16 kilometers of the international border in Canada: "Many bears collared in the U.S. have home ranges that extend into Canada. Mortality occurring in this area within Canada can affect calculations for U.S. populations." USFWS_041682. This scientific determination is entitled to deference. *Forsgren*, 336 F.3d at 954. Second, the data belie Plaintiffs' claim that grizzly bear mortality rates did not improve when Canadian mortalities are removed from the calculations. (Doc. 117, at 20). Excluding Canadian mortalities, the known female grizzly bear mortality rate for the Cabinet-Yaak decreased from 1.375 (11 mortalities) during 1999-2006 to 0.64 (7 mortalities) during 2007-2017, and the known human-caused female grizzly mortality rate decreased from 1.0 (8 mortalities) to 0.45 (5 mortalities) for those same time periods. USFWS_041689-91. Third, Proctor's 2018 article provides independent grounds to support the Service's finding that "[p]artial implementation of the mitigation measures prevented conflicts and helped reduce mortality rates." USFWS_041208, 042179-80. Fourth, contrary to Plaintiffs' assertions (Doc. 117, at 21), RC Resources'

calculations are not a “post hoc justification” for the Service’s approach, but instead show that Plaintiffs’ grizzly bear mortality analyses and conclusions are fatally flawed.

Plaintiffs’ claim that the Service “inexplicably” used “asymmetrical” time periods for its mortality analyses likewise fails. (Doc. 117, at 20). Plaintiffs provide no support (expert or otherwise) for their position that a comparison of mortality rates must use symmetrical time periods and that the use of asymmetrical time periods constitutes “unjustified deviations from the data.” Furthermore, the Service’s mortality calculations are based on Kasworm’s 2018 report, which examined mortality rates by breaking the data into periods of increase and decrease in population trend. USFWS_041207, 041705. This is the same methodology that Kasworm used in other progress reports to evaluate grizzly bear status in the Cabinet-Yaak. USFWS_041603 (Kasworm 2017); USFWS_035395 (Kasworm 2016). The Service’s use of these time periods is a scientific determination entitled to deference. *Forsgren*, 336 F.3d at 954. Plaintiffs themselves use asymmetrical time periods in their mortality analysis. (Doc. 117, at 23-4) (comparing bear mortality between 1994-2006 and 2007-2016).

Plaintiffs’ claim (Doc. 117, at 21) that grizzly bear survival rates “are not an appropriate metric for judging whether measures to reduce human-caused mortality are working” is meritless. Survival rates and human-caused mortality are directly

related. USFWS_003263, 041608 (explaining human-caused mortality accounted for much of the decline in adult and subadult female survival rates in 2006, and “[i]mproving survival by reducing human-caused mortality is crucial for recovery of this population.”). Moreover, improved survival data reflect the efficacy of the bear specialist because they show improved baseline conditions, which the Service predicted would occur from implementation of the Project’s proposed mitigation. USFWS_003262-65.

Plaintiffs’ attempt to down-play the increase in the Cabinet-Yaak grizzly bear population since 2006 is unavailing. (Doc. 117, at 21). The 2006 Biological Opinion reports: “[t]he best available information suggests a population of 30 to 40 bears grizzly bears in the entire CYE[.]” USFWS_001729. Kendall estimated the 2012 Cabinet-Yaak grizzly bear population at 48-50 bears. USFWS_041821. The Service estimated the 2016 Cabinet-Yaak grizzly bear population at approximately 55 bears (USFWS_003264, 041609), and estimated the 2017 population at approximately 55-60 bears. USFWS_041208, 041710. The population estimates for 2012, 2016, and 2017 reflect substantial improvements and steady increases over the 2006 estimate. While Plaintiffs may disagree with the percentage increase in the grizzly bear population, the steady growth in the bear population reflects a net improvement in bear status (USFWS_003271), and rebuts Plaintiffs’ claim that the Project’s mitigation measures are inadequate.

Contrary to Plaintiffs’ assertions, the Service did not rely on “generalized claims” to support the efficacy of the Project’s mitigation measures. (Doc. 117, at 21). As explained above, the “known human-caused female mortality rate” decreased by over one bear per year (1.50 to 0.45) between 1999-2006 and 2007-2017. USFWS_041207 (emphasis in original). By itself, this decrease refutes Plaintiffs’ claim that “mitigation measures have yielded no improvement in human-caused mortality rates[.]”² (Doc. 117, at 23) (emphasis in original). 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. They also show that the mitigation plan will satisfy its twin objectives: (i) offset the incidental take anticipated from mine development; and

² Plaintiffs’ comparison of human-caused mortality rates between 1994-2006 and 2007-2016 provides another example where they attempt to manipulate the mortality data to their advantage. (Doc. 117, at 23-4). They do this by selecting time intervals that deflate mortality rates pre-2007 and inflate mortality rates after 2007. A comparison of human-caused grizzly bear mortality rates in the Montana portion of the Cabinet-Yaak shows a decrease in rates from 1.36 (1996-2006) (15 mortalities) to 1.1 (2007-2017) (12 mortalities). USFWS_041690-91. Plaintiffs’ comparison contradicts their position that the use of “asymmetrical time periods” is an “unjustified deviation[.]” from the data. (Doc. 117, at 20).

(ii) reduce current and future rates of human-caused mortality not attributable to the mine. USFWS_041207.

Plaintiffs’ reconsultation claim is not supported by *Save Our Cabinets v. U.S. Fish & Wildlife Serv.*, 255 F. Supp. 3d 1035 (D. Mont. 2017). There, 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. *Id.* at 1063. Unlike that case, the record here shows that the Service comprehensively analyzed the grizzly bear mortality and population data for the Cabinet-Yaak, and determined that bear status, as measured by multiple metrics, has improved substantially since the bear specialist commenced work. These data include the mortality data upon which Plaintiffs base their claim. The analysis and “net improvement for grizzly bears” that the Court found lacking in *Save Our Cabinets*, *id.* at 1062, are present here. No error is therefore shown.

II. The 2019 Biological Opinion Did Not Unlawfully Segment the Project’s ESA Analysis.

Plaintiffs’ contention that the 2019 Biological Opinion “fails to analyze the full scope of the relevant action and/or its effects” is meritless. (Doc. 117, at 2). The relevant action for purposes of the Service’s ESA analysis was the Forest’s approval of an amended plan of operations for the Rock Creek evaluation adit, and the Service analyzed the full scope of the adit and its effects. Since the Forest did

not approve mining, and excluded it from the proposed action, the Service was not required to study mining pursuant to the ESA, its implementing regulations, or relevant cases. Furthermore, the Service had no duty to analyze the effects of mining the Rock Creek deposit, because the Forest has not authorized any such mining, and mining is not reasonably certain to occur. Plaintiffs' unlawful segmentation claim should be denied.

A. The 2019 Biological Opinion Analyzed the Relevant Action.

The "relevant action" in this proceeding is the Forest's approval of an amended plan of operations for the evaluation of the Rock Creek ore body. The ESA's plain language supports this result. ESA section 7 defines "agency action" as "any action authorized, funded, or carried out by [a federal] agency." 16 U.S.C. § 1536(a)(2). Applying this definition to the facts of this case, the Service had no duty to consult on, or study, any future mining of the Rock Creek deposit because the only action that the Project's 2018 Record of Decision ("Decision Record") authorized was an amended plan of operations for evaluation activities, and that plan of operations excluded mining. USFWS_042205. *See Karuk Tribe v. U.S. Forest Serv.*, 681 F.3d 1006, 1021 (9th Cir. 2012) (en banc) (first step in the "agency action" inquiry is "whether a federal agency affirmatively authorized, funded, or carried out the underlying activity").

Plaintiffs' contention that the Service unlawfully segmented its analysis is not supported by the ESA's implementing regulations, which 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]," 50 C.F.R. § 402.02. The Decision Record did not authorize mining the Rock Creek deposit, as Plaintiffs admit. (Doc. 118, at 7) ("Undisputed" that "The Decision Record gives no approval for mining the Rock Creek ore deposit[t]). Mining the Rock Creek deposit is therefore not an activity or program "authorized" in "whole or in part" by the Forest, and is excluded from the regulation's definition of "agency action."³ Plaintiffs' attempt to redefine the "action" as part of a "larger agency action" disregards the standalone status of the evaluation adit and the Service's intent to place the "ultimate responsibility for determining agency action" on the agency "engaged in consultation." 51 Fed. Reg. 19926, 19928 (June 3, 1986). Here, that agency was the Forest.

Plaintiffs contend the Decision Record did not approve a "standalone '[Evaluation] [P]roject,'" (Doc. 117, at 2,) (alterations in original), but this contention is incorrect. The Deputy Regional Forester instructed the "KNF Supervisor to issue a Final ROD that will approve only Phase I activities."

³ Excluding mining from the Service's definition of "action" does not render the words "in part" surplusage in the regulation. (Doc. 117, at 4). The words "in part" cover circumstances, where, as here, private activities have more than one source of activity. *Karuk Tribe*, 681 F.3d at 1023.

USFWS_042202; FS_011635. Consistent with this instruction, the Decision Record approved only an amended plan of operations for evaluation activities. USFWS_042205. It did not approve mining and made no commitment to approve any possible, future mining of the Rock Creek deposit. USFWS_042202, 042205. Furthermore, the Decision Record's description of the selected alternative is limited to evaluation adit activities. USFWS_042209-10, 042281-042321. While the Decision Record recognized that an underground mine could someday be built, it also acknowledged that mining may not be "authorized and implemented." USFWS_042203. 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.

Plaintiffs' contention that the Forest previously analyzed the "full project" does not support their claim that the "agency action" in this case must now include mining. (Doc. 117, at 3). As RC Resources explained in its opening brief (Doc. 110, at 38), "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 Deputy Regional Forester

instructed the Forest Supervisor to issue a final ROD that will approve only evaluation 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.

Plaintiffs fail to distinguish *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678 (D.C. Cir. 1982), which provides compelling authority that the agencies here did not unlawfully segment their analysis. In *Peterson*, the Court found no ESA violation arising from the Forest's approval of an exploratory drilling program notwithstanding that the Forest and Service limited their ESA findings to the drilling program, and did not consider a future mine's effects on grizzlies. *Id.* at 687. Plaintiffs' attempt to distinguish *Peterson* fails on three grounds. First, contrary to Plaintiffs' contention (Doc. 117, at 8), the Ninth Circuit's decision in *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 522 n.6 (9th Cir. 2010) did not find *Peterson* "not pertinent" to segmentation but, found instead, it was not pertinent to that case. Second, *Salazar* found *Peterson* "not pertinent" because the facts of the two cases were materially different. *Salazar* involved the "artificial

division of a continuing [fish hatchery] operation into short terms,” *id.* at 522, while *Peterson* involved a drilling program and potential, future mine, neither of which was a continuing operation. Third, Plaintiffs contend *Peterson* is “not pertinent” to this case because it involved “an initial, standalone exploration proposal,” while no such proposal is involved here. (Doc. 117, at 8). Plaintiffs have not shown a material difference between the two proposals. In *Peterson*, as is true here, mineral extraction was contemplated and would be studied in the future. 685 F. 2d at 681. Moreover, in *Peterson*, like here, agency approvals were limited to evaluation activities and did not include mining. *Id.* at 687. Further, any future proposals to conduct mining would require further ESA scrutiny and new decision records. *Id.* Each proposal is therefore standalone.

Conner v. Burford, 848 F.2d 1441 (9th Cir. 1988) fails to support Plaintiffs’ unlawful segmentation claim. As Plaintiffs acknowledge (Doc. 117, at 6), *Conner* relied on the “aim” of congressional mineral leasing policy (pumping oil) to hold that the agency action in that case included both leasing and post-leasing activities. *Id.* at 1453. The oil and gas lessees’ “aim” was not mentioned. Here, the Forest’s authority over the Project is based on the Organic Administration Act, USFWS_042223, whose purpose is to regulate, not promote, mining activities in National Forests. 16 U.S.C. § 551; USFWS_042223 (“Organic Administration Act authorizes the Forest Service to regulate use and occupancy, such as mineral

operation[s]”). This regulatory purpose does not support expanding the agency action to include mining, because the Forest has no statute-based objective to encourage mineral extraction. Based on *Conner*, RC Resource’s interest in future mining is irrelevant. *Conner* therefore does not support Plaintiffs’ segmentation claim.

Salazar, 628 F.3d 513, does not support Plaintiffs’ unlawful segmentation claim, as its underlying rationale is not here relevant. *Salazar* was concerned that the artificial division of a continuing operation into short terms “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 evaluation adit is not a continuing action (USFWS_001712, 041200); accordingly, there will not be “[i]mpact, in each of several subdivided periods of operation that, in cumulation, have an undeniably appreciable impact.” *Salazar*, 628 F.3d at 523. 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 its “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, among other requirements. *Salazar* therefore does not require a biological opinion evaluating possible, future mining of the Rock Creek deposit.

B. The Action’s Effects Exclude Mining.

In its opening brief (Doc. 110, at 41-3), RC Resources explained why mining the Rock Creek deposit is 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 Montana must grant all necessary approvals for the mine, including a state-issued hard rock operating permit. These approvals are not reasonably certain. *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”). Plaintiffs’ Reply does not dispute these facts. (Doc. 117, at 11-13). Instead, Plaintiffs contend that the Service did not

make a “factual finding, in the record, that Phase II’s effects” are not “reasonably certain to occur.” (Doc. 117, at 12). The Service made that finding.

The 2019 Biological Opinion states: “In light of the Forest Service’s 2018 ROD, the incidental take covered by the currently operable Incidental Take Statements exceeds the amount of take that is ‘reasonably certain to occur’ as a result of the updated proposed action.” USFWS_041199. Since the “currently operable” Incidental Take Statements covered both evaluation activities and mining, and the “updated proposed action” included only evaluation activities, the Service here found that mining and its effects were not reasonably certain to occur. *Id.* This finding is reinforced throughout the 2019 Biological Opinion: “Phase II would be subject to future ESA consultation and review *should it be proposed* following evaluation[.]” USFWS_041211 (emphasis added); USFWS_041214 (mine construction and operation “will undergo a separate review in the future should the KNF propose to approve them.”). The Service therefore made the “factual finding” that Plaintiffs claim was missing, and it was not required to study the “effects” of mining the Rock Creek deposit.

Plaintiffs’ contention that the Service did not make the necessary factual finding is further unpersuasive because federal agencies are entitled to a presumption of regularity which holds they “must be presumed” to have followed their regulations unless rebutted by evidence in the record. *Gifford Pinchot Task*

Force v. U.S. Fish and Wildlife Serv., 378 F.3d 1059, 1071-72 (9th Cir. 2004).

Here, there is no evidence rebutting the Service's compliance with 50 C.F.R. § 402.02 (defining "effects of the action"). This Court should find that the Service followed its definition of "effects of the action."

C. The Forest's Decision Record Is Supported By a Lawful Biological Opinion.

Section I.C. of Plaintiffs' Reply rests on the contention that the 2019 Biological Opinion is legally flawed. This contention is refuted by the discussion, above. Because the 2019 Biological Opinion is legally sound, it supports the Decision Record. This Court should dismiss Plaintiffs' third claim. *San Luis & Mendota Water Authority v. Locke*, 776 F.3d 971, 1009-1010 (9th Cir. 2014).

III. Remedies

Vacatur should not be ordered if this Court finds error and remands either the Decision Record or 2019 Biological Opinion to the agencies. The gravamen of Plaintiffs' first claim is the "agencies' persistent disregard of FWS data" regarding grizzly bear mortality in the Cabinet-Yaak. (Doc. 117, at 15). If this Court rules for Plaintiffs on this claim, no vacatur of the 2018 Decision Record and 2019 Biological Opinion should be ordered because the agencies can cure the error on remand by explaining more explicitly: (i) they considered the data that Plaintiffs identify; and (ii) the data do not identify effects not previously considered.

Heartland Reg'l Med. Ctr. v. Sebelius, 566 F.3d 193, 198 (D.C. Cir. 2009) (vacatur

not required “[w]hen an agency may be able to readily cure a defect in its explanation of a decision.”).

No vacatur should be ordered if the Court finds that the Service wrongfully segmented its review of the Project. 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.

Contrary to Plaintiffs’ contention, remand without vacatur does not “place[] the species at risk.” (Doc. 117, at 30) (original alteration). The Cabinet-Yaak grizzly bear population has improved significantly since 2007 when the bear specialist commenced work. USFWS_041206-08. The same mitigation would continue during the remand period. Remand without vacatur does not threaten bull trout because only evaluation activities would proceed and those activities are not anticipated to affect baseflow in streams supporting bull trout and their designated critical habitat. USFWS_001812, 042211, 042212. Because Plaintiffs have not rebutted this evidence, no vacatur should be ordered if this Court finds agency error.

CONCLUSION

For the foregoing reasons and as set forth in RC Resources' opening brief, this Court should grant RC Resources' Cross-Motion for Summary Judgment and deny Plaintiffs' Motion for Summary Judgment.

DATED: March 19, 2021.

/s/Robert Tuchman

Robert Tuchman

BRYAN CAVE LEIGHTON PAISNER LLP

1700 Lincoln Street, Suite 4100

Denver, CO 80203

Telephone: (303) 861-7000

Facsimile: (303) 866-0200

robert.tuchman@bclplaw.com

Counsel for Defendant-Intervenor

RC Resources, Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the undersigned certifies that the foregoing brief is 4,996 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 March 19, 2021, I filed the foregoing **RC Resources Inc.'s Reply in Support of Its Cross-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