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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, et al.; )

Defendants, )

REVETT SILVER COMPANY; )

Defendant-Intervenor )

Cause No. CV-05-107M-DWM

**PLAINTIFFS' MEMORANDUM  
IN SUPPORT OF THEIR  
MOTION FOR  
SUMMARY JUDGMENT**

ROCK CREEK ALLIANCE, CABINET )  
RESOURCE GROUP, SIERRA CLUB, )  
EARTHWORKS, ALLIANCE FOR THE )  
WILD ROCKIES, NATURAL RESOURCES )  
DEFENSE COUNCIL, TROUT UNLIMITED, )  
IDAHO COUNCIL OF TROUT UNLIMITED, )  
PACIFIC RIVERS COUNCIL, and GREAT )  
OLD BROADS FOR WILDERNESS, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
UNITED STATES FISH & WILDLIFE )  
SERVICE, )  
 )  
Defendant, )  
 )  
and )  
 )  
REVETT SILVER COMPANY, )  
 )  
Defendant-Intervenor. )  
\_\_\_\_\_ )

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## INTRODUCTION AND SUMMARY

Plaintiffs Rock Creek Alliance, et al., submit this memorandum in support of their motion for summary judgment. The Alliance challenges the U.S. Forest Service's ("USFS") approval of the Record of Decision ("ROD"), Plan of Operations ("PoO") and Final Environmental Impact Statement ("FEIS") for the Rock Creek Mine Project ("Project" or "Mine") issued by the Kootenai National Forest ("KNF") in September, 2001 (FEIS) and June, 2003 (ROD), and affirmed in September of 2003 by the USFS Regional Office. The Alliance also challenges the USFS' determination letter authorizing construction, as well as the three Supplemental Information Reports ("SIRs"), all issued on December 10, 2007.

The USFS' decisions and actions approving the Project violate a number of federal environmental and wildlife protection laws: the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* ("ESA"); National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* ("NEPA"); 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. § 551; and the implementing regulations of these laws.

Plaintiffs have also submitted a Statement of Undisputed Facts ("SOF").<sup>1</sup> In summary, Revett Silver Company ("Revett") proposes to build and operate the Project on 1,560 acres of public and private land in and adjacent to the Cabinet Mountains Wilderness of northwestern Montana – one the Nation's first designated Wilderness areas, created in 1964 to protect the heart of the Cabinet Mountains. The Mine would remove 10,000 tons of copper and silver ore per day, seven days a week, for over 30 years. Ore would be extracted by hollowing out giant underground rooms, leaving overlying Wilderness lands held up by rock pillars. The Project would create a major industrial facility including the mine itself, a railroad station, pipelines, a

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<sup>1</sup> Citations to the location of documents in the Administrative Record are found in the SOF.

power line, a tailings treatment plant, and associated infrastructure. The Project includes development of an evaluation adit/tunnel, a 5-7 year construction period, and an over 30-year operation and reclamation period. Revett would locate a processing mill and unlined waste dump near the confluence of the East and West forks of Rock Creek and a 100 million ton unlined tailings waste impoundment covering 320 acres near both Rock Creek and the Clark Fork River. A series of waste slurry and water pipelines would be constructed along Rock Creek. The Project will discharge up to 2,300 gallons per minute of wastewater into the Clark Fork River.

Although the ROD approved the PoO for the entire Project, the Project will proceed in two phases; Phase I, comprised of an evaluation adit which will provide data and other information required to evaluate the environmental baseline and Project impacts in preparation for Phase II; and Phase II, which consists of the construction and operation of the entire mine.

In addition to the use of federal public land, Revett must obtain permission from the Avista Corporation, which owns land on which Revett would construct a discharge water line and makeup water well. The discharge water line would be used to discharge water pumped from the evaluation adit for Phase I, and from the mine for Phase II, into the Clark Fork River. Avista has denied Revett's request to obtain an easement for these facilities. As a result, in January, 2006, Revett submitted a revised plan of operations to the USFS and Montana Department of Environmental Quality ("MDEQ") to change the location and receiving waters of the discharge from the Clark Fork River to groundwater. The Forest Service never submitted these revised plans for public review in the NEPA process.

The Project area contains 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. Rock Creek originates in the Cabinet Mountains and flows into the Clark Fork



River near the site of the tailings waste dump. Pursuant to the ESA, portions of Rock Creek have been designated as protected “critical habitat” for bull trout, Montana’s largest native freshwater fish. Both the Clark Fork and Rock Creek are classified as “B-1 waters,” which are protected for uses such as drinking water, recreation, fisheries habitat, and aquatic life. Rock Creek is currently listed as an “impaired” water body as a result of excessive sediment levels. The Project is predicted to discharge approximately 400 tons of sediment a year into Rock Creek. Despite severe impacts to bull trout and its critical habitat from Phase I, the proposed sediment mitigation will not be completed until after Phase I is done. The Project would also displace grizzly bears from the Mine’s 7,044-acre influence zone; increase the number of bears killed by people; and permanently fragment habitat in the Cabinet-Yaak Grizzly Bear Recovery Area.

### **STANDARD OF REVIEW**

The APA requires a reviewing court to “hold unlawful and set aside agency action, findings or conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; ... (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law.” 5 U.S.C. § 706(2). See Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1211 (9<sup>th</sup> Cir. 1998). “An agency's action is arbitrary and capricious if the agency fails to consider an important aspect of the problem, if the agency offers an explanation that is contrary to the evidence, ... or if the agency's decision is contrary to the governing law. 5 U.S.C. § 706(2).” Lands Council v. Powell, 395 F.3d 1019, 1026 (9<sup>th</sup> Cir. 2005).

### **ARGUMENT**

#### **I. VIOLATION OF THE CLEAN WATER ACT AND ORGANIC ACT**

##### **A. Clean Water Act Statutory Background**

The CWA is designed “to restore and maintain the chemical, physical, and biological

integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA establishes water quality standards which protect the desired conditions of each waterway. 33 U.S.C. § 1313(c)(2)(A). A water quality standard must include three elements: 1) one or more designated "uses," such as protection and propagation of fish and wildlife; 2) numeric and narrative "criteria" specifying the water quality conditions, such as fish habitat protection, that are necessary to protect the designated uses; and 3) an antidegradation policy that ensures that uses are protected and that high quality waters will be maintained and protected. 33 U.S.C. §§ 1313(c)(2), 1313(d)(4)(B). States are responsible for developing water quality standards. 33 U.S.C. § 1313(c)(1)&(3).

Section 313 of the CWA requires all federal agencies to comply with water quality standards. 33 U.S.C. § 1323(a). Federal agencies must ensure that activities on public lands comply with water quality standards. *See Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1153 (9<sup>th</sup> Cir. 1998); *Nat'l Wildlife Fed'n v. U.S. Army Corps of Engrs.*, 384 F.3d 1163, 1167 (9<sup>th</sup> Cir. 2004); *Hells Canyon Presv. Council v. Haines*, 2006 WL 2252554, \*4-5 (D. Or. 2006)(USFS mine approvals must comply with CWA standards).

Montana has established numerous water quality standards to protect Rock Creek and its fisheries, including two that were established to protect fisheries from sediment and suspended sediment. Under Montana law, **"no increases are allowed above naturally occurring concentrations of sediment or suspended sediment ... which will or are likely to ... render the waters harmful, detrimental, or injurious to --- wild animals, birds, fish, or other wildlife."** Admin. Rules of Montana ("ARM") § 17.30.623(f)(emphasis added). Montana water quality standards also require that "The maximum allowable increase above naturally occurring turbidity is five nephelometric turbidity units [NTUs]." ARM § 17.30.623(d). Additional protections apply to already-impaired streams such as Rock Creek. *See Friends of Pinto Creek v. EPA*, 504 F.3d 1007, 1011-1015 (9<sup>th</sup> Cir. 2007)(discharger cannot discharge pollutant into stream

that is already impaired for that pollutant).<sup>2</sup>

B. Organic Act Statutory Background

On the National Forests, the Organic Act requires the USFS “to regulate their occupancy and use and to preserve the forests thereon from destruction.” 16 U.S.C. § 551. “[P]ersons entering the national forests for the purpose of exploiting mineral resources must comply with the rules and regulations covering such national forests.” Clouser v. Espy, 42 F.3d 1522, 1529 (9<sup>th</sup> Cir. 1994). The USFS mining regulations require that “all [mining] operations shall be conducted so as, where feasible, to minimize adverse environmental impacts on National Forest resources.” 36 CFR § 228.8.

The operator must fully describe “measures to be taken to meet the requirements for environmental protection in § 228.8.” 36 CFR 228.4(c)(3). The “[o]perator shall comply with all applicable Federal and State water quality standards, including regulations issued pursuant to the Federal Water Pollution Control Act, as amended (33 U.S.C. 1151, et seq.)[the CWA].” 36 CFR § 228.8(b). “In addition to compliance with water quality and solid waste disposal standards required by this section, operator shall take all practicable measures to maintain and protect fisheries and wildlife habitat which may be affected by the operations.” 36 CFR § 228.8(e). The regulations thus impose an affirmative duty on the USFS to reject any mining plan that does not demonstrate compliance with the CWA or does not “protect fisheries and wildlife habitat.”

C. Failure to Comply with Water Quality Standards and Protect Fisheries

The Project is predicted to generate and discharge into Rock Creek roughly 400 tons of sediment per year. ROD at 20. SOF ¶ 18. This sediment will severely degrade water quality and fisheries:

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<sup>2</sup> Although the USFS stated that, because of its “impaired” condition, a Total Maximum Daily Load (“TMDL”) was required to be completed for Rock Creek prior to commencement of Project discharges, no TMDL has been done for Rock Creek. *See* FEIS at 2-187. SOF ¶ 17.

The most obvious direct impact of the construction and operation of the ... Mine to bull trout is the potential for an increased level of fine sediment entering the stream during the 5-year construction phase. ... The highest levels of sediment loading are expected to occur during the 5-year construction period with significantly decreasing levels of additional sediment entering the stream over the 35-year operating life of the mine. The increase in sediment loading is estimated to be 46% in the West Fork of Rock Creek, 20% in the East Fork of Rock Creek, and 38% overall for the entire Rock Creek watershed.

2006 Biological Opinion by U.S. FWS (“BiOp”), at B-72. SOF ¶ 19.

Increased sediment will adversely impact several life stages of bull trout within the action area during the proposed project. Increases in sedimentation affect incubation, emergence, and survival rates of eggs, fry, and juveniles. Fine sediment fills spaces between the gravel needed by incubating eggs and fry. Because bull trout eggs incubate about seven months in the gravel, they are especially vulnerable to fine sediment and water quality degradation. Juveniles are similarly affected, as they also live on or within the streambed cobble.

Given that several important population and habitat parameters are currently functioning at risk for bull trout, including fine sediment (see Table B4), increases in sediment, decreases in base flow, and changes in habitat complexity and water chemistry due to the proposed mining operations could adversely affect production and survival of bull trout in the Rock Creek drainage, particularly in mainstem Rock Creek and West Fork Rock Creek. Increases in sediment and reduction in habitat complexity could be more than insignificant or inconsequential, especially during the period of construction. Those activities would affect aquatic habitat as well as the associated life stages of bull trout in the Rock Creek watershed.

2006 BiOp at B-79. SOF ¶ 21. Designated critical habitat in Rock Creek is already “degraded with relatively high levels of sediment present in the spawning gravels,” USFWS 2007 BiOp Supplement at B-60, which “could be limiting reproduction,” Id. at B-63. The USFWS concluded that the Mine “is anticipated to negatively impact designated critical habitat in Rock Creek . . . due to increases in sedimentation in the West Fork and mainstem. . . .” Id. at B-90. This “would likely degrade aquatic habitat including spawning habitat ... and impact all bull trout life history stages” for the first 7 years of the Project. Id. Only upon completion of mitigation would levels of sedimentation later return to current inadequate “baseline levels” after this initial 7-year period. Id. SOF ¶¶ 21-24, 29-31, 33, 36-38.

Mitigation of this sediment loading is proposed to reduce the sediment into Rock Creek

by the end of the 5 to 7 year construction period. 2006 BiOp at B-74, 82. Bull trout normally spawn after age 4 and may live as long as 10 years. 2006 BiOp at B-23. Identification of sediment sources and a reduction plan is only required after Phase I and prior to Phase II. 2006 BiOp, B-97 (requiring Revett to “Identify sediment sources currently impacting Rock Creek and plan, design, and implement sediment abatement measures to reduce sediment input to the stream prior to initiation of any ground disturbing activities **not related to adit exploration and development.**”) (underline in original, bold added). SOF ¶¶ 20, 25-28, 34-35, 46-48. The ROD also approves a “stream diversion to be constructed around the paste facility.” ROD at 38. SOF ¶ 32. However, no designs of this facility were submitted and the FEIS does not contain any analysis of its sediment and other impacts to water quality and fisheries.

The USFS has failed to show how these significant sediment discharges will comply with the Montana narrative standard protecting fisheries from sediment releases and the state’s numeric turbidity standard. This is especially problematic due to the impaired condition of Rock Creek and the lack of a TMDL. SOF ¶¶ 16-17. *See also Friends of Pinto Creek*, 504 F.3d at 1011-1015. The USFS must comply with these standards at all times, and may not rely on “mitigation” that may alleviate the problem in the future. *See Sierra Club v. Union Oil Co.*, 813 F.2d 1480, 1489 (9th Cir. 1987) (water quality standards must “be met at all times”). *See also Hells Canyon*, 2006 WL 2252554, at \*5 (rejecting USFS argument that future mitigation would comply with CWA). The USFS violates the Organic Act and Part 228 regulations when it fails to ensure that water quality standards and fisheries will be protected at all times. *Id.* at \*6.

## II. VIOLATION OF THE ENDANGERED SPECIES ACT

In order to minimize redundancy, the summary judgment motion and memorandum submitted today by the Plaintiffs in Rock Creek Alliance v. USFWS, 08-28-M-DWM (Rock Creek II) will focus on the ESA issues in more depth and those arguments are incorporated and

adopted herein. This Brief will focus on one ESA claim specific to the USFS, the failure to complete all required consultation under the ESA prior to authorizing Project construction.

A. ESA Statutory Background

The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” TVA v. Hill, 437 U.S. 153, 180 (1978). It is “beyond doubt that congress intended endangered species to be afforded the highest of priorities.” Id. at 174. *See also* Sierra Club v. Marsh, 816 F.2d 1376, 1383 (9<sup>th</sup> Cir. 1987)(“Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as ‘institutionalized caution.’”). Congress “inten[ded] to give the benefit of the doubt to the species.” Conner v. Burford, 848 F.2d 1441, 1454 (9<sup>th</sup> Cir. 1986).

The USFS must comply with the ESA consultation process, which Congress designed “to ensure compliance with the [Act’s] substantive provisions.” Thomas v. Peterson, 753 F.2d 754, 764 (9<sup>th</sup> Cir. 1985). Simply engaging in consultation does not satisfy an agency’s “rigorous duty” under the Act. Instead, it is incumbent upon the action agency, the USFS, to independently ensure that its actions do not jeopardize a listed species or destroy or adversely modify critical habitat. *See* Pyramid Lake Paiute Tribe v. Dept. of the Navy, 898 F.2d 1410, 1415 (9<sup>th</sup> Cir. 1990).

ESA Section 7(d) also prohibits federal agencies from making “irreversible or irretrievable” commitments of resources that would foreclose “the formulation or implementation of any reasonable and prudent alternative measures” that would protect species and their habitat. 16 U.S.C. § 1536(d). Section 7(d) applies after the consultation process has been initiated, and prevents actions that might jeopardize listed species or adversely modify their critical habitat until consultation is completed. *See* PRC v. Thomas, 30 F.3d 1050, 1056-57 (9<sup>th</sup> Cir. 1994).

Congress made clear that section 7(d) is an additional limitation on agency action during the consultation period that does not diminish the express requirements of section 7(a)(2). *See Conner v. Burford*, 848 F.2d at 1455 n.34. Actions which may affect listed species or their critical habitat cannot go forward unless and until the consultation process has been completed. *See Washington Toxics Coalition v. EPA*, 413 F.3d 1024, 1034-35 (9th Cir. 2005) (“Section 7(d) was enacted to ensure that the status quo would be maintained during the consultation process, to prevent agencies from sinking resources into a project in order to ensure its completion regardless of its impacts on endangered species.”).

B. Illegal Reliance on Future Consultation

The USFS is violating its Section 7(d) duty by allowing construction of the Project prior to the conclusion of its consultation with FWS regarding the sufficiency of mitigation parcels to offset impacts to, and thereby avoid jeopardizing, the grizzly bear, as well as prior to the conclusion of consultation regarding mitigation of the severe sediment impacts to bull trout and its critical habitat.

In concluding that the Project will not jeopardize the Cabinet-Yaak grizzly bear population, the USFS relied on the FWS biological opinion’s approval of a mitigation plan that requires 566 acres of “replacement habitat” to be acquired **after** construction of the Rock Creek Mine facilities is complete (i.e., just “prior to starting full operations.”). 2006 Mitigation Plan at 5. SOF ¶ 49. However, the USFS provides no assurance that mitigation parcels containing sufficient habitat to ensure survival of the grizzly bear population will be available once the Mine is built. In any case, the FWS’ biological opinion, along with the Mitigation Plan, make clear that the USFS and FWS must further consult to make sure that any available mitigation properties are sufficient to avoid jeopardizing the grizzly bear. *See* 2006 BiOp at A-56 (providing that the Forest Service, “in coordination with FWS,” will “assess and approve each of the potential

parcels, ensuring that they each contribute to offsetting the impacts of the proposed Rock Creek Mine”); *see also* Mitigation Plan at 6 (“The Fish and Wildlife Service will be consulted with and asked advice on the mitigation acres and associated conservation easements as they relate to the requirements included in the Biological Opinion...”); *Id.* at 12-13 (USFS shall “[e]nsure that the Fish and Wildlife Service is consulted on the mitigation properties ... and the [Fish and Wildlife] Service is requested to advise the Forest Service if the properties ... meet the requirements in the biological opinion”). SOF ¶¶ 50-51.

Similarly, regarding bull trout, additional consultation with the FWS is required for the future sediment and other mitigation measures aimed at preventing adverse modification of critical habitat and species jeopardy. The FWS lists sixteen monitoring and mitigation plans that would need to be approved by the FWS in the future. 2006 BiOp at B-79. “The [Fish & Wildlife] Service will have approval authority for these plans and evaluations.” *Id.* at B-78. *See also Id.* at B-91 to 92 (same); 2006 BiOp at B-96 (stating that the FWS “will participate in the development and approval of this [Aquatic and Fisheries] Plan.”). SOF ¶¶ 52-54.

Accordingly, even though FWS has issued a biological opinion on the Project, the ESA consultation between the USFS and FWS has not been completed, and will not be completed until the last parcel of grizzly mitigation property has been acquired, if such property becomes available, and when all the sediment mitigation for bull trout has been reviewed and approved. However, by these times, the USFS will have authorized the ground disturbance and associated environmental damage associated with construction of the Project. This violates the USFS’ express duties under Section 7(d). *See Washington Toxics*, 413 F.3d at 1034-35; *PRC v. Thomas*, 30 F.3d at 1057; *Massachusetts v. Andrus*, 481 F. Supp. 685, 691 (D. Mass. 1979) (oil and gas drilling “an irretrievable or irreversible commitment” violating § 7(d)), *aff’d*, 623 F.2d 712 (1<sup>st</sup> Cir. 1979).



### III. VIOLATION OF THE NATIONAL FOREST MANAGEMENT ACT

#### A. NFMA Statutory Background

The NFMA, which provides the legal framework for managing natural resources on USFS lands, requires the agency to prepare a land and resource management plan (“Forest Plan”) for each national forest, 16 U.S.C. § 1604(a), and include in the Plan certain standards for how the forest shall be managed. 16 U.S.C. §§ 1604(c), (g)(2) & (3). The NFMA requires that all agency projects and activities “shall be consistent with the land management plans.” 16 U.S.C. § 1604(i). *See Neighbors of Cuddy Mountain v. U.S. Forest Svc.*, 137 F.3d 1372, 1377-38 (9<sup>th</sup> Cir. 1998); *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059 (9<sup>th</sup> Cir. 1998). USFS authorization of mining must comply with all Forest Plan requirements. *See Hells Canyon*, 2006 WL 2252554, \*7-\*10 (approval of mining violated INFISH and other Forest Plan standards); *Siskiyou Regional Education Project v. Rose*, 87 F. Supp. 2d 1074 (D. Or. 1999) (violation of Forest Plan standards for mining).

In 1995, the Forest Service amended the Kootenai Forest Plan when it adopted the Inland Native Fish Strategy (“INFISH”) to provide additional protections for fish on federal lands. *See* USDA Forest Service, “Inland Native Fish Strategy, 1995.” (Exhibit 2 to SOF). INFISH creates buffer zones in Riparian Habitat Conservation Areas (“RHCAs”) and establishes specific standards for minerals management in these protected areas. Rock Creek and its tributaries are within protected RHCAs. *See* FEIS at 4-129, Figure 4-4 (showing up to 600 foot-wide RHCAs). SOF ¶ 56. INFISH “standards and guidelines replace existing conflicting direction [in Forest Plans] except where Forest Plan direction provides for more protection for inland native fish habitat.” *The Lands Council*, 395 F.3d at 1033.

INFISH established six standards for Mineral Management, MM1-MM6. These binding standards require, in part, the Forest Service to:

[MM1] **Minimize adverse affects to inland native fish species** from mineral operations. ... For operations in a [RHCA] take all practicable measures to **maintain, protect, and rehabilitate fish and wildlife habitat** which may be affected by the operations. ...

[MM2] **Locate structures, support facilities, and roads outside [RHCAs]**. Where no alternative to siting facilities in [RHCAs] exists, locate and construct the facilities in ways that **avoid impacts to [RHCAs] and streams and adverse effects on inland native fish.**”

[MM3] **“Prohibit solid and sanitary waste facilities in [RHCAs]**. If no alternative to locating mine wastes (waste rock, spent ore, tailings) facilities in [RHCAs] exists, **and releases can be prevented** and stability ensured, then (a) analyze the waste material using the best conventional sampling methods and analytic techniques to determine its chemical and physical stability characteristics. (b) ... If the best conventional technology is not sufficient to prevent such releases and ensure stability over the long term, **prohibit such facilities in [RHCAs]**.”

INFISH at A-10 (emphasis added). INFISH’s “Roads Management” Standard, RF-2d, requires the agency to “avoid sediment delivery to streams from the road surface.” INFISH at A-8.

#### B. Failure to Comply with Forest Plan & INFISH Standards

In approving the Project, the USFS did not avoid all adverse impacts to bull trout and Westslope cutthroat trout, as required by INFISH. As detailed above, at pp. 5-7, the Project will increase sediment loading into the RHCAs along Rock Creek (for at least the five year construction period, if not longer) – with the associated adverse impacts to fish. Also as detailed above, the USFS’ reliance on future mitigation to reduce the impacts of the project on bull trout and other species does not protect these species. These Standards have not been met:

“[I]t is likely that some sediment would be deposited in Rock Creek from construction activities within the riparian zone (see Figure 4-4). Because sediment fines are already relatively high in some Rock Creek spawning gravels, **increased sediment loading could adversely affect inland native fish**. Specific mitigations proposed as part of road construction design would satisfy the overall goals and objectives of INFS **even if this specific standard [MM-2] was not met**.”

FEIS, at 4-128 (emphasis added). SOF ¶ 59.

The ROD also does not ensure that the operator take all practicable measures to “maintain, protect, and rehabilitate fish and wildlife habitat” as required by INFISH standard MM-1. The same is true for the agency’s decision to locate “structures, support facilities, and

roads” in a RHCA (MM-2). FEIS Figure 4-4 (showing pipelines, roads and other structures within the RHCAs). SOF ¶ 60. Because these pipelines, transmission lines, culverts, fences, and mitigation structures are considered structures or support facilities, they are prohibited, unless there is no alternative to locating them within a RHCA. *See Hells Canyon*, 2006 WL 2252554, at \*8-9. The agency has not shown that no alternative exists for these structures and facilities.

Further, the ROD does not avoid locating solid waste and facilities outside of RHCAs, as required by MM-3. The bulk of the mill site and associated waste/development rock will be located in a RHCA. FEIS Figure 4-4. SOF ¶ 61. Such location could only be authorized after the required alternatives review, waste analysis, and other MM-3 requirements – something which has yet to occur.

Even if the FEIS had reviewed alternative waste facilities outside of RHCAs, the other requirements of MM-3 have been violated. Releases from the waste and development rock dump at the mill site within an RHCA will not be “prevented,” and the location of waste facilities has not been “prohibited,” as required by MM-3. FEIS Vol. IV, WTR-306 at 16 (“waste rock used for construction uses will contain blasting residuals (ammonium and nitrate), other constituents (dissolved solids), and potentially other pollutants (metals, oil and grease, reagents) which will infiltrate into ground water. Potentially contaminated ground water may return to surface water during periods of critical low flow and have a chronic affect on aquatic organisms.”). SOF ¶ 62. “Some seepage could escape from the mill site underdrain system and may enter area ground water. The seepage ... may contain nitrates.” *Id.* at 17. SOF ¶ 63. The retention pond at the mill site “would discharge to Rock Creek” every time “the storm event exceeds the 10-year 24 hour event.” *Id.* SOF ¶ 63. Thus, it is highly likely that in a 30+ year Project, such major releases would occur.

Also, even if releases could be prevented, the USFS did not “analyze the waste material

using the best conventional sampling methods and analytic techniques to determine its chemical and physical stability characteristics” – as required by MM-3. This is largely because Revett and the agency are waiting for the results of the evaluation audit to make this analysis. SOF ¶¶ 64-65.

Regarding the “Roads Management” INFISH Standard, RF-2d, the agency failed to “avoid sediment delivery to streams from the road surface.” The over 10 miles of road construction and re-construction will result in substantial amounts of sediment delivered to Rock Creek and its tributaries. *See also* FEIS at Vol. II, App. N, at N-7 to N-10 (discussing sediment delivery from Project road work). SOF ¶ 18.

The Project will also violate other NFMA Forest Plan requirements. For example, Wildlife and Fish Standards for part of the affected area require that: “Activities will be conducted to prevent siltation in streams that provide spawning habitat for both resident and migratory fish.” FEIS Vol. II, Appendix 0-4. SOF ¶ 66. As detailed above, the agency admits that siltation will occur into Rock Creek and its tributaries. The standard is clear, however; siltation must be “prevented,” not simply reduced many years later.

#### **IV. VIOLATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT**

##### **A. NEPA Statutory Background**

NEPA requires the federal agency to “consider every significant aspect of the environmental impact of a proposed action,” Vermont Yankee Power Corp. v. NRDC, 435 U.S. 519, 553 (1978). The Forest Service must take a “hard look” at the environmental impacts of the Project. *See* Blue Mountains, 161 F.3d at 1211. NEPA’s analysis and disclosure goals are two-fold: (1) to insure that the agency has carefully and fully contemplated the environmental effects of its action, and (2) “to insure that the public has sufficient information to challenge the agency.” Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). This review must be supported by detailed data and analysis; unsupported conclusions violate NEPA. Idaho Sporting Congress v.

Thomas, 137 F.3d 1146, 1150 (9<sup>th</sup> Cir. 1998).

The USFS must also “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). It must “rigorously explore and objectively evaluate all reasonable alternatives” to the proposed action.

City of Tenakee Springs v. Clough, 915 F.2d 1308, 1310 (9<sup>th</sup> Cir. 1990).

NEPA also requires that mitigation measures be fully reviewed in the FEIS, not in the future. “[O]mission of a reasonably complete discussion of possible mitigation measures would undermine the ‘action-forcing’ function of NEPA. Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects.”

Robertson, 490 U.S. at 353.

B. The Agency Approved the Entire Project Despite the Lack of Critical Information

The USFS approved **both** phases of the Project, despite acknowledging that critical information is lacking about the Project’s baseline conditions and environmental impacts. The Phase I evaluation audit is needed to “gather additional data on ground water quality and flow, geochemical data, and rock mechanics data.” ROD at 7. SOF ¶¶ 5-6. “Without the collection of geochemical data during the evaluation audit construction and throughout mine operation, it would be difficult for Sterling to accurately identify whether potentially acid generating waste rock and tailings existed and needed to be handled differently to avoid or minimize impacts.” FEIS p. 4-30. SOF ¶¶ 45, 65. *See also* FEIS at 4-108 (noting “the uncertainties or inability to accurately predict groundwater movement associated with the mine”). SOF ¶¶ 45, 65. Despite this, the USFS believes that it had enough information to approve the entire Project and will only later review the information to be obtained by Phase I. The EPA termed this a “permit now and design later mentality.” Sept. 25, 1998 EPA letter to USFS. SOF at ¶¶ 11-12.

By failing to conduct an adequate analysis of the impacts of the entire Project, the agency also failed to fully involve the public in its decision-making processes. “NEPA procedures must ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.” 40 CFR § 1500.1(b). “NEPA is not designed to postpone analysis of an environmental consequence to the last possible moment. Rather, it is designed to require such analysis as soon as it can reasonably be done.” Kern v. BLM, 284 F.3d 1062, 1072 (9<sup>th</sup> Cir. 2002). The agency also lacks the required baseline information (to be obtained from Phase I). SOF ¶¶ 6, 64, 65. “[W]ithout establishing ... baseline conditions ... there is simply no way to determine what effect [an action] will have on the environment, and consequently, no way to comply with NEPA.” Half Moon Bay Fisherman’s Mark’t Ass’n v. Carlucci, 857 F.2d 505, 510 (9<sup>th</sup> Cir. 1988).

C. Failure to Review the Reasonable Alternative of Approving Only Phase I

The agency’s decision to approve the entire Project at one time also violates its NEPA duty to “rigorously explore and objectively evaluate all reasonable alternatives” to the proposed action. City of Tenakee Springs, 915 F.2d at 1310. Although due to the severe environmental impacts and illegalities of Phase I, the Alliance of course does not support approval of either Phase, the agency should have fully considered approval of only the evaluation adit.

Revett admits that Phase I is a stand-alone project and that its decision to move forward with Phase II has yet to be made. “[T]he [evaluation] adit and mine are essentially two projects, not one.” Revett’s Scheduling Proposal, Docket 40, at 6. Notably, MDEQ, the co-permitting agency, has only approved Phase I, waiting to evaluate the data from the evaluation adit before approving Phase II. SOF ¶¶ 8-9. Despite this, the USFS never considered approving only the Phase I project as a separate project. ROD at 61 (list of alternatives with no mention of the evaluation adit). SOF ¶ 7.

D. Lack of Mitigation and Other Analysis

Similar to the agency's deferral of review of information to be obtained from Phase I, the FEIS also defers review of a host of mitigation measures and analysis of the Project's baseline (current) conditions and future environmental impacts.

1. *Deferral of Mitigation Analysis*

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). In addition, under 40 CFR § 1505.2(c), "A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation."

The USFS listed many important mitigation measures without any detailed analysis of their implementation or effectiveness. SOF ¶¶ 25-28, 34-35, 45, 48. This approach was rejected by the Ninth Circuit in Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1380-81 (9<sup>th</sup> Cir. 1998)("The Forest Service's broad generalizations and vague references to mitigation measures . . . do not constitute the detail as to mitigation measures that would be undertaken, and their effectiveness, that the Forest Service is required to provide.").

For example, Revett will only "[i]dentify sediment sources currently impacting Rock Creek and plan, design, and implement sediment abatement measures to reduce sediment input to the stream prior to initiation of any ground disturbing activities **not related to adit exploration and development.**" ROD at 38 (underline in original, bold added). SOF ¶ 26. The ROD only requires **future** submittal of: (1) "An assessment of current habitat conditions for bull trout. The assessment would include information on quantity and quality of spawning, rearing and overwintering conditions for resident and adfluvial bull trout."; (2) "An assessment of possible

sediment mitigation and reduction projects with the Rock Creek basin.”; (3) “A feasibility assessment ... for sediment abatement measures that would reduce sediment levels in the Rock Creek drainage. This assessment would include any design for the proposed stream diversion around the proposed paste facility and a complete roads analysis and recommendations associated with proposed mitigation projects and mine activities.” ROD at 39. SOF ¶ 26. *See* ROD at 37-41 (list of future mitigation/monitoring plans that were never subject to public review). SOF ¶¶ 25, 27-28, 49-54. *See also*, list of deferred mitigation analysis at SOF ¶ 48.

2. *Deferral of Baseline and Environmental Impact Analysis*

The FEIS also relies on future submittals of analysis of current baseline conditions and Project environmental impacts. As just one example: “The current level of information present on the (bull trout) populations in Rock Creek is minimal and additional information on fish presence, absence, migration and population characteristics are necessary to fully assess the condition of this watershed.” 2003 BiOp at B-24. SOF ¶ 46. *See also* ROD Attachment 2 at 19 (discussing “inadequate” aquatics baseline data). SOF ¶ 47. Additional examples of deferred analysis is contained at SOF ¶¶ 6, 11, 45, 48, 64, 65.

3. *Failure to Review Impacts From New Water Discharge Facilities*

In addition to the use of federal public land, Revett must obtain an easement from the Avista Corporation, which owns land on which Revett would construct a discharge water line and makeup water well for both Project phases. ROD at 18. SOF ¶ 41. The discharge water line would be used to discharge water pumped from the evaluation adit for phase I, and from the mine workings for phase II, into the Clark Fork River. To date, Avista has denied Revett’s request to obtain an easement for these facilities. *See* Avista January 4, 2007 letter to Revett. SOF ¶ 41.

In part to avoid having to cross Avista’s land for the discharge pipeline into the Clark Fork River, in January of 2006, Revett submitted a revised plan of operations to the USFS and



MDEQ to change the location and receiving waters of the Project discharges from the Clark Fork River to groundwater. *See* Fed. Answer at ¶¶ 43-44. SOF ¶ 42. The FEIS had based its review of impacts from this discharge water on the dilution effects from high flow levels in the Clark Fork River, without any analysis of the discharge into the groundwater (with no benefits from dilution). SOF ¶ 43.

The USFS failed to analyze this change and its impacts to ground water and other resources prior to authorizing construction. The agency never submitted these revised plans for public review. Such an important change in the Project's environmental impacts should have been fully analyzed by the agency and subjected to public review. Under NEPA, the agency must consider all direct, indirect, and cumulative environmental impacts of the proposed action. 40 CFR §§ 1502.16; 1508.7; 1508.8; 1508.25(c). "NEPA imposes on federal agencies a continuing duty to supplement existing ... EISs in response to 'significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.' 40 CFR 1509(c)(1)(ii)." Idaho Sporting Congress v. Alexander, 222 F.3d 562, 566 n. 2 (9<sup>th</sup> Cir. 2000). "[NEPA] is designed to require such analysis as soon as it can reasonably be done." Kern v. BLM, 284 F.3d at 1072.

## **V. A PERMANENT INJUNCTION IS WARRANTED**

Based on the above violations of the ESA, this Court should enjoin the Forest Service from any further violations of these laws, including any ground disturbance authorized by the agency. "Given a substantial procedural violation of the ESA in connection with a federal project, [therefore], the remedy must be an injunction of the project pending compliance with the ESA." Thomas v. Peterson, 753 F.2d at 764. *See also* Washington Toxics, 413 F.3d at 1031.

In addition, the above noted violations of the CWA, Organic Act, NFMA and NEPA also

warrant injunctive relief – particularly due to the Project’s significant environmental damage. “When the proposed project may significantly degrade some human environmental factor, injunctive relief is appropriate.” National Parks & Conservation Association v. Babbitt, 241 F.3d 722, 737 (9th Cir. 2001).

Lastly, the APA provides that a court “shall . . . set aside” agency action found to be “arbitrary, capricious, or not in accordance with law.” 5 U.S.C. § 706(2)(A); *see* NRDC v. Houston, 146 F.3d 1118, 1129 (9<sup>th</sup> Cir. 1998). Here, the agency’s illegal decisions and actions to approve the Project, have direct, immediate and irreparable harm to the environment and Plaintiffs and thus deserve to be enjoined pending the USFS’ compliance with these laws. *See* Declarations submitted with Plaintiffs’ Motion for Summary Judgment.

### **CONCLUSION**

This Court should grant summary judgment in favor of the Alliance and permanently enjoin the Rock Creek Project pending compliance with all applicable law.

Respectfully submitted this 28<sup>th</sup> day of April, 2008.

*/s/ David K. W. Wilson, Jr.*

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### CERTIFICATE OF SERVICE

I certify that the forgoing was served upon the following this 28<sup>th</sup> day of April, 2008, by filing it with this Court's electronic filing system.

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