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

ROCK CREEK ALLIANCE;)
CLARK FORK COALITION;)
CABINET RESOURCE GROUP;)
MONTANA WILDERNESS ASSOCIATION;)
EARTHWORKS;)
AND ALLIANCE FOR THE WILD ROCKIES;)

Plaintiffs,)

v.)

UNITED STATES FOREST SERVICE;)
U.S DEPARTMENT OF AGRICULTURE;)
ABIGAIL R. KIMBELL, in her official capacity as)
Regional Forester for the Northern Region;)
BOB CASTANEDA, in his official capacity as)
Forest Supervisor of the Kootenai National Forest;)
MIKE JOHANNNS, in his official capacity as)
Secretary of the U.S. Department of Agriculture;)

Defendants.)

Cause No. _____

**PLAINTIFFS' COMPLAINT
FOR INJUNCTIVE AND
DECLARATORY
RELIEF**

INTRODUCTION

1. Plaintiffs Rock Creek Alliance, Clark Fork Coalition, Cabinet Resource Group, Montana Wilderness Association, Earthworks, and the Alliance for the Wild Rockies, file this action for declaratory and injunctive relief arising from defendants' unlawful approval of the Record of Decision ("ROD"), Plan of Operations ("PoO") and Final Environmental Impact Statement ("FEIS") for the Rock Creek Project ("Project" or "Mine") issued by the Kootenai National Forest ("KNF") Supervisor in September, 2001 ("FEIS") and June, 2003 ("ROD"), and affirmed in September of 2003 by the Northern Regional Office of the United States Forest Service.

2. This suit challenges the United States Forest Service's failure to comply with mandatory procedural and substantive requirements governing the Forest Service's approval of mining and other activities on National Forest lands for the Rock Creek Project. These violations include failure to comply with the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* ("ESA"); National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* ("NEPA"); 1872 Mining Law, 30 U.S.C. §§ 21, *et seq.*; Federal Land Policy and Management Act, 43 U.S.C. §§ 1701, *et seq.* ("FLPMA"); Wilderness Act, 16 U.S.C. §§ 1131-1136; National Forest Management Act, 16 U.S.C. §§ 1600-1614 ("NFMA"); the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* ("CWA"); Forest Service Organic Administration Act of 1897 ("Organic Act"), 16 U.S.C. §§ 478, 551; the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, and the implementing regulations of these laws.

3. Plaintiffs also seek injunctive relief to protect ESA-listed grizzly bears and bull trout from harm, including but not limited to jeopardy, destruction and adverse modification of critical habitat, and take until the federal defendants comply with the law. This relief is necessary to

preserve the status quo, to correct illegal final agency action, and to prevent unlawful agency action that may cause irreparable harm to the environment and species listed for protection under the ESA.

4. In compliance with 16 U.S.C. § 1540(g), on April 19, 2004, Plaintiffs gave notice of the ESA and other violations specified in this complaint and of its intent to file suit to defendants. A Copy of this letter is attached. Sixty days or more have elapsed since the notices were properly served. The violations complained of in the notice letter have not been remedied. Through approval of the ROD and FEIS, Defendants remain in violation of the ESA.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 (federal question); 1346 (United States as defendant); 1361 (mandamus); 2201 (declaratory relief); 2202 (injunctive relief); and the APA, 5 U.S.C. §§ 702 and 706. The citizen suit provision of the ESA also establishes jurisdiction. 16 U.S.C. § 1540(g). There is a present and actual controversy between the parties. Plaintiffs seek a declaratory judgment and injunctive relief to remedy the violations complained of herein. Plaintiffs also seek an award of costs, including attorney and expert witness fees. See Equal Access to Justice Act, 28 U.S.C. § 2412(d); and the ESA, 16 U.S.C. § 1540(g).

6. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e), as a substantial part of events/omissions giving rise to this suit occur in this District, and the regional headquarters of the U.S. Forest Service is in this District. The headquarters of the U.S. Forest Service, Northern Region, the office responsible for the denial of Plaintiffs' administrative appeal, is in Missoula, Montana.

PARTIES

7. The Rock Creek Alliance (“RCA”) is a non-profit organization formed by conservationists, sports people, and business owners to protect public lands, air quality, and water resources from proposed mining activity in the Clark Fork-Pend Oreille Watershed, especially the Rock Creek Project. The RCA has offices in Sandpoint, Idaho and is authorized as a foreign corporation in Montana. The RCA also is working to protect fish and wildlife species from the proposed Mine including the threatened grizzly bear, bull trout, and lynx. The Alliance has 12 member organizations and approximately 800 individual members, primarily from Idaho, Montana, and Washington.

8. The Clark Fork Coalition (“Coalition”) is a non-profit organization of over 1,000 members dedicated to the protection of water quality in the Clark Fork River basin. The Coalition works to protect the natural ecosystems of the Clark Fork River and its tributaries, including the area impacted by the proposed Rock Creek Project. The Coalition has offices in Missoula, Montana.

9. Cabinet Resource Group (“CRG”) is a non-profit organization founded in 1976. CRG seeks to educate and mobilize the public regarding the protection of the Cabinet Mountains’ spectacular and precious natural resources. CRG operates in Lincoln and Sanders Counties, Montana, with an office in Heron, Montana.

10. Earthworks, formally known as Mineral Policy Center, is a non-profit environmental organization dedicated to protecting communities and the environment by preventing the environmental impacts associated with irresponsible mining and mineral development, and by cleaning up pollution caused by past mining. Earthworks is headquartered in Washington D.C. and has field offices in Missoula, Montana and Tucson, Arizona. Like the other Plaintiffs,

Earthworks participated extensively in the proposed Rock Creek Mine's permitting process, and has provided assistance to local community groups concerned about the Mine's impacts.

11. Alliance for the Wild Rockies ("AWR") is a non-profit conservation organization dedicated to the protection of the Northern Rockies, including the Cabinet-Yaak ecosystem. AWR's members live and recreate in the Cabinet-Yaak ecosystem, and AWR members make their living conducting scientific research on grizzly bears and other wildlife in the Cabinet-Yaak.

12. The Montana Wilderness Association ("MWA") is a non-profit organization founded in 1958 to advocate the protection of Montana's wilderness resource and to protect and preserve all of Montana's remaining wild lands and naturally functioning ecosystems. Six years later, MWA leaders were instrumental in the passage of the 1964 Wilderness Act. Since that time, MWA has led the fight to protect Montana's wild lands, National Forest, and BLM areas. MWA has thousands of dues paying members, and active chapters in Bozeman, Billings, Kalispell, Helena, Great Falls, and Libby.

13. Plaintiffs and their members use the lands in the Cabinet-Yaak ecosystem (including the site of the Rock Creek Project and its affected areas), the Clark Fork River and its tributaries in Montana and Idaho, including Rock Creek and downstream waters such as Lake Pend Oreille, for recreational, scientific, aesthetic, and commercial purposes. Plaintiffs and their members derive recreational, scientific, aesthetic, and commercial benefits from these lands, waters, and wildlife. The past, present, and future enjoyment of these benefits by Plaintiffs and their members has been, is being, and will continue to be irreparably harmed by the Forest Service's disregard of its statutory duties and by the unlawful injuries imposed by these actions.

14. The above-described aesthetic, conservation, recreational, commercial, scientific, and procedural interests of Plaintiffs and their respective members have been, are being, and will continue to be adversely affected and irreparably injured by the Forest Service's failure to comply with federal law as described herein.

15. The Plaintiffs submitted extensive comments to the Forest Service and the State of Montana during the environmental review and permitting process for the Rock Creek Project. The Plaintiffs filed an administrative appeal challenging the decision approving the ROD and FEIS, and that appeal was rejected by the Defendant U.S. Forest Service, Northern Region, located in Missoula, Montana. By filing this appeal, Plaintiffs exhausted all available remedies through the Forest Service administrative review process.

16. Defendant United States Forest Service (Forest Service) is an agency of the United States Department of Agriculture. The Forest Service and its officers are responsible for implementing all laws and regulations relating to the management of the National Forests, including the Kootenai National Forest (KNF).

17. Defendant United States Department of Agriculture is a cabinet-level Department within the executive branch of the federal government. Defendant Mike Johanns is the Secretary of Agriculture. The U.S. Forest Service is an administrative agency within the Department of Agriculture.

18. Defendant Abigail Kimbell is the Regional Forester for the Northern Region of the U.S. Forest Service. The Northern Region denied Plaintiffs' administrative appeal challenging the approval of the ROD and FEIS. The Northern Region's decision denying Plaintiffs' administrative appeal is the final agency action under the APA challenged in this case.

19. Defendant Bob Castaneda is the Forest Supervisor for the Kootenai National Forest,

within which the Rock Creek Mine is proposed. Mr. Castaneda signed the approval for the ROD and FEIS challenged in this action.

FACTUAL AND REGULATORY BACKGROUND

Description of the Area of the Proposed Mine

20. The Cabinet Mountains Wilderness in Northwestern Montana encompasses 94,272 acres of some of the best remaining remote and wild habitat in the contiguous United States for grizzly bears, lynx, bull trout, westslope cutthroat trout, harlequin duck, wolverines, mountain goats, and other threatened, endangered and sensitive plant and animal species. Cliff, Copper, Moran Basin and St. Paul Lakes are wilderness lakes above and adjacent to the proposed mine along with the East Fork of Bull River and East Fork of Rock Creek. These and other waters in the Wilderness are designated as Outstanding Resource Waters under Montana law.

21. The stunning beauty of the Cabinet Mountains was first recognized by President Theodore Roosevelt in 1907 when he created the “Cabinet Forest Reserve.” In 1935 the Forest Service designated the Cabinet Mountains for the “purpose of inspirational and other recreational enjoyment.” Finally, in 1964 following the passage of the Wilderness Act, Congress officially designated the Cabinet Mountains as a wilderness area—making it one of the first ten areas to receive this designation.

22. The Clark Fork River is immediately adjacent to the project area and is slated as a receiving water of much of the Mine’s proposed water pollution discharges. The 320 mile-long Clark Fork River is western Montana’s largest river, draining the Blackfoot, Bitterroot, and Flathead River basins. Soon after leaving Montana, it empties into Idaho’s Lake Pend Oreille. Lake Pend Oreille is a pristine lake providing important fish and aquatic life habitat threatened

by the proposed Rock Creek Mine in Montana. The Clark Fork River is important for recreational uses and provides habitat for a wide variety of fish and aquatic life.

23. Rock Creek itself originates in the Cabinet Mountains and flows into the Clark Fork River at the site of the proposed mine. Rock Creek provides crucial habitat for the threatened bull trout, Montana's largest native freshwater fish. It also provides habitat for cutthroat trout, harlequin duck and other aquatic species.

24. Both the Clark Fork and Rock Creek are classified as "B-1 waters," which are protected for uses such as drinking water, recreation, growth and propagation of salmonid fishes and associated aquatic life. Both Rock Creek and the Clark Fork River are also currently listed as impaired water bodies by the DEQ as a result of human caused degradation.

Description of the Rock Creek Mine Project

25. The Revett Minerals Company ("Revett") proposes to build and operate the Rock Creek copper and silver mine on 1,560 acres of public and private land in and adjacent to the Cabinet Mountains Wilderness of northwestern Montana. The Rock Creek Project was formerly proposed by Sterling Mining Company ("Sterling"). The proposed Mine would remove 10,000 tons of copper and silver ore per day, seven days a week, for 35 years. Ore would be extracted by hollowing out giant underground rooms, leaving overlying wilderness lands held up by rock pillars.

26. Although the Cabinet Mountains Wilderness was withdrawn from mineral entry in 1984, pursuant to the Wilderness Act, that withdrawal was subject to valid existing rights. In 1985, the Forest Service determined that ASARCO had established valid existing rights to the mineral deposits under the Cabinet Mountains Wilderness and in 1999, Sterling purchased those mineral rights from ASARCO. Revett now has the rights to these properties and the Rock Creek Project.

27. Revett would also locate a processing facility near the confluence of the east and west forks of Rock Creek and a 320-acre tailings impoundment within one-third mile of both Rock Creek and the Clark Fork River. The mill site and 100-million-ton tailings impoundment would be constructed in the Rock Creek drainage of the lower Clark Fork River Valley and would be left permanently in an unlined pile along Rock Creek and just 1/4 mile from the Clark Fork River.

28. In 1987, prior to Sterling's purchase of the mineral rights, ASARCO submitted an "Application for Hardrock Operating Permit." After this application was deemed complete in 1989, ASARCO submitted an application for the development of an evaluation adit. ASARCO also submitted revised water management plans in March 1995 and January 1997. These applications have been transferred to Revett.

29. The ROD approved the Plan of Operations ("PoO") submitted by Revett/Sterling for the Rock Creek Project. Although the ROD approved the PoO for entire Rock Creek Project, Project will proceed in two distinct phases; the first comprised of an evaluation adit, which will provide data and other information required to evaluate the second phase, which consists of the construction and operation of the entire mine with up to four adits, mill, water treatment facility, roads, and tailings paste storage facility.

30. Construction and operation of the mine will result in nearly 600 acres of surface disturbance consisting of evaluation, service and ventilation adits, the mine and associated mill facility, utility and transportation corridors, tailing paste storage, facility, waste water treatment facility and support facilities. The FEIS predicts that the mine will discharge up to 2,300 gallons per minute of wastewater into the Clark Fork River, Rock Creek, Miller Gulch and groundwater.

The Forest Service's Inadequate Review of Environmental Impacts

31. The Forest Service failed to take a “hard look” at, and failed to provide sufficient scientific basis for, its analysis of baseline conditions and potential environmental impacts from the Rock Creek Project, including all direct, indirect, and cumulative impacts.

Deficient Baseline Comparison with Troy Mine

32. The Forest Service's environmental analysis relied on the assertion that environmental impacts at the Rock Creek project will be similar to those observed at the nearby Troy Mine. These alleged similarities are not supported by the data in the Record. Rather, there are important differences between the Rock Creek and Troy Mine projects, particularly with respect to geochemistry and metal leaching potential.

33. There are geochemical differences between the Troy Mine and the proposed Rock Creek Mine. As a result, reliance on Troy data is not sufficient to predict potential impacts at Rock Creek as is required by NEPA. The U.S. Environmental Protection Agency (EPA) raised concerns regarding the adequacy of the comparison between the Troy and Rock Creek deposits. In response, the Forest Service relies on yet to be obtained data that will only be collected during the evaluation adit phase of the Project.

34. The Forest Service's analysis of environmental impacts from the Rock Creek Mine contain inadequate data on waste and ore characterization, inaccurate conclusions regarding acid generation, metal leaching, and discharges to Rock Creek. In supporting the environmental analysis of the Rock Creek Mine, the Forest Service relied on documents containing new data that was never made available for public review under NEPA prior to issuance of the ROD.

Improper Reliance on Future Scientific Studies

35. Revett has not provided, and the Forest Service has not obtained, the data necessary to develop a final design for the Rock Creek Mine.

36. The Forest Service has not collected the necessary scientific data to adequately describe the affected environment and the Mine's impacts. The Forest Service has not disclosed and analyzed the costs of uncertainty nor the costs of proceeding without more and better information. The Forest Service failed to properly evaluate the alternative of permitting the evaluation adit alone and evaluating the data collected.

37. The Forest Service and/or Revett have not submitted detailed evaluation and monitoring plans necessary to evaluate mine subsidence, water quality discharges, and wilderness impacts. Instead, the Forest Service relies upon conceptual plans that will be finalized through future agency review panels without input from the public.

Mine Subsidence in Wilderness

38. The geology, hydrology, and mine plan for the proposed Rock Creek Project exhibits several characteristics that are favorable for subsidence, including: faulting and fracturing; interbedding of clays and silts; active seismic activity; and low overburden to extraction ratio in some areas.

39. Mining subsidence induces fissuring in overlying and surrounding strata which influences hydrologic systems in ways that will cause changes to both water quality and quantity at the proposed Rock Creek Project. Subsidence and hydrology impacts occur at every underground mining operation and can bring about changes to surface landforms, ground water and surface water. Subsidence is an inevitable consequence of underground mining and it will result in impacts to the overlying strata at the proposed Rock Creek Project. Sulfide ore bodies such as

the proposed Rock Creek Project exhibit potential for acid drainage and compound subsidence and hydrologic impacts from mining.

40. The Forest Service attempted to identify subsidence and hydrologic impacts that will occur to the overlying Cabinet Mountains Wilderness and other areas in the Kootenai National Forest because of Rock Creek's extensive underground mining operations. The FEIS and ROD proposed various mitigation measures to attempt to reduce, but not prevent, the potential for subsidence and hydrologic impacts from the underground mining operations. The FEIS and ROD are based on the assumption that subsidence and related hydrologic impacts are extremely remote possibilities. This assumption is not supported by sound science or the Record in this case.

41. The ROD does not address the impacts or reclamation on any resulting subsidence areas from the proposed underground mining operations, and does not require reclamation of those areas. The ROD does not ensure that hydrologic impacts from underground mining will not impact existing uses of state waters and that and the level of water quality necessary to protect those uses will be maintained and protected. The ROD does not ensure that hydrologic impacts from underground mining will not degrade the ground water aquifer or surface water such as wilderness lakes, streams, springs and seeps.

42. Subsidence from underground mining will disturb the natural landform of the Cabinet Mountains Wilderness area and surrounding areas. As a result of subsidence and/or hydrologic impacts from the underground mining operation, the actions allowed by the ROD may result in unintended impacts to the surface, wetlands and associated surface water systems that make up the overlying Cabinet Mountains Wilderness Area. Because the extent of impacts and resulting treatment cannot be reasonably predicted or ensured, the Forest Service cannot reasonably

guarantee that hydrologic impacts from underground mining will not negatively impact existing uses of state waters and the Wilderness Area.

43. Buffer zones such as the Forest Service has proposed for the Rock Creek Project assume that there is a practical aerial limit to the extent that hydrologic impacts occur. The Forest Service did not require that these “buffer zones” be left permanently in place – leaving the decision whether to ultimately mine these zones up to Revett.

44. The Forest Service relied upon documents and information in support of the FEIS and ROD with respect to the impacts from subsidence that were not presented for public review. The conclusion that the FEIS and ROD contain accurate and sufficient information regarding subsidence, hydrology, and related issues is not supported by the Record.

45. Without full baseline condition data, there is no way for the agency or the public to evaluate the potential environmental consequences of the proposed action and the alternatives and the potential of the listed mitigation measures to avoid or minimize the adverse impacts.

Water Quality Impacts

46. The FEIS and ROD set forth an inadequate and legally insufficient analysis of the reasonably foreseeable direct, indirect, and cumulative effects and incremental impacts that discharges from the proposed Rock Creek Project will have on downstream waters, including the Clark Fork River and Lake Pend Oreille.

47. Neither the FEIS, nor ROD, include a discussion of cumulative effects to Lake Pend Oreille as a result of the mine discharge.

48. The Forest Service did not adequately evaluate impacts to the Clark Fork River in Idaho from the Rock Creek Mine.

49. The Forest Service's FEIS only evaluated impacts from Outfall 001, the treatment system at the Rock Creek Mine. In addition to Outfall 001, Outfalls 002, 003, and 004 are proposed to result in releases to the Clark Fork River from the mine, none of which were evaluated.

50. Uncontrolled releases from seeps and groundwater infiltration were not considered in FEIS' evaluation. Seeps created by the underground mine during and after operation would affect water quality in Rock Creek and the Clark Fork River. The FEIS states that the exact location of preferred fracture flow paths cannot be identified. Seeps from adits along fractures that were not collected as part of Outfall 001 and seeps from the mine storage area would also discharge to the Rock Creek drainage while the mine is operating.

51. Settling and runoff of airborne releases of metals and nutrients are not considered in the FEIS' evaluation of water quality impacts from the Rock Creek Mine. The FEIS also did not adequately evaluate impacts from runoff and settling of dust from construction and production and impacts from blasting, diesel equipment, heating, crushing, ore transfer, and tailings area during production.

52. The potential location, magnitude, and severity of water quality impacts to the ground water system, or to any surface lakes or streams in the Rock Creek area are unknown. The Forest Service inappropriately relied on concentrations from the Troy Mine in Montana rather than original data from the Rock Creek deposit.

53. The Forest Service's use of the Troy Mine as an environmental analogue for the Rock Creek Mine underestimates concentrations of metals, acid, and other pollutants in outfalls at the Rock Creek Mine.

Air Quality Impacts

54. The ROD authorizes Revett to construct an exhaust ventilation adit for its underground mine development that will be located less than 1/3 of a mile from the Cabinet Mountains Wilderness boundary.

55. Emissions from the exhaust ventilation adit will be 1.0 tons per year of PM-10 and 29.9 tons per year of NOx. Mine development by Revett will include driving two parallel adits directly north east of the mill site which is located less than 2.5 miles from the Cabinet Mountain Wilderness boundary. Each adit will be approximately 25 feet wide by 20 feet high. The north adit would be used as a conveyor adit and the south as a service adit for mine access. Electric ventilation fans would be used in the conveyor adit for intake and the service adit for exhaust.

56. The FEIS did not adequately review the emissions from, nor does the ROD or air quality permit set emissions limitations for, the service adit.

57. The FEIS and ROD also authorize an additional ventilation adit during the operation phase of the mine to be located approximately 1.2 miles inside the Cabinet Mountain Wilderness to be driven from the underground mine when Revett's mining operations proceed under the Wilderness area.

58. The FEIS did not adequately review the emissions from, nor does the ROD or air quality permit set emissions limitations for, the Cabinet Mountain Wilderness ventilation adit.

The FEIS and ROD fail to note that Revett's permit will violate or potentially violate and cause violations of the Class I and Class II increments for PM-10, SO₂ and NO₂. The FEIS/ROD ignores the newly approved nearby Thompson River Co-Generation Power Plant that will emit numerous pollutants into the Rock Creek airshed.

Inadequate Analysis of Proposed Mitigation Measures

59. The ROD and FEIS fail to specify the specific mitigation and other requirements necessary and required by the Forest Service to reduce the environmental impacts associated with the Rock Creek Mine. In addition, the FEIS and ROD fail to specify the monitoring and enforcement program required in the FEIS and ROD. The Forest Service listed many mitigation measures required as a condition of the Forest Service's approval of the full Rock Creek Mine development, but did not provide detailed analysis of the implementation or effectiveness of these required mitigation measures, or their impacts on the environment.

Insufficient Alternatives Analysis

60. The Forest Service described the purpose and need for the Rock Creek Project as Revett's purpose is to make a profit from the mining and milling of copper and silver from the Rock Creek deposit.

61. The Forest Service assumed in processing the Rock Creek Mine permit that the filing of unpatented mining claims by Revett under the Mining Law and the development of Revett's private minerals prohibits the Forest Service from denying any part of the proposed operation.

62. The Forest Service did not consider in detail the alternative of approving the evaluation adit only prior to approving full-scale mining in the ROD/PoO approval. The Forest Service did not consider in detail all reasonable alternatives to the proposed Project.

63. The evaluation adit is needed to obtain critical water quality, geochemistry, hydrology and mineral economic information. As approved, the evaluation adit is "phase 1" of 2 of the Rock Creek Project. ASARCO had submitted the evaluation adit proposal to the Forest Service as a separate plan of operations. The Forest Service did not approve or review in detail this

separate plan. The Montana Department of Environmental Quality's ROD only approved the evaluation adit.

Failure to Comply with the Endangered Species Act's Protections For Grizzly Bear and Bull Trout

64. Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), contains both procedural and substantive requirements. Substantively, the statute requires the Forest Service to insure that its actions are not likely to jeopardize a listed species or destroy or adversely modify its critical habitat. 16 U.S.C. § 1536(a)(2). This duty is constant, relieved only by an exemption from the Endangered Species Committee. 16 U.S.C. § 1536(h). Procedurally, Section 7 requires that the Forest Service consult with FWS whenever an action "may affect" a listed species. However, because the Forest Service has a continuing and independent legal duty to avoid any action that would cause jeopardy to a listed species, the agency's reliance on an inadequate, incomplete, or flawed biological opinion to satisfy its duty to avoid jeopardy is arbitrary and capricious. Following receipt of the Fish & Wildlife Service's Biological Opinion, the Forest Service must determine whether and in what manner to proceed with the Rock Creek Mine. The Forest Service must make its ESA § 7 determination based on the best scientific and commercial data available. The Forest Service has failed to comply with both its procedural and substantive Section 7 duties in this case.

65. Once the agencies have initiated consultation, the Forest Service cannot make any irreversible or irretrievable commitment of resources with respect to the proposed action that may foreclose the formulation or implementation of any RPA measures that could avoid jeopardy. *Id.* § 1536(d). This prohibition remains in effect until the completion of the consultation process. 50 C.F.R. § 402.09. The purpose of ESA § 7(d) is to maintain the status quo pending the completion of interagency consultation.

66. The ESA also prohibits “take” of any grizzly bear and bull trout. 16 U.S.C. § 1538; 50 C.F.R. § 17.40(b)(i); 50 C.F.R. § 17.44(w)(2). “Take” by federal agencies is nevertheless sometimes permitted to the extent the agency receives an incidental take statement (“ITS”) pursuant to section 7(b)(4), upon completion of formal consultation. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(5). An ITS is issued only if FWS reaches a no-jeopardy/no-adverse modification finding for a proposed action. 50 C.F.R. § 402.14(i). Take of listed species that is consistent with an incidental take statement is not subject to the prohibition against take in section 9 of the ESA. 16 U.S.C. § 1536(b)(4).

67. Mining and associated development threaten grizzly bear survival by increasing the potential for direct mortality, habituation, and displacement of grizzly bears, and by fragmenting the bears’ remaining habitat. The Rock Creek Mine will also negatively affect bull trout in Rock Creek. The FWS acknowledges that the impacts to bull trout in Rock Creek caused by the Rock Creek Mine are substantial and increase the risk of extinction for Rock Creek Bull Trout and the Cabinet Gorge subpopulation.

68. Some of the Plaintiffs in this case filed a lawsuit challenging FWS’ determination that the Mine development would avoid jeopardy to the Cabinet-Yaak grizzly population. On March 28, 2005, the Federal District Court for the District of Montana ruled that the May 2003 Biological Opinion was issued contrary to law and set aside the opinion, including its incidental take statement. The Forest Service Record of Decision relied upon the May 2003 Biological Opinion to ensure compliance with the Endangered Species Act. Despite of the fact that the biological opinion has been invalidated and set aside, the Forest Service has not withdrawn or otherwise suspended or revoked the Record of Decision. The Forest Service cannot rely on the set-aside Biological Opinion to support its decision to approve the ROD, FEIS, and PoO.

69. The Forest Service cannot authorize any activities or ground disturbance, and cannot legally issue the ROD, without complying with the substantive and procedural requirements of the ESA. Due to the District Court's March 28, 2005 decision setting aside the biological opinion, the Forest Service's reliance on that opinion to authorize activities and/or ground disturbance violates its substantive and procedural duties to avoid jeopardy under the ESA. Without a legally valid Biological Opinion, the ROD, which relies on that opinion to satisfy the Forest Service's ESA obligations is also not legally valid.

70. The Forest Service's actions in approving the ROD and PoO and in relying upon the FEIS, violates the substantive and procedural requirements of the ESA and its implementing regulations.

Violation of the Surface Resources Act of 1955, Organic Act, and the 36 CFR Part 228 Regulations

71. The Forest Service may only approve mining activities that are "reasonably incident" to the proper and logical stage of a potential mining operation. Mining activity or facilities that are "reasonably incident" will vary depending on the stage of mining activity.

72. In considering and approval mining activities on national forest lands, the Forest Service must minimize the amount of disturbance to surface resources in order to prevent destruction of the forests, and to ensure that disturbance is commensurate with each level of development.

73. With respect to the Rock Creek Mine, the next step in the logical sequence of mining is the evaluation adit – and not full-scale mining. The purpose of the evaluation adit is to evaluate the ore zones and structures, to obtain rock mechanics and other data, and to obtain a bulk ore sample for additional metallurgical testing. The evaluation adit is a distinct "Phase One," whereas full-scale development is a separate "Phase Two."

74. Neither the Forest Service nor Revett has produced or provided a feasibility study demonstrating that full-scale mine development is reasonable under economic conditions existing when the ROD was signed. Neither Revett nor the Forest Service has full knowledge of the environmental and economic conditions of the site/mine.

75. The Forest Service cannot approve a full mine development where the record does not adequately address the reasonableness of the proposed activities. Reasonable mine development requires the analysis of environmental concerns up front so that they can be considered as a cost of developing and operating the mine, and be a critical element in mine planning and disclosure. As a result of this lack of information, the Forest Service does not have a full accounting of environmental and other costs.

Failure to Properly Apply and Interpret Mining “Rights” Under the Mining Law of 1872

76. The Forest Service takes the position that if Revett’s proposal can be approved in a manner that will comply with all applicable environmental laws, the Forest Service has no authority to prohibit or to deny proposals that are reasonably necessary to mining of private mineral estate or the use of unpatented claims on National Forest subject to the 1872 Mining Law.

77. The Forest Service processed the entire Rock Creek mining proposal, including all federal land mining-related activities, under the auspices of the 1872 Mining Law and the 36 CFR Part 228 regulations.

78. The Forest Service did not make the determinations or approvals for the Rock Creek mining proposal necessary under the Forest Service’s discretionary authority under the National Forest Management Act, the 1897 Organic Act, and the Federal Land Policy and Management

Act, and the implementing regulations for these statutes (e.g., rights-of-way for electrical transmission lines and various pipelines).

79. The minerals to be mined by the Rock Creek Project are owned by Revett or some other private entity. These minerals are private property, and are not considered public land or minerals. The 1872 Mining Law does not govern the exploration or development of privately-held minerals such as the Rock Creek ore body. The 1872 Mining Law does not govern privately-owned surface land, such as the private property to be utilized by the Rock Creek Project. The 1872 Mining Law does not govern activities proposed on lands that are not claimed by the project proponent, Revett, or on unclaimed lands.

80. The Forest Service prepared the FEIS and ROD based on the assumption that Revett had statutory rights to develop all federal land in the area that were proposed for development under the Rock Creek Mine proposal. The Forest Service prepared the FEIS and ROD based on the assumption that federal mining laws applied to the agency's approval of operations that will occur on Revett's private land and/or private mineral holdings.

81. The Forest Service reviewed the alternatives, and approved the full-scale mining under Alternative V, under the assumption that Revett had statutory rights to use its millsite claims under the 1872 Mining Law.

82. Revett has no rights to use federal land mining claims under the 1872 Mining Law unless those mining claims are valid. Revett has no right to use federal public land that are not claimed under the 1872 Mining Law. Some of the lands that will be used for Revett's water and tailings pipelines and electrical transmissions lines along the Rock Creek corridor are not subject to claims under the 1872 Mining Law.

83. The evidence in the record demonstrates that at the time the Rock Creek Mine was approved by the Forest Service, there was no reasonable prospect that the Rock Creek ore body could be economically mined.

84. Neither the Forest Service nor the Interior Department has determined whether the lode and millsite claims approved for use by Revett are valid claims under the 1872 Mining Law.

85. The Forest Service approved Revett to access the ore body from the service adit(s), via a tunnel site or tunnel site claim. However, tunnel sites or tunnel site claims are only to be used for exploration purposes. The service adit(s) are not to be used for exploration purposes. Only the evaluation adit is to be used for exploration purposes.

Violation of the Federal Land Policy and Management Act of 1976 (FLPMA)

86. Revett has not submitted a Right of Way application for the Rock Creek Mine facilities. The Forest Service has not properly analyzed a Right of Way application for the Rock Creek Mine facilities, including electrical and water transmission lines, under the authority of FLPMA and Forest Service implementing regulations. The Forest Service has not required Revett to pay fair market value for the Right of Way(s), or complied with the other procedural and substantive requirements of FLPMA.

87. There is no evidence in the record for the Forest Service's approval of the Rock Creek Mine that the water and tailings pipelines and electrical transmission lines are necessary for Revett's "access" to its ore body or mining claims for ingress and egress, or to its private lands and minerals.

88. The Forest Service approved the water and tailings pipelines and electrical transmission lines, at least in part, under the authority of the access provisions contained in the Alaska

National Interest Lands and Conservation Act (ANILCA). This access provision in ANILCA applies only to public lands within the State of Alaska.

89. ANILCA also does not apply to access to non-federally owned mineral estate such as the Rock Creek ore body in this case. ANILCA also does not apply to property interests that are not wholly surrounded by national forest, such as the ore body to be developed in this case by Revett. The ore body in this is bordered in part by private surface and mineral estate owned or controlled by Revett.

90. The Forest Service approved the Rock Creek Mine, including ingress and egress and the water and tailings pipelines and electrical transmission lines, in part, under the authority of the Wilderness Act of 1964. The Forest Service did not analyze in detail an alternative that would have provided for an exchange for federally owned land in the same State of approximately equal value.

91. Revett's ore body is adjacent to Revett's private land and is not wholly surrounded by Wilderness. The Forest Service improperly did not exercise discretion in deciding whether or not to grant access to Revett's private holdings and into the Wilderness for Revett to access its private ore body underlying the Wilderness.

Failure to Comply with the Organic Act of 1897 and Forest Service 36 C.F.R. Part 228 Regulations

92. For those aspects of the Rock Creek Project that might be subject to the Part 228 regulations, the Forest Service must "minimize adverse environmental impacts" to Forest resources. The Forest Service failed to meet this duty.

93. A less-than-full-scale development alternative, including a land exchange, and/or the evaluation adit only, would have less environmental impacts than the Forest Service's approval of the full mine development alternative.

94. The Forest Service approval of the Rock Creek Mine permit, among other impacts, the degradation of water quality in Rock Creek and the Clark Fork River, the potential for subsidence and related impacts, impacts to sensitive, threatened, and indicator species, potential seepage from the unlined tailings facility, perpetual water treatment, and contaminated mine water. These impacts could reasonably have been minimized.

95. The Forest Service is not precluded from requiring further mitigation and environmental impact minimization measures because such measures are financially un-feasible under Revett's financial situation or because of commodity prices.

96. The Forest Service can only authorize a mining operation that can ensure successful reclamation. Revett and the Forest Service have not determined the final reclamation plan for the main service/access adits for the Rock Creek Mine. The Forest Service and Revett have not determined whether or not to plug the main access adits created by the Rock Creek Mine. Whether the Forest Service ultimately requires plugging or not, the agency failed to properly analyze the environmental impacts from each scenario.

97. Revett has proposed to perpetually discharge adit water to the Clark Fork River. Treatment in perpetuity would require continued operation and maintenance of the water treatment facility as long as it was required as well as the pipeline between the mine and the point of discharge.

98. The Forest Service underestimated the reclamation liability associated with the Rock Creek Mine. In calculating the bond, the Forest Service ignored necessary costs and made assumptions which are dependent on future studies and analytical work.

99. The Forest Service did not require mitigation off of National Forest System lands, based on an assumption that it did not have the authority to require mitigation on Revett's private lands.

100. The Forest Service must assess the private land components of the Rock Creek Project in analyzing all environmental impacts under NEPA, as well as ensure that actions taken on private and public land minimize impacts to Forest resources. This was not done.

Violations of the National Forest Management Act (NFMA), its Implementing Regulations, and Binding Forest Plan Requirements

101. NFMA requires the Forest Service to provide animal and plant diversity in the national forests (16 U.S.C. 1604(g)(3)(B)). Agency regulations implementing this requirement direct forest managers to manage forests for viable populations of native vertebrate and desired non-native species.

102. To ensure that viable populations are maintained, the Forest Service identifies management indicator species (MIS) and monitor population trends of the management indicator species will be monitored and relationships to habitat change determined. This monitoring is essential to verify and, if necessary, modify the forest plan's assumptions about the effects of timber harvesting and other management activities on wildlife. In order to meet the monitoring requirement, planners need to obtain adequate inventories of wildlife populations and distribution.

103. The Forest Service has not obtained and have not kept current inventory data appropriate for planning and managing the resources under its administrative jurisdiction. The Forest Service has not conducted inventories which include quantitative data making possible the evaluation of diversity in terms of its prior and present condition. The Forest Service lacks relevant actual and trend population data for its selected management indicator species for the Rock Creek Mine

Project. The Forest Service has not completed an assessment based on monitoring of overall habitat in the Kootenai National Forest or in the relevant DPS (Columbia River Basin) to estimate the impacts of the project on viability to management indicator species.

104. The National Forest Management Act (NFMA) requires that all agency projects and activities “shall be consistent with the land management plans.” 16 U.S.C. § 1604(i). The ROD, PoO approval and FEIS are not consistent with all of the requirements of the applicable Forest Plan(s).

105. On or about July 28, 1995, Regional Forester Hal Salwasser signed the Record of Decision and Finding of No Significant Impact for the Inland Native Fish Strategy Environmental Assessment (INFISH). This decision created protection for inland native fish on 22 National Forests, including the Kootenai National Forest. The Record of Decision (ROD) for INFISH amended the Kootenai National Forest Plan. The Standards and Guidelines (S&Gs) incorporated into the Kootenai Plan must be met at the project-decision level – such as the Plan of Operations/EIS in this case.

106. As part of INFISH, six standards for Mineral Management were established, MM1-MM6, that apply on the Kootenai National Forest. These binding standards require the Forest Service to (MM1) Minimize adverse affects to inland native fish species from mineral operations; (MM2) Locate structures, support facilities, and roads outside Riparian Habitat Conservation Areas. Where no alternative to siting facilities in [RHCA] exists, locate and construct the facilities in ways that avoid impacts to [RHCA] and streams and adverse effects on inland native fish; and (MM3) Prohibit solid and sanitary waste facilities in Riparian Habitat Conservation Areas, among other requirements.

107. In approving the Rock Creek Mine project, the Forest Service did not avoid all adverse impacts to bull trout and Westslope cutthroat trout. The Forest Service Rock Creek ROD does not avoid locating solid waste facilities outside of RHCAs. The mill site and associated waste/development rock will be located at least partially within a RHCA. Portions of the tailings and related facilities will be located within RHCAs. Prior to approving these locations, the Forest Service did not conduct an alternatives, or other reviews, required by the MM standards and guidelines. The FEIS did not fully review an alternative of locating all waste facilities outside of RHCAs. Water pollution releases from the waste/development rock at the mill site within the RHCA will not be prevented under the ROD.

108. The Forest Service has not analyzed the waste material using the best conventional sampling methods and analytic techniques to determine its chemical and physical stability characteristics. Sediment loading from facilities governed by the MM Standards and Guidelines will increase sediment loading into Rock Creek and tributaries – with the associated adverse impacts to inland native fish, including bull trout.

109. The Forest Service relies on future mitigation to reduce the impacts of the project on bull trout and other species. The Forest Service will require a sediment abatement program to mitigate the impacts of the Rock Creek Mine project on bull trout populations. In approving the Rock Creek Mine project, the Forest Service has not required that all mitigation measures, including the sediment abatement program, will be completed prior to and during the construction period of the project.

110. The Rock Creek Mine project and its associated actions will result in the Kootenai NF not meeting some of their standards and guidelines for managing for the survival and recovery of the grizzly bear as stipulated in their 1987 Forest Plan and addressed under the ITS.

In order to issue the ROD, the agency improperly created new Management Area (MA) Prescriptions 23 (Electrical Transmission Corridor) and 31 (Mineral Development). The agency termed these as non-significant amendments to the Forest Plan. This decision was based on the assumption that the Forest Service was obligated to change the Plan to accommodate Sterling's asserted rights under the Mining Law. Without the change in MAs to accommodate the Rock Creek Mine project the Project would have to be denied as not in compliance with the Forest Plan.

111. In determining that changes to the Forest Plan made by the Rock Creek Mine ROD were non-significant Forest Plan amendments, the Forest Service did not consider the overall impact of approving the Mine via the Plan change or that changes specifically eliminate large acreages of the Grizzly Bear habitat MA. Significant changes to a Forest Plan require the same procedures as required for development and approval of a forest plan. The same procedures as are required for development and approval of a forest plan were not completed by the Forest Service in approving the Rock Creek Mine project ROD.

Violations of the Wilderness Act of 1964

112. The Forest Service must ensure that mining operations be conducted so as to protect National Forest surface resources in accordance with the general purposes of maintaining the National Wilderness Preservation System unimpaired for future use and enjoyment as wilderness and to preserve its wilderness character., consistent with the use of the land for mineral location, exploration, development, drilling and production, including, where essential, the use of mechanized transport, aircraft or motorized equipment.

113. The Rock Creek Mine ROD authorizes the construction of a ventilation adit within the Cabinet Mountains Wilderness. The Forest Service has not demonstrated that the ventilation adit is essential.

114. The Rock Creek Mine may result in subsidence on lands within the Wilderness and drainage impacts to the Wilderness lakes. In approving the ROD, the Forest Service did not provide evidentiary support for the agency's conclusions that subsidence will not occur.

115. The Rock Creek Mine will result in air quality impacts to an area designated as a Class I area under the Clean Air Act. In approving the ROD for the Rock Creek Mine, the Forest did not adequately protect wilderness air quality.

116. The Forest Service's approved water management plan (if the mine is plugged) will result in polluted discharge of waters in the Cabinet Mountains Wilderness. Seepage water from mine facilities would likely contain elevated concentrations of nitrate, metals, and total dissolved solids. As a result of these water quality impacts, the Rock Creek Mine project will adversely and illegally impact wilderness values.

CLAIMS FOR RELIEF

Count One

Violations of Section 7 of the Endangered Species Act and its Implementing Regulations

117. Plaintiffs reallege all preceding paragraphs.

118. Section 7(a)(2) of the ESA requires all federal agencies, including the Forest Service, to "insure that any action authorized, funded or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2) (2004).

119. The Forest Service's ROD for the Mine is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the ESA because it is based on an invalid biological opinion. The Forest Service's reliance on FWS' invalid May 9, 2003 biological opinion in its ROD is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the

ESA and its implementing regulations. The Forest Service has not evaluated, proposed or implemented further protective measures for ESA-listed grizzly bears or bull trout in order to avoid jeopardy and destruction and adverse modification of critical habitat.

120. The Forest Service's approval of the Rock Creek Mine ROD and its conclusion that any activities associated with or permitted through the Rock Creek Mine plan of operations will not jeopardize the Cabinet-Yaak grizzly bear population or the Columbia River bull trout DPS is not based on the best available science.

121. The Forest Service has not completed a valid § 7(a)(2) consultation for the Rock Creek Mine. The Forest Service's authorization of any activities associated with or permitted by the Rock Creek Mine plan of operations is illegal until the Forest Service achieves full compliance with §7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2). The ESA prohibits the Forest Service from authorizing the Mine pending compliance with the procedural requirements of § 7(a)(2). The Forest Service has not developed any analysis of its own to establish that its actions comply with the requirements of ESA § 7(a)(2). The Forest Service's authorization of any activities associated with or permitted by the Rock Creek Mine plan of operations is illegal until the Forest Service achieves full compliance with §7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) by completing a valid consultation with FWS.

122. In concluding that the Rock Creek Mine will not jeopardize the Cabinet-Yaak grizzly bear population, the Forest Service relied on a mitigation plan that requires "replacement habitat" to be acquired after construction of the Rock Creek Mine facilities is complete. However, the Forest Service can provide no assurance that sufficient habitat will be available to ensure survival of the Cabinet-Yaak grizzly bear population once the Mine is built. This violates the ESA's express prohibition on making "any irreversible commitment of resources with respect to

the agency action which has the effect of foreclosing the formulation or implementation of any reasonable or prudent measures” to avoid jeopardy to listed species. 16 U.S.C. § 1536(d). The Forest Service’s approval of the Rock Creek Mine ROD is thus arbitrary, capricious, an abuse of discretion, and otherwise contrary to the ESA, 16 U.S.C. § 1536(d). All of these ESA violations are subject to judicial review under 16 U.S.C. § 1540 (g).

Count II

Violations of Section 9 of the ESA and its Implementing Regulations

123. Plaintiffs reallege all preceding paragraphs.

124. Section 9(a)(1) of the ESA prohibits the “take” of threatened and endangered species. 16 U.S.C. § 1538(a)(1)(A)&(G). “Take” is defined to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect.” 16 U.S.C. § 1532(19). The term “harm” is further defined to include “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R § 17.3. Section 9’s “take” prohibition applies equally to federal and local agencies as well as private parties.

125. The Rock Creek Project, as authorized by the ROD, will “take” Grizzly Bear and Bull Trout. The Forest Service has failed to prevent the “take” of threatened and endangered species in approving the ROD for the Rock Creek Mine in violation of ESA Section 9. 16 U.S.C. § 1538 (2004). The ESA prohibits any “taking” that is not authorized in a properly issued Incidental Take Statement in a biological opinion. 16 U.S.C. §§ 1536(b)(4), (o)(2). The Forest Service does not enjoy incidental take protection for authorization of any activity with the potential to “take” even a single member of an ESA-listed species. Such violations are subject to judicial review under 16 U.S.C. § 1540(g).

Count Three

Violations of the National Environmental Policy Act (NEPA), its Implementing Regulations, and the Administrative Procedure Act

126. Plaintiffs reallege all preceding paragraphs.

127. NEPA requires federal agencies to prepare an EIS for any proposed major action that may significantly affect the quality of the environment. 42 U.S.C. § 4332(2)(C). The CEQ promulgated uniform regulations to implement NEPA which are binding on all federal agencies. 40 C.F.R. §§ 1500.3, 1507.1.

128. Pursuant to the CEQ regulations, agencies must insure the professional integrity, including scientific integrity of the discussions and analysis in environmental impact statements, identify any methodologies used, and make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. 40 CFR 1502.24 (Methodology and Scientific Accuracy). Also, 40 CFR § 1502.1 mandates that NEPA documents be supported by evidence that the agency has made the necessary environmental analysis. Consequently, the Forest Service has a duty to disclose the underlying scientific data and rationale supporting the conclusions and assumptions in the FEIS. Unsupported conclusions and assumptions violate NEPA. The Forest Service violated this requirement in approving the ROD for the Rock Creek Mine. As set forth herein, the Forest Service failed to disclose underlying scientific data in the Rock Creek EIS.

129. The Forest Service is required to “describe the environment of the areas to be affected or created by the alternatives under consideration.” 40 CFR § 1502.15. The establishment of the baseline conditions of the affected environment is a practical requirement of the NEPA process.

130. NEPA requires “the disclosure and analysis of the costs of uncertainty [and] the costs of proceeding without more and better information.” 40 CFR § 1502.22. 40 CFR § 1502.22

imposes mandatory obligations on the Forest Service in the face of scientific uncertainty. The Forest Service has failed to meet these requirements in the face of substantial uncertainty regarding numerous foreseeable environmental impacts of the Rock Creek Project – deferring review until after the FEIS and ROD were completed.

131. NEPA mandates that the Forest Service must look at a number of types of actions and effects, including those actions and effects that are cumulative. Cumulative actions are those that “have cumulatively significant impacts and should therefore be discussed in the same impact statement.” 40 CFR § 1508.25(a)(2). Similar actions include those that have “common timing or geography.” *Id.* at § 1508.25(a)(3). A project’s “cumulative impact,” is “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” 40 CFR § 1508.7. The Forest Service failed to analyze all impacts from the Rock Creek Mine, in violation of NEPA.

132. NEPA regulations require that an EIS: (1) “include appropriate mitigation measures not already included in the proposed action or alternatives,” 40 CFR § 1502.14(f); and (2) “include discussions of: . . . Means to mitigate adverse environmental impacts (if not already covered under 1502.14(f)).” 40 CFR § 1502.16(h). The Forest Service must evaluate any mitigation measures it adopts and relies upon in approving an agency action for their effectiveness. The CEQ also has stated that: “All relevant, reasonable mitigation measures that could improve the project are to be identified, even if they are outside the jurisdiction of the lead agency or the cooperation agencies. . . .” Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act

Regulations, 46 Fed. Reg. 18026, 18031 (March 23, 1981). In addition, under 40 CFR § 1505.2©, the agency is required to: “State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.” According to the CEQ, “[a]ny such measures that are adopted must be explained and committed in the ROD.” Forty Questions, supra, 46 Fed. Reg. at 18036. The failure of the ROD and FEIS to explain or specify the specific mitigation and other requirements, or to explain or specify the monitoring and enforcement programs approved by the Forest Service in the Rock Creek Mine ROD violates NEPA.

133. NEPA requires agencies to prepare a “purpose and need” statement which “specif[ies] the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.” 40 CFR § 1502.13. An agency’s definition of the purpose and need must be reasonable to ensure that agencies do not avoid NEPA’s requirements by defining a project’s purpose so narrowly as to preclude consideration of reasonable alternatives.

Consideration of alternatives is “the heart of the environmental impact statement.” 40 CFR § 1502.14. The Forest Service must “[r]igorously explore and objectively evaluate all reasonable alternatives” to a proposed action. 40 CFR § 1502.14(a). NEPA requires agencies to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(E); 40 CFR § 1508.9(b). In this case, the Forest Service violated NEPA by unreasonably constraining its defined purpose and need for the Rock Creek Mine project and by failing to rigorously explore and objectively evaluate all reasonable alternatives to the proposed action.

134. The Forest Service's actions approving the Rock Creek Mine project ROD and PoO (and the issuance of the FEIS) are arbitrary, capricious, an abuse of discretion, and is otherwise contrary to NEPA, in violation of the APA, 5 U.S.C. §§ 701-706.

Count Four

Violations of the Forest Service Organic Act of 1897, the Surface Resources Act of 1955, their Implementing Regulations, and the Administrative Procedure Act

135. Plaintiffs reallege all preceding paragraphs.

136. The Organic Act of 1897 set forth the Forest Service's responsibility for lands in the National Forest System, and requires the Forest Service "to regulate their occupancy and use to preserve the forest thereon from destruction." 16 U.S.C. §§ 478, 551. The 36 CFR Part 228 regulations implement the Organic Act's requirements, and mandate that the Forest Service "minimize adverse environmental impacts" to Forest resources. 36 CFR § 228.8. The Forest Service did not minimize impacts in this case.

137. Under the Surface Resources Act of 1955, 30 U.S.C. § 611 et seq., a mining or millsite claim "shall not be used ... for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto." Under established Forest Service policy and interpretation of this law, the agency can only approve activities that are an integral, necessary, and logical part of an operation at the proper sequence in the development of the claims.

138. Full-scale development of the ore body at Rock Creek Mine (Alternative V) is not reasonably incident at this time due to the severe environmental and economic uncertainties in the full-scale alternatives. The Forest Service's action approving the Rock Creek Mine project ROD, and not evaluating and approving a limited alternative of further evaluation of the site, is arbitrary, capricious, an abuse of discretion, otherwise contrary to the Organic Act and the

Multiple Use Act, not in accordance with the law, and without observance of procedures required by law within the meaning of the APA. 5 U.S.C. §§ 701-706.

139. The only constraint on the Forest Service's duty to minimize adverse environmental impacts to forest resources is that such minimization measures must be "feasible." 36 CFR § 228.8. There is nothing in the regulations or law that states that the agency is precluded from requiring further mitigation and minimization measures because such measures are financially un-feasible under Revett's financial situation or because of commodity prices.

140. The Forest Service's decision approving the Rock Creek Mine project ROD without reviewing and choosing a less-than-full-scale development alternative, a less environmentally damaging alternative, and/or the evaluation adit only alternative, as well as the ROD's allowance for degradation of water quality in Rock Creek and the Clark Fork River, the likelihood of subsidence and related impacts, impacts to sensitive, threatened, and indicator species, seepage from the unlined tailings facility, perpetual water treatment, and contaminated mine water, as set forth fully herein is arbitrary, capricious, an abuse of discretion, otherwise contrary to the Organic Act, it implementing regulations, not in accordance with the law, and without observance of procedures required by law within the meaning of the APA. 5 U.S.C. §§ 701-706.

141. Under the Part 228 regulations, the Forest Service can only authorize a mining operation that can ensure successful reclamation. A mine that can never close, i.e. be reclaimed, cannot be authorized under either the Part 228 regulations or Montana's constitutional duty to reclaim all lands disturbed by the taking of natural resources. (Mont. Const. Art. IX, Sec. 2). At Rock Creek, the agency cannot make this finding. At best, the ROD authorizes a project that will either require perpetual "reclamation" (i.e., water treatment), or will result in water discharges that have yet to be evaluated and may require perpetual treatment/reclamation.

142. The Forest Service's Rock Creek Mine ROD is incorrect in assuming that it does not have authority over Revett's private land when it comes to reclamation and environmental protection requirements. The Forest Service must assess the private land components of the Rock Creek Project in analyzing all environmental impacts under NEPA, as well as ensure that actions taken on private land minimize impacts to Forest resources. This includes, but is not limited to, such things as ensuring that all state laws are complied with, including ensuring compliance with all private land reclamation requirements.

143. The Forest Service's decision approving the Rock Creek Mine project ROD without ensuring successful reclamation and compliance with federal and state laws, including for reclamation activities to occur on private lands, is arbitrary, capricious, an abuse of discretion, otherwise contrary to the Organic Act, its implementing regulations, not in accordance with the law, and without observance of procedures required by law within the meaning of the APA. 5 U.S.C. §§ 701-706.

Count Five

Violations of the 1872 Mining Law, Organic Act of 1897, the National Forest Management Act (NFMA), the Federal Land Policy and Management Act (FLPMA), Implementing Regulations, and the Administrative Procedure Act

144. Plaintiffs reallege all preceding paragraphs.

145. The 1872 Mining Law applies only to mining operations and activities proposed on valid mining claims on public land. Any activity that is not proposed for valid claims must be reviewed and approved/disapproved under the Forest Service's discretionary authority under the NFMA, Organic Act, and FLPMA, and their implementing regulations, including rights-of-way for electrical transmission lines, and water and tailings pipelines.

146. The Forest Service's action approving the Rock Creek Mine project ROD based on an assumption that all federal lands proposed for any mine-related development were encumbered by statutory rights under the 1872 Mining Law, without differentiating between activities proposed on valid claims and those proposed off of valid mining claims, without requiring Sterling to submit a FLPMA Right-of-Way application for transmission lines, and water and tailings pipelines, and based on an incorrect and illegal tunnel site(s) or tunnel site claim(s) is arbitrary, capricious, an abuse of discretion, otherwise contrary to the 1872 Mining Law, Organic Act, NFMA, FLPMA, the implementing regulations for these statutes, is not in accordance with the law, and is without observance of procedures required by law within the meaning of the APA. 5 U.S.C. §§ 701-706.

147. The Forest Service improperly relied on ANILCA to limit or eliminate its discretion to deny Revett's proposed activities. The Forest Service's actions approving the Rock Creek Mine without complying with the substantive and procedural requirements of FLPMA is not in accordance with the law, and is without observance of procedures required by law within the meaning of the APA. 5 U.S.C. §§ 701-706.

Count Six

Violations of the National Forest Management Act (NFMA), its Implementing Regulations, and the Administrative Procedure Act

148. Plaintiffs reallege all preceding paragraphs.

149. NFMA requires the Forest Service to provide animal and plant diversity in the national forests (16 U.S.C. 1604(g)(3)(B)). The Forest Service Forest Plan and NFMA regulations have similar requirements that must be met, but have not been met by the approval of the ROD and PoO and issuance of the FEIS.

150. The Forest Service's action approving the Rock Creek Mine project ROD failed to comply with the required species and habitat monitoring and inventory requirements and is arbitrary, capricious, an abuse of discretion, otherwise contrary to the NFMA, its implementing regulations, is not in accordance with the law, and is without observance of procedures required by law within the meaning of the APA. 5 U.S.C. §§ 701-706.

151. The National Forest Management Act (NFMA) requires that all agency projects and activities "shall be consistent with the land management plans." 16 U.S.C. § 1604(i). The Standards and Guidelines and other binding requirements, including those imposed by INFISH, and incorporated into the Kootenai Plan must be met at the project-decision level – such as the Plan of Operations/EIS in this case. Under NFMA, the Forest Service must demonstrate that site-specific actions, such as mining projects, are consistent with the Forest Plan for the entire forest, which has not been done in this case. 16 U.S.C. § 1604(i).

152. NFMA requires public participation in review of Forest Plan amendments. 16 U.S.C. § 1604(d). The statute requires that any action which constitutes a "significant change" in the Forest Plan be subject to the same procedure necessary to formulate the Forest Plan itself. Since the changes are significant, the agency must adhere to the same procedures as required for development and approval of a forest plan. 36 CFR Part 219. That was not done at Rock Creek.

153. The Forest Service's action approving the Rock Creek Mine project ROD was not in compliance with all the requirements incorporated into the Kootenai Forest Plan and is arbitrary, capricious, an abuse of discretion, otherwise contrary to the NFMA, its implementing regulations, is not in accordance with the law, and is without observance of procedures required by law within the meaning of the APA. 5 U.S.C. §§ 701-706.

Count Seven

Violations of the Wilderness Act of 1964, its Implementing Regulations, and the Administrative Procedure Act

154. Plaintiffs reallege all preceding paragraphs.

155. Forest Service regulations state that: “Operations shall be conducted so as to protect National Forest surface resources in accordance with the general purposes of maintaining the National Wilderness Preservation System unimpaired for future use and enjoyment as wilderness and to preserve its wilderness character, consistent with the use of the land for mineral location, exploration, development, drilling and production . . . including, where essential, the use of mechanized transport, aircraft or motorized equipment.” 36 CFR § 228.15(b).

156. The Forest Service’s action approving the Rock Creek Mine project ROD will likely lead to subsidence of land forms within the Cabinet Mountains Wilderness, and will likely cause adverse hydrologic impacts to Wilderness lakes and waters. The Forest Service has also approved activities in the Wilderness (such as the ventilation adit) and approved activities that will adversely effect the Wilderness and wilderness values. The Forest Service approval is arbitrary, capricious, an abuse of discretion, otherwise contrary to the Wilderness Act, its implementing regulations, is not in accordance with the law, and is without observance of procedures required by law within the meaning of the APA. 5 U.S.C. §§ 701-706.

REQUEST FOR RELIEF

For the foregoing reasons, Plaintiffs respectfully request that this court:

A. Declare that the Forest Service has violated the ESA, NEPA, the NFMA, the Organic Act, FLPMA, the Wilderness Act, the 1872 Mining Law, the Multiple Use Act, the APA, and the implementing regulations and policies of these laws;

B. Enjoin the Forest Service from allowing, authorizing or approving mining or mining related operations in reliance on the ROD and FEIS until the Forest Service has complied with the ESA, NEPA, the NFMA, the Organic Act, FLPMA, The Wilderness Act, the 1872 Mining Law, the Multiple Use Act, and the APA.

C. Award the Plaintiffs their reasonable fees, costs, expenses, and disbursements, including attorneys' fees under the ESA, 16 U.S.C. § 1540, the Equal Access to Justice Act, 28 U.S.C. § 2412, and any other applicable federal law; and

D. Grant such additional relief as this court deems equitable and just.

Respectfully submitted this ____ day of June , 2005.

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