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

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

Plaintiffs,

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' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Congress designed Section 7 of the Endangered Species Act ("ESA") to ensure that federal agencies do not jeopardize listed species through the actions that they authorize, fund, or carry out. Consistent with this mandate, 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 ("Evaluation Project"). Contrary to Plaintiffs' characterization, the United States Forest Service ("Forest Service") has not taken a "full-speed ahead, damn-the-torpedoes" approach in this approval process. In fact, it is exactly the opposite. Out of an abundance of caution and consistent 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 authorize only those activities associated with the Evaluation Project—nothing more.

Plaintiffs would seemingly prefer that, rather than proceed with this reasonable caution, the Forest Service instead speculate about possible future mining activities in the abstract. Plaintiffs' insistence that the Forest Service and U.S. Fish and Wildlife Service ("FWS") consult on actions that have not been approved is not only legally unsupported and a waste of agency resources, but it conflicts with this Court's findings in the Montanore Mine litigation that long-term

effects analyses are problematic without first obtaining evaluation adit data. *See Save Our Cabinets v. FWS*, 255 F.Supp.3d 1035 (D. Mont. 2017). Based on the limited authorized agency action, FWS confirmed that the Evaluation Project is not likely to jeopardize any ESA-listed species or destroy or adversely modify critical habitat. The agencies' decisions to approve only non-jeopardizing data-gathering efforts before contemplating approval of other agency actions is reasonable and complies with the law.

Furthermore, Plaintiffs' claim that the agencies failed to reinitiate consultation to reevaluate the expected efficacy of mitigation measures falls short because FWS has addressed that issue in both the 2017 Supplement to the Biological Opinion ("2017 Supplement") and in the 2019 reinitiation of formal consultation, which culminated in the 2019 Supplement to the Biological Opinion ("2019 Biological Opinion"). FWS considered the same data cited by Plaintiffs, but analyzed it in accordance with the existing scientific literature and ultimately reached a different conclusion than Plaintiffs. FWS's consideration of this mortality data and other evidence of the efficacy of mitigation measures for the Evaluation Project was reasonable is entitled to deference.

ARGUMENT

I. THE FOREST SERVICE APPROVED A STANDALONE EVALUATION PROJECT.

Contrary to Plaintiffs' characterization, the Forest Service's 2018 Record of Decision does not approve a multi-stage project, nor does it constitute a commitment to approve any future use of the surface of National Forest System lands for any mining project. The Forest Service's approval was limited strictly to those activities associated with the Evaluation Project and made clear that following completion of the Project, and based on monitoring data and analysis, the Forest Service will make a separate decision whether to approve a plan of operations for subsequent mining operations. FS_118278; FS_118340-41.

Plaintiffs selectively quote the Final Record of Decision to support their view that, rather than approve the standalone Evaluation Project, the Forest Service instead approved the first part of a larger, multi-stage mine project. *See* ECF No. 117 at 3 ("Pls.' Reply"). But the relevant portion of the Record of Decision states clearly that the Forest Service is approving "an amended Phase I Plan of Operations for the *evaluation* of the Rock Creek copper and silver deposit consistent with Alternative V of the Final SEIS as modified by this ROD." FS_118281 (emphasis added). 36 C.F.R. Subpart A requires that the Forest Service process a proposed plan of operations, provided that it meets applicable criteria. *See* 36 C.F.R. § 228.4(c). Because RC Resources proposed a plan of operations for both evaluation and mining operations—both distinct operations under the Mining Law (*see* 36 C.F.R. § 228.3(a))—the Record of Decision states that the "Proposed

Action" is a "copper and silver underground mine project." FS_118279. But that is not what the Record of Decision *approves*. Plaintiffs fail to acknowledge the limited nature of the approval detailed in the Record of Decision coupled with their outright refusal to address the purpose of, and process specified by, the Forest Service's locatable minerals regulations. *See, e.g.*, 36 C.F.R. §§ 228.1, 228.3(a), and 228.8. To date, the Forest Service has not approved any plan of operations for actual mine development and its approval of the Evaluation Project does not irreversibly commit its resources or constrain its regulatory authority to require changes to a proposed plan of operations as it finds necessary to minimize environmental impacts to the extent feasible.

For their part, Plaintiffs offer creative but baseless arguments why the agency action subject to consultation should be read capaciously to include operations for which the Forest Service has explicitly withheld approval. They suggest that Federal Defendants, through use of an ellipsis, "misleadingly quot[e]" 50 C.F.R. § 402.02's definition of "action" and insist that the omitted language supports their position that the regulation requires a broader consultation. Pls.' Reply at 3-4. Federal Defendants' use of an ellipsis in their opening brief to omit "in whole or in part" was not intended to mislead but merely an attempt to save space. Indeed, the language is irrelevant because both the Forest Service and FWS analyzed the entire agency action, in whole—the Forest Service's approval of the

Evaluation Project (or Phase I)[1]. The Forest Service has not approved "in whole or in part" any activities associated with Phase II.

Although the regulation requires ESA consultation for activities authorized "in part," Plaintiffs misunderstand the purpose of that language. Pls.' Reply at 4. Indeed, they provide no support for their reading of the regulation. The phrase "in whole or in part" was meant to clarify the extent of federal involvement required to meet the definition of "action." *See Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006 (9th Cir. 2012) (en banc). It was included to ensure that federal agencies could not avoid consultation on a project by asserting that another entity (e.g., state or private actors) was ultimately responsible for the action. For example, the Ninth Circuit in *Karuk Tribe* concluded that the Forest Service's approval of notices of intent to conduct mining activities met the definition of agency "action" because the court interpreted this as an authorization, *in part*, by the Forest Service. The "test under the ESA is whether the agency *authorizes*, funds, or carries out the activity, at least in part." *Id*. at 1023 (citation omitted) (emphasis in original). Here, the Forest Service approved the Evaluation Project and it analyzed the entire

[1] The terms "Phase I" and "Phase II" are artifacts of the time that both the evaluation activities and mining activities were proposed for concurrent approval. *See* USFWS_002988-91. FWS kept that phrasing to remain clear about what was approved and subject to ESA analysis. *See* USFWS_041199. The use of the term "phase" does not mean that the evaluation and mining phases are inherently inseparable. Rather, they consist of entirely separate activities and can accurately be described as separate projects.

action, including the non-federal components of the Project taken by RC Resources.

II. FWS'S BIOLOGICAL OPINION WAS APPROPRIATELY COEXTENSIVE WITH THE FOREST SERVICE'S AUTHORIZED ACTION.

ESA Section 7 consultation must be coextensive with the scope of the authorized action. *Conner v. Burford*, 848 F.2d 1441, 1457 (9th Cir. 1988). Here, it was.

In 1987, RC Resources' predecessors in interest submitted a plan of operations for the "Rock Creek Project," which was divided into two phases. First, the "evaluation phase," involved drilling an evaluation adit into the ore body, constructing support facilities for the adit, and gathering information; and second, the "mining phase," included the development, construction, operation, and reclamation of the mine and mill facilities. *See* FS_118276; FS_118279; USFWS_002988-91. Because the applicant proposed that the Forest Service approve both phases, FWS issued biological opinions covering both phases. *See* FS_118276; USFWS_002986-88 (describing ESA consultation history).

In October 2017, however, the Deputy Regional Forester for Region One, after considering public objections to the Final Supplemental EIS and draft Record of Decision, instructed the responsible official to sign a final Record of Decision "that approves only Phase I project activities," i.e., the evaluation activities.

FS_011635. The change reflected uncertainty regarding Phase II, the mining phase. The Deputy Regional Forester stated:

> Proceeding with Phase I construction of the evaluation adit to the Rock Creek ore body will generate additional hydrologic and geologic data relevant to making an informed decision regarding Phase II. The responsible official shall not approve a decision for Phase II of the project until the information generated during Phase I can be evaluated and a determination whether additional analysis is required is made.

Id. The Forest Service had the authority to narrow the scope of 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 same in its 2019 Biological Opinion and by reasonably concluding that the proposed action is not likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat. Should additional development be proposed for authorization in the future, additional ESA consultation will occur at that time. USFWS_041217.

Plaintiffs call for de novo review of the scope of the authorized action when they argue that courts "consistently undertake an independent fact-based inquiry" to determine a project's true scope. Pls.' Reply at 5. But that is not the proper standard of review. Under the Administrative Procedure Act ("APA"), the Court's role is to consider whether the Forest Service's authorization of the Evaluation Project—and FWS's biological opinion—was arbitrary and capricious. *Ctr. for*

Biological Diversity v. Salazar, 695 F.3d 893, 901-02 (9th Cir. 2012). Plaintiffs bear a "heavy burden" under the APA. *Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235, 1244 (9th Cir. 2013). "Agency action is presumed to be valid and must be upheld if a reasonable basis exists for the agency decision." *Peck v. Thomas*, 697 F.3d 767, 772 (9th Cir. 2012). "A reasonable basis exists where the agency considered the relevant factors and articulated a rational connection between the facts found and the choices made." *Id*. (citation omitted). Here, the Forest Service had the legal authority and discretion to approve only the Evaluation Project, and its decision to do so is not arbitrary and capricious. The Court should not second-guess that discretionary choice by forcing the agency to analyze a different action.

Plaintiffs also misapply the Ninth Circuit's decisions in *Wild Fish Conservancy v. Salazar* and in *Conner v. Burford*. To start, *Wild Fish Conservancy* did not address an analogous situation. That case involved a fish hatchery that had been in operation for nearly 70 years with no end in sight. The question at issue involved the *duration* of FWS's analysis—whether it could limit review of an ongoing agency action to five years, even though the hatchery would operate indefinitely into the future. 628 F.3d 513, 521 (9th Cir. 2010). The court specifically relied on the "long life of [the] facility and the absence of any indication that the Hatchery might close down altogether in the foreseeable future." *Id*. at 523-24. This case simply does not raise comparable concerns of artificially

reducing a continuous action into small pieces in ways that distorts any ESA analysis.

Conner v. Burford is also unavailing to Plaintiffs. The court in *Conner* discussed and distinguished development projects authorized under various statutory schemes. Some of these, the court found, require comprehensive consultation at the outset as with oil and gas operations under the Mineral Leasing Act, and others can be staged as with offshore well development under the Outer Continental Shelf Lands Act. At issue in *Conner* were oil and gas operations managed under the Mineral Leasing Act. The court held that the agency action entailed not only leasing but all post-leasing activities through production and abandonment. 848 F.2d 1441, 1453 (9th Cir. 1988). But here, the proposed action is limited explicitly to the Evaluation Project, and FWS satisfied its Section 7 obligation by analyzing the full scope of that action.

In fact, the Ninth Circuit in *Conner* acknowledged that FWS properly analyzed nearly identical operations in *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678 (D.C. Cir. 1982). "In that case the FWS biological opinion detailed the effects of [a four-year exploratory drilling proposal] and thus considered the effect of the *entire* agency action." *Conner*, 848 F.2d at 1457 (emphasis in original). Ultimately, the Ninth Circuit endorsed the D.C. Circuit's view that the limited four-year exploration phase at issue in *Cabinet Mountains Wilderness* was

the *entire* agency action, in the same way the Evaluation Project here is the *entire* agency action subject to consultation. Plaintiffs are wrong when they argue that *Cabinet Mountains Wilderness* is not "pertinent because this is not a case involving an initial, standalone exploration proposal," Pls.' Reply at 8, because that is precisely what the Forest Service authorized here.

A finding that the Forest Service cannot approve a standalone Evaluation Project designed to better inform the effects of possible future mining would create an impossible dilemma. *See Concerned Citizens & Retired Miners Coal. v. U.S. Forest Serv*., 279 F.Supp.3d 898, 913-14 (D. Ariz. 2017). In *Save Our Cabinets*, this Court set aside the Forest Service's Record of Decision after identifying problems with FWS's analysis of the effects of future mining activities on bull trout based on extant data. The Forest Service cannot evaluate whether to collect data and, at the same time, use that data to perform an ESA analysis. *See id*. at 913 (explaining that the data must precede the analysis). Plaintiffs' position that evaluation activities and mining activities have to be analyzed simultaneously creates an impractical and absurd result in the present case, where the Forest Service determined that there was insufficient information to approve the mine operation until the gathering of information through the Evaluation Project.

Ultimately, Plaintiffs provide no meaningful analysis of the statutory and regulatory scheme that is at issue or offer reasons why the Court should impose oil

and gas leasing law on a locatable minerals project. Plaintiffs may prefer that FWS speculate over actions that the Forest Service is not considering and which RC Resources may never pursue, but their mere preference—without more—does not render FWS's biological opinion arbitrary and capricious.[2]

III. THE EVALUATION PROJECT'S EFFECTS DO NOT INCLUDE PHASE II OF THE ROCK CREEK PROJECT.

The authorized agency action at issue is the Forest Service's approval of a plan of operations for construction of an evaluation adit. Phase II, as described by the Record of Decision, is not an "effect" of that action, but a separate and distinct action, which RC Resources may or may not pursue. *See Concerned Citizens*, 279 F.Supp.3d at 912 (explaining that "courts within the Ninth Circuit have found that data gathering and 'research [have] independent value, distinct from the action itself.'") (alteration in original) (citations omitted). But even if Phase II could be considered an "effect" of the Evaluation Project, it is not "reasonably certain to occur" as required by 50 C.F.R. § 402.02. "Mineral exploration projects … often move forward even when a mine is never developed." *Chilkat Indian Vill. of Klukwan v. Bureau of Land Mgmt.*, 825 F.App'x. 425, 429 (9th Cir. 2020).

[2] The Forest Service reasonably relied on the 2019 Biological Opinion to support its approval of the Evaluation Project. Absent new information suggesting that the evaluation activities are likely to jeopardize listed species, the Forest Service is entitled to deference on its decision to rely on the 2019 Biological Opinion to support its Record of Decision. *See Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of Navy*, 898 F.2d 1410 (9th Cir. 1990).

Plaintiffs' argument that the effects of Phase II *are* reasonably certain to occur relies almost entirely 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."). Plaintiffs ignore the ESA regulations, which dictate that reasonably certain to occur "must be based on *clear and substantial information*, using the best scientific and commercial data available." 50 C.F.R. § 402.17(a), (b) (emphasis added). Plaintiffs fail to point to any "clear and substantial information" in the record to support their argument that Phase II is "reasonably certain" and the Court did not apply the ESA regulations to the facts of this case. By contrast, both the Record of Decision and the 2019 Biological Opinion emphasize that any further development is contingent on whether RC Resources chooses to pursue it and whether state and local agencies issue the necessary permits and approvals at some point in the undetermined future. *See, e.g.*, USFWS_041217, FS_118341, FS_118329-32.

IV. FWS APPROPRIATELY REINITIATED CONSULTATION AND REASONABLY CONSIDERED GRIZZLY BEAR MORTALITY DATA.

Plaintiffs admit that FWS reinitiated consultation in 2019, but continue to pursue their "failure to reinitiate" claim based on their belief that FWS has not

reevaluated the efficacy of mitigation measures in light of post-2006 mortality data. However, both the 2017 Supplement and the 2019 Biological Opinion explicitly discussed the efficacy of mitigation measures and the 2019 Biological Opinion cited the same grizzly bear mortality data relied upon by Plaintiffs. FWS undertook the requisite process, exercised its expert judgment, and arrived at a different conclusion than Plaintiffs.

The 2006 Biological Opinion anticipated that the extensive mitigation plan requiring RC Resources to fund two bear management specialist positions, fund a law enforcement position, and implement dozens of other mitigation measures, *see* ECF No. 116 at ¶¶15-16, Defs.' Statement of Undisputed Facts, would "result in a net reduction in future human-caused grizzly bear mortality rates that would have occurred without the project." USFWS_001793. After the Forest Service approved only the limited Evaluation Project, FWS's 2019 Biological Opinion confirmed that the Evaluation Project would not jeopardize grizzly bears and that the mitigation measures would likely be sufficient to prevent any mortalities from evaluation activities. USFWS_041208. Only a small portion of the mitigation package had been implemented by 2019—most notably the hiring of one bear management specialist in 2007. *See* Defs.' Statement of Undisputed Facts ¶15.[3]

[3] Contrary to Plaintiffs' representation, Pls.' Reply at 18 n.2, Federal Defendants correctly stated that RC Resources began funding the position in 2006. The

But already, the data and relevant literature suggest that the bear management specialist has already led to a reduction in mortality rates from what they otherwise would have been.[4]

A. FWS Considered the Relevant Mortality Data.

Both FWS and Plaintiffs rely on mortality data documented by Kasworm et al.'s annual "Research and Monitoring Progress Report" for the Cabinet-Yaak Ecosystem. *See* Pls.' Br. at 31 (citing Kasworm 2018, USFWS_041689-91 and Kasworm 2017, USFWS_041588-89); USFWS_041207 (2019 Biological Opinion citing Kasworm 2018); USFWS_003262-64 (2017 Supplement citing Kasworm 2016 and Kasworm 2017 (in prep)). These reports track the success of recovery efforts in the Cabinet-Yaak Ecosystem and are the best available source for data on the population's demographics. Contrary to Plaintiffs' characterization, FWS's analysis of the Kasworm reports' data did not boil down to one "general citation" without further discussion. Pls.' Reply at 19. Rather, FWS specifically cited mortality data from the reports, reproduced some of the reports' key statistical analyses, and explained how that data supported FWS's determinations. *See*

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position began operating in 2007, but was funded starting in 2006. *See* USFWS_034425-26.

[4] Notably, FWS never required that mortality rates actually *decrease* prior to or during the Evaluation Project. Even if the mitigation measures successfully prevented some mortality that otherwise would have occurred, "[f]actors beyond the control of the Forest Service or RC Resources could influence future mortality rates." USFWS_041208.

USFWS_041206-08; USFWS_003262-65.[5] Indeed, Plaintiffs do not dispute that FWS considered Kasworm's mortality data, compared mortality rates from before and after 2007, and "[b]ased on this data, FWS concluded that the mortality rate has improved 'since the grizzly bear specialist has been in place.'" *See* Pls.' Resp. to Defs.' Statement of Undisputed Facts ¶ 72, ECF 119.

The dispute boils down to *how* FWS analyzed the Kasworm data. The 2019 Biological Opinion, for instance, discusses Kasworm's statistical analysis showing that from 1999-2006 the average annual known human-caused mortality for Cabinet-Yaak grizzly bears was 2.25 per year while from 2007 to 2017, the most recent data then available, the average annual known human-caused mortality was 2.1 bears per year. USFWS_041207. This data shows a reduction in human-caused mortality following the partial implementation of mitigation measures in 2007. Plaintiffs rely on the same raw data, but group the data into different time periods than the ones utilized by FWS. *See, e.g.*, Pls.' Reply at 23-24 (comparing mortality rates from 2007-2016 to mortality rates from 1994-2006); Pls.' Br. at 31. Plaintiffs looked at only the mortalities in Montana and Idaho, not in Canada. *See* Pls.' Br. at 31 n.5. Data can be compared in countless ways and an agency need not generate every possible statistical comparison. FWS's data analysis was reasonable, and

[5] The Forest Service did the same and reasonably concluded that reinitiation of consultation was not required to address the efficacy of mitigation measures. *See* FS_011646-47.

therefore it should be upheld even if Plaintiffs would have approached it differently. *See Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008).

FWS used the same time periods as the Kasworm reports, which reflect the best available science on mortality in this population. Kasworm selected time periods that reflected trends in overall population: 1982-1998 when the rate of population change was improving, 1999-2006 when it was declining, and 2007 onward when it was again improving. USFWS_041207; USFWS_041705; USFWS_041710 (chart showing annual percent change in population). Kasworm had analyzed pre-1999 and post-1999 data in separate groupings since at least the 2010 report. *See* USFWS_035227. Kasworm considered varying time periods by dividing the number of mortalities by the number of years, generating an *annual* mortality rate that could compare across time periods of different lengths. USFWS_041705. Plaintiffs do not explain why asymmetrical time periods are inherently inappropriate, given that FWS corrected for the differing lengths. The 2019 Biological Opinion reasonably reported mortality rates using the same groupings as Kasworm. USFWS_041207.

By contrast, Plaintiffs *do* appear to have cherry-picked time periods to support their argument. They too compare asymmetrical time periods, reaching back to 1994 to capture lower mortality years in the pre-2007 period, and exclude 2017 (a year that had zero known human-caused mortality in the U.S. portion of

the Cabinet-Yaak), which skews the results. Pls.' Reply at 23-24 (comparing mortality rates from 2007-2016 to mortality rates from 1994-2006); Pls.' Br. at 31. Unlike Plaintiffs' calculations, FWS's use of time periods from the existing literature to compare annual mortality rates was not arbitrary or capricious.

The mortality rates in the 2019 Biological Opinion included all mortalities for the Cabinet-Yaak grizzly bear population, including mortalities occurring in Canada within 16 kilometers of the international border. Although Canada is not within the Cabinet-Yaak recovery zone, Kasworm included this data because "[m]any bears collared in the U.S. have home ranges that extend into Canada" and mortalities occurring just across the border affect the Cabinet-Yaak population. USFWS_041682. FWS relied on the best available science (the Kasworm reports) and therefore used the same data set.[6]

Plaintiffs criticize the use of Canadian mortalities because the bear management specialist works in Montana. But even if only Montana data were used, the average annual mortality was lower in 2007-2017 than it was 1999-2006.[7] Additionally, Proctor et al. (2018)—a peer-reviewed, published scientific

[6] Additionally, both the Montana and Canadian efforts to reduce human-caused mortality integrated the Montana Fish, Wildlife and Parks model. USFWS_042170. Therefore, a reduction in mortality in Canada is further evidence of the success of these types of mitigation measures.

[7] Kasworm's data shows 13 known human-caused mortalities in Montana from 1999-2006 (1.625 per year) and 12 from 2007-2017 (1.09 per year). USFWS_041690-91.

paper cited in the 2019 Biological Opinion—shows that mortality rates in the Montana portion of the Cabinet-Yaak had been on an increasing trend before the implementation of the bear management specialist, and have been on a declining trend since then. USFWS_042179 ("A reversing of morality trend is detectable when the running 3-year average of non-hunt human-caused grizzly bear mortality within the northwest Montana portion of the Cabinet-Yaak ecosystem is compared pre- and post-hiring of a grizzly bear conflict specialist."); USFWS_042180 (chart showing the decline in mortality rates after 2008). In the "control" population, where similar mitigation measures were not implemented, mortality rates continued to increase during this time period. USFWS_042179-81. Thus, in Montana, the work of a bear management specialist has coincided with lower mortality rates and a statistically significant reversal in the mortality trend. USFWS_042180.

Finally, Plaintiffs incorrectly assert that FWS could not have grappled with grizzly bear mortality data because the purpose of the 2019 consultation was to "'harmonize' FWS's analysis with the scope of the Record of Decision." Pls.' Reply at 17. While that was the primary goal, the 2019 consultation *also* examined new information relevant to the agency action, including updated grizzly bear mortality numbers. *See* USFWS_041205-08. FWS reinitiated consultation and addressed the very data and issue Plaintiffs raise.

B. FWS's Holistic Approach to Analyzing the Impact of Mitigation Measures Was Not Arbitrary or Capricious.

FWS not only examined the grizzly bear mortality data, but also looked holistically at other metrics and known information to evaluate the likely effectiveness of mitigation measures. FWS considered the number of calls and human-bear conflicts addressed by the bear management specialist, known and human-caused female bear mortality rates, female survival rates, population size and trends, and relevant literature. USFWS_041206-08; USFWS_003262. While none of these considerations alone can prove that the bear management specialist prevented some mortalities that would have otherwise occurred—and indeed, proving what would have happened is impossible—FWS has authority to "'fill[] the gaps in scientific evidence' and [] courts 'must respect the agency's judgment even in the face of uncertainty.'" *Save Our Cabinets*, 255 F. Supp. 3d at 1061 (quoting *San Luis & Delta–Mendota Water Auth. v. Jewell*, 747 F.3d 581, 633 (9th Cir. 2014)). FWS's consideration of multiple different metrics and sources to inform its judgment was reasonable.

For example, FWS noted that total and human-caused female mortality decreased dramatically after 2006, and female survival rates correspondingly increased. USFWS_041207; USFWS_003271. Plaintiffs do not dispute that "[t]he loss of grizzly bear females is the most critical factor affecting the grizzly bear population trend because of their reproductive contribution to current and future

growth." Pls.' Resp. to Def-Intervenor's Statement of Undisputed Facts ¶65. And Plaintiffs assert that FWS must show that the mitigation measures would prevent at least one *female* grizzly bear mortality over the 35-year life of the mine. Pls.' Reply at 22. The significant decline in human-caused female grizzly bear mortality, cited in both the 2017 Supplement and 2019 Biological Opinion, suggests that the bear management specialist may have already prevented the death of one or more female grizzly bears. This far exceeds what FWS would expect to observe before the Evaluation Project, let alone the full mine project, has even begun and before the implementation of the majority of the mitigation measures.

The 2017 Supplement and 2019 Biological Opinion are not alone in concluding that even partial implementation of the mitigation plan appears to have made a measurable difference. Proctor et al. (2018) found that the approach implemented by the bear management specialist was likely effective at reducing human-caused mortality rates in the Cabinet-Yaak ecosystem, and has been similarly effective in other ecosystems. USFWS_042182-83. Kasworm et al. (2018) also found that declines in mortality on private lands "may be the result of the initiation of the [Montana Fish Wildlife and Parks] bear management specialist position." USFWS_041707.

This case differs significantly from *Save Our Cabinets*, where the biological opinion did not discuss whether the bear management specialist's work appeared to

have impacted mortality. The Court found that "the agency failed to consider an important aspect of the problem" by not evaluating the potential inadequacy of mitigation measures. *Save Our Cabinets*, 255 F. Supp. 3d at 1063. Here, the agency *has* considered this potential issue, examined relevant data and literature, and concluded that the bear management specialist has met expectations.

Even Plaintiffs concede that "the conflict-reduction measures implemented to date likely prevented some conflicts and that mortality rates might have been even worse in the absence of such measures." Pls.' Br. at 39. The human-caused mortality data, other data reflecting the health of the Cabinet-Yaak grizzly bear population, and a qualitative understanding of the bear management specialist's efforts all suggest that even partial implementation of the mitigation measures for the Evaluation Project have already had the anticipated effect. FWS thoroughly considered this issue.

CONCLUSION

Plaintiffs must show that the Forest Service was arbitrary and capricious in its authorization of the Evaluation Project and that FWS was arbitrary and capricious in considering the effects of the same in its 2019 Biological Opinion. Plaintiffs have not made this showing. Out of an abundance of caution, and recognizing the Court's concerns raised in *Save Our Cabinets*, the Forest Service reasonably narrowed the scope of its authorized agency action. The Evaluation

Project will provide valuable data that is highly relevant to future ESA review should the Forest Service consider approving further mine development.

Further, FWS's considerations of the efficacy of mitigation measures for the Evaluation Project was reasonable. FWS addressed mortality and other relevant data and reasonably found that the partial implementation of the mitigation plan has already benefited the Cabinet-Yaak grizzly bear population.

For these reasons, the Court should deny Plaintiffs' motion for summary judgment, grant Federal Defendants' cross-motion for summary judgment, and dismiss the case.

Dated: March 19, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 19, 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 5,000 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 4,992 words.

/s/ Davis A. Backer
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