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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

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, v. UNITED STATES FISH & WILDLIFE SERVICE, Defendant.	Cause No. _____ COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This case challenges the third in a series of biological opinions issued by the U.S. Fish and Wildlife Service ("FWS") under section 7 of the Endangered Species Act, 16 U.S.C. § 1536, in an effort to permit construction and operation of the Rock Creek copper and silver mine in the midst of grizzly bear and bull trout habitat in Sanders County, Montana.

2. The public lands where the Rock Creek Mine would be located are now among the last and best available habitat for the severely imperiled Cabinet Mountains grizzly bear and bull trout. Accordingly, the survival of the last remaining grizzly bears in the Cabinet Mountain range and an important core population of bull trout is at stake in this case.

3. Because there are so few grizzly bears and so little suitable habitat left in the Cabinet-Yaak Ecosystem, FWS has long recognized that the Rock Creek Mine could push this tiny grizzly population to extinction. Nevertheless, FWS concluded in an October 11, 2006, biological opinion that acquisition of undisclosed lands within the Ecosystem, as well as grizzly bear augmentation and various public education and law enforcement efforts, will compensate for increased bear mortality and a devastating net habitat loss over the life of the mine. FWS reaffirmed this conclusion in a September 27, 2007 "Supplement" to that biological opinion. This conclusion ignores the best available science and is arbitrary, capricious, and an abuse of discretion in violation of the Endangered Species Act § 7, 16 U.S.C. § 1536 ("ESA"), and the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA").

4. FWS further predicts that the proposed Rock Creek Mine will result in the wholesale loss of threatened bull trout in Rock Creek and will result in further

degradation of critical spawning habitat. FWS's conclusion that potential extirpation of Rock Creek bull trout and destruction of critical habitat will not jeopardize bull trout or destroy or adversely modify critical habitat within the larger Columbia River Basin ignores the best available science and is arbitrary, capricious, and an abuse of discretion in violation of the ESA, 16 U.S.C. § 1536, and the APA, 5 U.S.C. §§ 701-706.

PARTIES

5. Plaintiff Rock Creek Alliance ("Alliance") is a non-profit organization formed by conservationists, sports people, and business owners to protect public lands and water resources from proposed mining activity in the Clark Fork-Pend Oreille Watershed. The Alliance is actively working to ensure that the proposed Rock Creek Mine does not threaten fish and wildlife species and the integrity of the Cabinet Mountains Wilderness Area in Montana, the Clark Fork River in Montana and Idaho, and Idaho's Lake Pend Oreille. The Alliance has offices in Trout Creek, Montana and Sandpoint, Idaho and has approximately 800 individual members and 11 member organizations, primarily from Idaho, Montana, and Washington.

6. Plaintiff Cabinet Resource Group is a non-profit organization founded in 1976. Cabinet Resource Group seeks to educate and mobilize the public regarding the protection of the Cabinet Mountains' spectacular and precious natural resources. Cabinet Resource Group operates in Lincoln and Sanders Counties, with an office in Heron, Montana.

7. Plaintiff Sierra Club is a national environmental organization founded in 1892 and devoted to the study and protection of the earth's scenic and ecological resources – mountains, wetlands, woodlands, wild shores and rivers, deserts, plains, and their wild flora and fauna. An important part of Sierra Club's mission is to protect

threatened and endangered species, including grizzly bears and bull trout, and their habitats. Sierra Club has 60 chapters in the United States and Canada, including chapters in Montana and Idaho, and a principal place of business in San Francisco, California. Sierra Club has 1.3 million members and supporters nationwide, including more than 2,300 members in Montana and more than 2,800 members in Idaho.

8. Plaintiff EARTHWORKS is a non-profit organization dedicated to protecting communities and the environment from the destructive impacts of mineral development in the U.S. and worldwide. EARTHWORKS is headquartered in Washington, D.C. and has field offices across the country, including Missoula, Montana, and Bozeman, Montana. EARTHWORKS has 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.

9. Plaintiff Alliance for the Wild Rockies ("AWR") is a 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.

10. Plaintiff Natural Resources Defense Council ("NRDC") is a non-profit organization that uses law, science, and the support of more than 400,000 members to protect the planet's wildlife and wild places, and to ensure a safe and healthy environment. NRDC and its members have a longstanding interest in conserving threatened and endangered species, including grizzly bears and bull trout, and in preventing environmental degradation resulting from irresponsible mineral development.

11. Plaintiff Trout Unlimited ("TU") is a nonprofit coldwater fisheries conservation organization with regional offices in Idaho Falls and Boise, Idaho; Bozeman, Montana; and Portland, Oregon, and national headquarters in Arlington, Virginia. TU is dedicated to the protection of wild trout, salmon, and steelhead fishery resources. TU has approximately 130,000 members nationwide and 8,000 members in the states of Oregon, Washington, Idaho, and Montana. TU's members live and recreate in the Columbia River basin and TU has long participated in efforts to maintain and restore bull trout in the Columbia basin and throughout its range.

12. Plaintiff Idaho Council of Trout Unlimited ("ITU") is a non-profit conservation organization dedicated to protecting and restoring naturally sustaining salmonid fisheries and their habitat. ITU has approximately 1,500 members in the state of Idaho, and is part of the larger network of Trout Unlimited affiliate state councils. ITU has worked on important recovery issues throughout the bull trout's range in Idaho, including an extremely successful collaborative effort to relicense the Avista Power Projects on the Clark Fork River in Idaho and Montana. Further, ITU members in the Panhandle Region of Idaho have worked with Avista, Crown Pacific, state and federal resource agencies, and a private landowner to improve bull trout and westslope cutthroat trout habitat on much of lower Twin Creek, a tributary of the lower Clark Fork River. Protection of Rock Creek bull trout is an important component of ITU's watershed-scale efforts to protect bull trout, and is integral to ITU's long-term commitment to native salmonid restoration in the lower Clark Fork River.

13. Plaintiff Pacific Rivers Council ("PRC") is a non-profit conservation organization dedicated to protecting and restoring rivers, their watersheds, and the native

aquatic species that depend on them. PRC pursues its mission for the benefits that healthy watersheds provide to present and future generations – and for the intrinsic virtues of rivers themselves. Headquartered in Eugene, Oregon, PRC's programs, staff, and membership extend throughout the western states, including Montana and Idaho. PRC works to protect and restore native western trout, including bull trout, and their habitats throughout the West.

14. Plaintiff Great Old Broads for Wilderness is a national, grassroots nonprofit organization dedicated to preserving and protecting America's roadless, wild public lands. The Great Old Broads was founded in 1989 in celebration of the 25th anniversary of the Wilderness Act. Today the group's membership has grown to include men and younger women, though the majority of its membership continues to be older women committed to protecting wilderness areas. The organization has hosted two membership events in the vicinity of the Cabinet Mountains Wilderness Area and is active in issues pertaining to its health and integrity. Great Old Broads for Wilderness is based in Durango, Colorado.

15. Members and staff of each of the plaintiff conservation groups use lands in the Cabinet-Yaak Ecosystem and enjoy the Clark Fork River and its tributaries throughout Montana and Idaho, including Rock Creek, for various recreational, scientific and business pursuits, including hiking; hunting; fishing; wildlife study, observation and photography; and aesthetic enjoyment. In particular, members and staff of each of the plaintiff conservation groups seek to observe grizzly bears, their tracks, and other signs of their presence in these forests. Members and staff of each of the plaintiff conservation groups also seek to observe bull trout in Rock Creek and associated waters. Defendant's

challenged action threatens to adversely affect and irreparably injure plaintiffs' interest in the Cabinet-Yaak Ecosystem, the Clark Fork River, and Rock Creek, and specifically threatens irreparable injury to plaintiffs' interest in observing grizzly bears, and signs of the presence of grizzly bears, and bull trout in this region. The defendant's violations of the ESA alleged herein thus cause direct injury to the recreational, scientific, aesthetic, and business interests of members and staff of the plaintiff organizations. These injuries are fairly traceable to defendant's' conduct, and are redressable through this action.

16. Defendant FWS is an agency of the United States Department of Interior, responsible for administering the provisions of the Endangered Species Act with regard to threatened and endangered species, including the threatened grizzly bear and threatened bull trout.

JURISDICTION AND VENUE

17. Plaintiffs bring this action pursuant to the judicial review provisions of the APA, 5 U.S.C. § 701 et seq., which waives the defendant's sovereign immunity. This Court has jurisdiction over plaintiffs' claims pursuant to 28 U.S.C. § 1331 (federal question) and may issue a declaratory judgment and further relief pursuant to 28 U.S.C. §§ 2201-02. To the extent that any of the claims herein arise under the citizen suit provision of the Endangered Species Act, 16 U.S.C. § 1540(g), plaintiffs have provided the statutorily required notice for these claims in letters dated December 26 and 28, 2007.

18. Venue lies in the District of Montana pursuant to 28 U.S.C. § 1391(e) because: Plaintiffs Cabinet Resource Group and Alliance for the Wild Rockies are headquartered in Montana; lands at issue in this suit are located in Sanders County, Montana; and a substantial part of the events or omissions giving rise to plaintiffs' legal claims occurred in this district.

STATUTORY FRAMEWORK

19. The ESA commands that all federal agencies "shall, in consultation with and with the assistance of" a federal wildlife agency (FWS for terrestrial and freshwater species such as the grizzly bear and bull trout), "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 or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary … to be critical." 16 U.S.C. § 1536(a)(2). Interior Department regulations implement this consultation requirement by directing that formal consultation is required before a federal agency may take "any action [that] may affect listed species." 50 C.F.R. § 402.14(a).

20. Formal consultation results in the issuance of a biological opinion by FWS. In formulating this biological opinion, FWS must evaluate the "effects of the action" together with "cumulative effects" on the listed species. 50 C.F.R. §§ 402.14(g)(3)-(4). This multi-step analysis requires FWS to consider:

a. the direct, indirect, interrelated and interdependent effects of the proposed action, 50 C.F.R. § 402.02;

b. the "environmental baseline," to which the proposed action will be added. This baseline includes "all past and present impacts of all Federal, State, or private actions and other human activities in the action area; the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation; and the impact of State or private actions which are contemporaneous with the consultation in progress," 50 C.F.R. § 402.02; and,

c. any "future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation," 50 C.F.R. § 402.02.

21. FWS must also determine whether the proposed action will result in the destruction or adverse modification of critical habitat. 50 C.F.R. § 402.14(g)(4). This is a separate determination from whether the action will jeopardize the continued existence of the species. The regulations implementing the ESA define "destruction or adverse modification" to mean "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical." 50 C.F.R. § 402.02.

22. If FWS concludes that the proposed action is likely to jeopardize a listed species, or destroy or adversely modify its critical habitat, FWS must identify and describe any reasonable and prudent alternative ("RPA") to the proposed action that it believes would avoid jeopardy and adverse modification. 16 U.S.C. § 1536(b)(3)(B). If FWS believes that there is no reasonable and prudent alternative to the proposed action, its biological opinion must so state. 50 C.F.R. § 402.14(h)(3).

23. If FWS finds that either a proposed action "(or implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species" will not cause jeopardy or destruction or adverse modification of critical habitat, it will also issue an incidental take statement ("ITS") for any take of a listed species that is likely to occur. 50 C.F.R. § 402.14(i)(1). Within that ITS, FWS must specify the amount

or extent of any incidental "taking" of the species that may be authorized to occur as a result of the action. 50 C.F.R. § 402.14(i). Under the ESA, the term "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The ITS must, among other things "(i) specif[y] the impact, i.e., the amount or extent, or such incidental taking on the species[.]" 50 C.F.R. § 402.14(i)(1); 16 U.S.C. § 1536(b)(4). If the amount or extent of taking specified in the ITS is exceeded, reinitiation of formal consultation is required. 50 C.F.R. §§ 402.14(i)(4); 402.16. 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).

24. Section 7(a)(2) of the ESA requires every federal agency to "use the best scientific and commercial data available" in assessing impacts to protected species and their designated critical habitat. 16 U.S.C. § 1536(a)(2).

THE ROCK CREEK MINE

25. The Revett Silver Company ("Revett") is proposing a 10,000-ton-per-day copper and silver mine located approximately 13 miles northeast of the town of Noxon in northwest Montana. The majority of the mine would be constructed and operated on Kootenai National Forest land adjacent to and literally underneath the Cabinet Mountains Wilderness Area in the Rock Creek drainage of the Cabinet Mountains Range. In the midst of what is now remote and generally undisturbed forest land, the Rock Creek Mine would create a major industrial facility — including the mine itself, a railroad station, pipelines, a power line, a tailings treatment plant, and associated infrastructure — operating 24 hours a day for an estimated 35 years. This includes the development of an evaluation adit, a 5.5-year construction period, a 27.5-year operation and production

period, and a 2-year reclamation period. The Rock Creek Mine's permit boundary would encompass 1,560 acres, with 483 of those acres directly impacted by mine activity.

26. The mine would bring a major influx of people into the largely undisturbed Rock Creek area. Employment at the mine itself would range from 23 to 73 people during the initial evaluation adit phase, and up to 340 people during the production phase, which could last about 28 years. The mine is expected to draw a total of as many as 770 new people to the general Rock Creek area – including mine employees and their families and people associated with related development.

27. The area where the mine would be located now offers habitat for a number of rare and sensitive wildlife species, including the harlequin duck, the fisher and the wolverine, and in particular two federally-listed threatened species, the grizzly bear and the bull trout.

CONSULTATION HISTORY

28. Because most of the Rock Creek Mine facilities and most of the ore deposit to be exploited by the Rock Creek Mine exist on or under National Forest lands, federal law required the mine proponent to obtain the U.S. Forest Service's approval of a plan of operations for the mine. Further, because the Forest Service's approval of any such plan of operations threatened to impact, inter alia, the grizzly bear and the bull trout, Section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536, required the Forest Service to undertake formal consultation regarding the Rock Creek Mine with FWS to insure that approval of the mine would not jeopardize the continued existence of these species or adversely modify any of their designated critical habitat.

29. FWS completed a biological opinion concerning the impacts of the Rock Creek Mine on December 15, 2000. In that biological opinion, FWS determined that the

proposed Rock Creek Mine was likely to jeopardize the continued existence of the grizzly bear in the Cabinet-Yaak Grizzly Bear Ecosystem. However, FWS set forth a reasonable and prudent alternative that it asserted would avoid a likelihood of jeopardizing the grizzly bear. FWS further determined that the proposed Rock Creek Mine was not likely to jeopardize the continued existence of the Columbia River basin bull trout distinct population segment.

30. On August 28, 2001, plaintiffs Rock Creek Alliance, et al., filed a lawsuit in this Court to challenge FWS's December 15, 2000 biological opinion. In response to plaintiffs' complaint, FWS withdrew its biological opinion in March 2002. FWS then undertook further consultation with the Forest Service.

31. On May 9, 2003, FWS issued a second biological opinion regarding the Rock Creek Mine project. In this biological opinion, FWS concluded that the Rock Creek Mine is not likely to jeopardize the continued existence of the grizzly bear in the Cabinet-Yaak Ecosystem. FWS also concluded that the proposed Mine is not likely to jeopardize the continued existence of the Columbia River basin bull trout distinct population segment.

32. On July 10, 2003, plaintiffs Rock Creek Alliance, et al., filed an amended complaint in this Court to challenge the FWS' May 9, 2003, biological opinion.

33. On March 28, 2005, this Court issued an order granting, in part, plaintiffs' motion for summary judgment on their amended complaint, remanding the May 9, 2003, biological opinion to FWS for reconsideration, and enjoining FWS from authorizing any take of grizzly bears or bull trout pending compliance with the ESA and this Court's order.

34. Thereafter, FWS again undertook further consultation with the Forest Service. On October 11, 2006, the FWS issued its third biological opinion regarding the Rock Creek Mine project ("2006 biological opinion"). FWS again concluded that the Rock Creek Mine is not likely to jeopardize the continued existence of the grizzly bear in the Cabinet-Yaak Ecosystem or the Columbia River basin bull trout distinct population segment. In addition, FWS this time also concluded that the proposed mine is not likely to adversely modify recently-designated critical habitat for bull trout in Rock Creek.

35. On February 13, 2007, several of the plaintiffs petitioned FWS to withdraw the 2006 biological opinion in response to two subsequent events. Administrative Procedure Act Petition to Withdraw October 11, 2006 Biological Opinion on the Effects of the Rock Creek Mine (Feb. 13, 2007). First, in a December 13, 2006 ruling, the United States District Court for the District of Montana set aside the Forest Service's forest plan amendments governing road density standards for grizzly bears in the Cabinet-Yaak ecosystem and remanded them to the Forest Service for reconsideration in a new analysis. See Cabinet Resource Group v. U.S. Fish & Wildlife Serv., 465 F. Supp. 2d 1067, 1101 (D. Mont. 2006). The 2006 biological opinion relied on these amendments to "moderate" the impacts of the Mine, and to contribute to offsetting the Mine's impacts. Second, on December 22, 2006, Avista Utilities, which operates several dams on the Clark Fork River, sent a letter to FWS raising concerns about the agency's use of Avista's data on bull trout. Avista concluded that the 2006 biological opinion "has significant errors, misrepresentations, and inadequacies" in its discussion of the status of bull trout in the Clark Fork River.

36. FWS responded on March 8, 2007 and announced that it would reinitiate

consultation with the Forest Service.

37. On September 27, 2007, FWS notified the Forest Service that it had "supplemented" the 2006 biological opinion based on the Forest Service's request for reinitiation of consultation ("2007 Supplement"). The "supplemental" biological opinion purports to address the altered baseline for grizzly bears affected by the project and makes some "clarification[s]" to its discussion of the Mine's impacts on threatened bull trout. FWS's no-jeopardy and no-adverse-modification conclusions for each species were unaffected by the changes.

FACTS RELATING TO GRIZZLY BEAR CLAIMS

38. The grizzly bear was listed as a "threatened" species in the lower-48 United States in 1975. While grizzly bears were once common throughout western North America, there are now only four isolated populations of grizzly bears left in the lower-48 states, including the population occupying the Cabinet-Yaak Grizzly Bear Ecosystem in northwest Montana and the neighboring Idaho panhandle.

39. The Cabinet-Yaak Grizzly Bear Ecosystem ("CYE") encompasses approximately 2,600 square miles. It is geographically divided into two portions. The southern portion is the Cabinet Mountains Range, encompassing approximately 978,000 acres. The northern portion is the Yaak area, which is 466,000 acres and has gentler topography and slightly lower elevations. The Cabinet Mountains portion of the CYE is connected to the Yaak portion of the CYE to the north by two relatively narrow corridors of habitat.

40. The CYE grizzly bear population is extremely small. FWS estimates that the grizzly bear population in the entire CYE numbers only 30 to 40 animals, including an estimated 15 or fewer grizzly bears in the Cabinet Mountains, or southern, portion of

the CYE where the Rock Creek Mine would be located.

41. The CYE grizzly bear population is also highly imperiled. The estimated 30- to 40-bear population is far below FWS's goal for a recovered CYE grizzly bear population, which would require at least 100 grizzly bears. In 1993, FWS determined that the CYE grizzly bear's legal status should be reclassified as an endangered, rather than a threatened, species, but nevertheless determined to devote its ESA listing resources to other work that it deemed of a higher priority. FWS reiterated this finding in 1999. In its 1999 finding, FWS cited the proposed Rock Creek Mine as among the threats to the CYE grizzly bear justifying its reclassification to endangered status.

42. Recent population trend analyses suggest that the CYE grizzly bear population is in decline. While FWS has yet to produce an absolutely conclusive population trend analysis because of the small sample size that is available for such studies, an agency analysis performed in 2005 indicated a 91 percent probability that the CYE grizzly bear population was declining.

43. The Rock Creek Mine threatens severe adverse impacts to the CYE grizzly bear population. The CYE is divided into administrative Bear Management Units ("BMUs") designed to contain sufficient acreage to approximate the home range of an adult female grizzly bear. The Rock Creek Mine would be located within, and would directly impact, BMUs 4, 5, and 6 in the Cabinet Mountains, and would indirectly impact four additional adjoining BMUs. This entire area is occupied by grizzly bears. Moreover, sightings through 2004 indicate that two and perhaps three reproductive adult female grizzly bears have home ranges within the area to be impacted by the mine. Impacts to reproductive-aged female grizzly bears are particularly significant for grizzly

bear populations because the species has one of the lowest reproductive rates among terrestrial mammals, resulting primarily from the late age at first reproduction, small average litter size, and the long interval between litters. The number of adult female grizzly bears sighted within the impact area of the Rock Creek Mine represents a significant number of the reproductive female grizzly bear population in the entire CYE. FWS estimates that 0.28 percent of a grizzly bear population would be adult females; applying this assumption to a conservative estimate of 30 grizzly bears in the CYE, only 8 would be adult females. Thus, the two or three reproductive adult female grizzly bears utilizing the area where the Rock Creek Mine would be located may represent 25 to 38 percent of all adult females in the CYE.

FWS' FINDING THAT THE ROCK CREEK MINE
WOULD NOT JEOPARDIZE CABINET-YAAK GRIZZLY BEARS

44. In its October 11, 2006, biological opinion and 2007 Supplement concerning the Rock Creek Mine, FWS concluded that the mine's noise and human activity would likely displace grizzly bears from 7,044 acres in the Rock Creek drainage. FWS anticipated that this displacement would impair the reproductive ability of displaced female bears at some point during the 30-year life of the mine.

45. FWS's no-jeopardy finding in the biological opinion fails to provide any assurance that mitigation plans will avoid jeopardizing the CYE grizzly bear population due to these displacement impacts. FWS found the Rock Creek Mine's displacement impact to be adequately mitigated largely due to a plan that calls for Revett to acquire, through fee title transfer or perpetual conservation easements, 2,350 acres of private lands that would be transferred to the Forest Service. FWS acknowledged that this mitigation plan does not necessarily offer a net gain in suitable habitat for grizzly bears affected by

the Rock Creek Mine because the mitigation parcels may already be undeveloped and receiving use by bears and thus do not afford "new" bear habitat to replace that lost to the mine.

46. To explain the disparity between the 7,044 acres from which grizzly bears are expected to be displaced and the 2,350 acres of private lands to be acquired to mitigate this displacement, FWS asserted that the grizzly bear habitat potential of some of the lands to be impacted by the mine is already compromised by existing developments. For example, FWS asserted that 5,656 of the 7,044 acres constituting the mine's displacement impact zone are already impacted by disturbance from existing roads not associated with the Rock Creek Mine. FWS claimed that the ability of these 5,656 acres to support grizzly bears has already been reduced by 70 percent due to existing developments, and that additional impacts flowing from the mine would contribute an additional 20 percent reduction in the ability of these acres to support grizzly bears. On this basis, FWS concluded that 1,131 acres of mitigation lands (20 percent of 5,656 acres) would be required to offset the mine's displacement impacts across this 5,656-acre area. Applying similar calculations to other lands within the 7,044-acre zone affected by the mine, FWS calculated that 2,350 acres of mitigation lands would be required to offset all of the mine's displacement impacts.

47. However, FWS in the October 11, 2006, biological opinion and 2007 Supplement did not apply a similar discount factor in assessing the grizzly bear habitat potential of the mitigation lands to be acquired. Revett must acquire the 2,350 acres of mitigation habitat from among specified private parcels that have been prioritized by FWS and the Forest Service based on location and habitat quality. Nevertheless, in

approving a 2,350-acre mitigation package for displacement impacts, FWS did not address or consider the extent to which the ability of the identified potential mitigation lands to support grizzly bears was compromised by existing roads or other developments that could not be removed even upon Revett's acquisition of fee title or a perpetual conservation easement. Instead, FWS assumed, contrary to its treatment of lands impacted by the mine, that each acre of the potential mitigation lands would be able to fully support grizzly bears. In sum, FWS applied a discount factor to determine that 2,350 acres of effective grizzly bear habitat must be acquired to offset the Rock Creek Mine's displacement impacts across 7,044 acres, but did not equally apply a discount factor to determine how many acres of the identified mitigation parcels must be acquired to secure 2,350 acres of fully effective grizzly bear habitat.

48. Further, FWS requires only a portion of the total 2,350 acres of mitigation lands to be acquired before the mine is built. The mitigation plan establishes a schedule for Revett's acquisition of the private mitigation lands. According to this schedule, Revett must acquire 53 acres of mitigation habitat before construction of the mine's exploration adit, and 1,731 acres before construction of the mine itself. However, the schedule permits Revett to fully construct the Rock Creek Mine before acquiring the final 566 acres of required mitigation habitat – nearly a quarter of the total. There is no guarantee that sufficient habitat will be available to fulfill the requirements of FWS's mitigation plan when construction is eventually completed and Revett seeks to commence operations. Thus, FWS's mitigation plan allows the Rock Creek Mine to be fully constructed without first insuring that the mine will not jeopardize Cabinet-Yaak grizzly bears.

49. FWS's October 11, 2006, biological opinion and 2007 Supplement also concluded that the Rock Creek Mine threatens to partially sever the southern Cabinet Mountains from the rest of the grizzly bear habitat in the Cabinet Range. FWS recognized that the Rock Creek Mine would be located on the western edge of a constricted north-south corridor in the CYE. In this constricted corridor, the distance between existing or potential sites of high human use is less than two miles. High disturbance in this area could prevent grizzly bear use of this movement corridor, thereby severing grizzly bear habitat in BMUs 6, 7, 8, and 22, located in the southern Cabinet Mountains, from grizzly bear habitat located north of the Rock Creek Mine's impact area.

50. FWS's no-jeopardy finding in the October 11, 2006, biological opinion and 2007 Supplement fails to provide any assurance that mitigation plans will avoid jeopardy to the CYE grizzly bear population due to this habitat fragmentation impact. The mitigation plan primarily relies on a requirement for Revett to acquire an additional 100 acres of mitigation habitat (for a total of 2,450 acres) to address habitat fragmentation. According to FWS, 153 acres of the total 2,450 acres of mitigation habitat must be located in BMUs 4, 5 and 6 to specifically reduce or mitigate for the potential fragmentation of the north-south movement corridor in the Rock Creek Mine area. However, FWS admits that it does not know which parcels of mitigation habitat will be available from willing sellers for this purpose, and further admits that some combinations of potential mitigation properties in BMUs 4, 5 and 6 may not adequately offset the mine's fragmentation impacts.

51. FWS stated in the October 11, 2006, biological opinion and 2007 Supplement that Revett in 2005 purchased 273 acres within the north-south corridor.

FWS stated that this parcel, if approved by FWS and the Forest Service, could be used as part of the mitigation lands for the Rock Creek Mine project. However, this parcel consists of undeveloped land that is already available to grizzly bears, so its acquisition does not improve the status quo for grizzly bears with respect to the potential fragmentation impacts of the Rock Creek Mine. In other words, the parcel acquired by Revett fails to offer any additional habitat that is not already used by grizzly bears for purposes of offsetting the Rock Creek Mine's fragmentation impact.

52. FWS also stated in the October 11, 2006, biological opinion and 2007 Supplement that the remainder of the 2,350 acres of mitigation lands to be acquired to offset the Rock Creek Mine's displacement impacts also could serve to improve habitat connectivity in the north-south movement corridor, depending on where such lands were located. However, as discussed supra, FWS failed to apply any discount factor to ensure that the mitigation lands would ultimately secure 2,350 acres of fully effective grizzly bear habitat. Further, and in any event, FWS's mitigation plan permits Revett to defer acquisition of almost a quarter of the 2,350-acre mitigation lands package until after the Rock Creek Mine is fully constructed, without any assurance that needed mitigation lands will ultimately be available.

FACTS RELATING TO BULL TROUT CLAIMS

53. Like grizzly bears, bull trout are severely threatened by the proposed Rock Creek Mine.

54. The bull trout, Salvelinus confluentus, is the Northwest's largest native migratory trout. Historically, bull trout thrived in almost all waters within its historic range throughout the Columbia River basin and its headwaters in Montana and Canada, including lakes, large rivers, and small tributary streams. Today, bull trout mainly persist

in small, isolated populations in headwater lakes and streams.

55. Bull trout are extremely sensitive to environmental disturbance because they have highly specific habitat requirements. To successfully spawn, develop, and survive, bull trout require water that is very cold – 5 to 9 degrees Celsius – and clean. Embryos and juveniles require cold, sediment-free stream bottoms with small spaces between pebbles, which provide cover for juveniles to hide from predators and allow the flow of oxygenated water to nourish eggs deposited in the gravel. Bull trout are particularly sensitive to changes in stream cover, sediment levels, stream channel form and stability, blockage, modification, and other impediments in their migratory corridors. Land use activities that degrade water quality, such as roading, logging, mining, irrigation, and grazing, have led to widespread bull trout declines. In addition, dams have blocked fish migration corridors throughout the Columbia River basin, leading to the extirpation of nearly all migratory bull trout within the basin.

56. FWS listed the Columbia River "distinct population segment" of bull trout ("DPS"), along with two other DPSs, as threatened species in 1998 and 1999. 63 Fed. Reg. 31,647 (June 10, 1998); 64 Fed. Reg. 17,110 (Apr. 8, 1999). In 1999, the agency listed the two remaining DPSs of bull trout, so that all populations of bull trout in the lower-48 states are now protected by the ESA. 64 Fed. Reg. 58,910 (Nov. 1, 1999). Though the listing now encompasses all bull trout in the coterminous United States, FWS preserved the original DPS designations for the Columbia River Basin and others because each DPS is isolated from the other with no genetic interchange between them. For the "purposes of [ESA section 7] consultation and recovery planning, we [FWS] will continue to refer to these populations as DPSs. These DPSs will serve as interim

recovery units in the absence of an approved recovery plan." Id. at 58,912. There is no approved final recovery plan for bull trout.

57. The bull trout that make up the Columbia River Basin DPS are primarily resident fish that are restricted to isolated patches of marginal habitat in headwater lakes and streams. Prior to issuance of the 2006 biological opinion, FWS had considered the Columbia River Basin bull trout DPS to comprise 141 subpopulations of bull trout. Small size and isolation make these subpopulations especially vulnerable to extirpation. FWS noted that many relatively recent local extirpations have been reported in the Columbia River basin. Of the 141 bull trout subpopulations within the DPS, FWS found that 75 are at risk of disappearing due to their small size and isolation from other source populations.

58. FWS has previously concluded that extirpation of any bull trout subpopulation is an irreplaceable loss, because locally adapted populations are uniquely suited to their native streams. After a local population is extirpated, other bull trout are unlikely to colonize the vacant habitat. The prospects for successful reintroduction are poor because bull trout from other areas have not evolved the adaptations necessary for survival in the vacant habitat. This means that the loss of a subpopulation is likely to be long-lasting and irrevocable in the time frame relevant to bull trout survival and recovery. See 64 Fed. Reg. at 58,912.

59. FWS has explained in other biological opinions that "adverse effects that compromise the functional integrity of a bull trout subpopulation will be considered an appreciable reduction in the likelihood of survival and recovery of the DPS by reducing its distribution and potential ecological genetic diversity." U.S. Fish and Wildlife

Service, Biological Opinion for White Pine Creek Project 15 (Sept. 13, 2001). The survival and recovery of the Columbia River bull trout DPS requires healthy subpopulations widely distributed throughout the river basin. In short, the DPS is only as healthy as its constituent subpopulations.

60. Prior to the 2006 biological opinion and 2007 Supplement, FWS previously found that each of the 141 bull trout subpopulations in the Columbia River basin DPS was comprised of several "core" areas, which represented "drainages containing the strongest remaining populations of bull trout within each restoration/conservation area." 2003 Biological Opinion at B-18. The maintenance of these core areas was the starting point for protecting and recovering a bull trout subpopulation. Both Rock Creek and Bull River had been designated as bull trout "core" areas for the Cabinet Gorge subpopulation. Historically, bull trout from these streams migrated down the Clark Fork River to Lake Pend Oreille to mature and then swam back to their natal streams to spawn. While some bull trout in Rock Creek still migrate downstream to Lake Pend Oreille, construction of Cabinet Gorge Dam has blocked the historic upstream migration of these fish.

61. The Cabinet Gorge subpopulation is critical to the conservation of bull trout in the Clark Fork River basin. Like most bull trout subpopulations in the Columbia River DPS, the migratory life form of the Cabinet Gorge population has diminished significantly due to blockage of upstream fish passage by the Cabinet Gorge dam. Nonetheless, both Rock Creek and Bull River bull trout have both resident and migratory life forms with the resident life forms predominating. FWS has acknowledged the importance of the Cabinet Gorge subpopulation to the recovery of the Columbia River

bull trout DPS. The FWS Draft Bull Trout Recovery Plan directs FWS and other entities to "[i]nvestigate and implement upstream fish passage at . . . Cabinet Gorge and Noxon Rapids . . . Dams, as needed, to reconnect fragmented core habitat of bull trout with Lake Pend Oreille." FWS, Region 1, Bull Trout Draft Recovery Plan 166 (Oct. 2002) ("Draft Bull Trout Recovery Plan"). In its Draft Bull Trout Recovery Plan, FWS also notes that "[t]he Rock Creek drainage has been identified as one of two spawning and rearing streams for migratory bull trout living in Cabinet Gorge Reservoir." Draft Bull Trout Recovery Plan at 73. The Draft Bull Trout Recovery Plan identifies several actions to protect Rock Creek bull trout, including the need to "[d]evelop and implement an aggressive mitigation program to protect bull trout in the Rock Creek watershed if the Rock Creek Mine (Sterling Mining Company) is developed." Id. at 163.

FWS'S FINDING THAT THE ROCK CREEK MINE WOULD NOT DESTROY OR ADVERSELY MODIFY BULL TROUT CRITICAL HABITAT

62. On September 26, 2005, six months after this Court set aside the 2003 biological opinion concerning the Rock Creek Mine, FWS published a final rule formally designating critical habitat for bull trout. See 70 Fed. Reg. 56,211-56,311 (Sept. 26, 2005). FWS designated five segments of Rock Creek (totaling 2.88 miles of stream) as critical habitat for bull trout spawning, rearing, feeding, and migration. The Primary Constituent Elements ("PCEs") that comprise critical habitat for Rock Creek bull trout include cold water temperature, complex stream channels, gravel of "sufficient size, amount, and composition for juvenile and egg survival," natural stream flows, areas of cold water upwelling from groundwater, migratory corridors free of barriers, adequate food, and a permanent water source. See 2007 Supplement at B-65.

63. Bull trout require sediment-free gravel to dig their spawning nests, or

"redds," and deposit their eggs for incubation. Those eggs require gravel with enough interstitial space to allow oxygenated water to wash over the eggs and emerging juvenile fish. See 2007 Supplement at B-25 (concluding that because bull trout incubate for up to seven months, they are "especially vulnerable to fine sediment accumulation and water quality degradation").

64. In the 2006 biological opinion and 2007 Supplement, FWS found that designated critical habitat in Rock Creek is currently "degraded with relatively high levels of sediment present in the spawning gravels," 2007 Supplement at B-60, which under existing conditions "could be limiting reproduction," id. at B-63. See also id. at B-62 (existing sediment levels are elevated by 10-49 percent throughout Rock Creek); id. at B-57 (sediment is "functioning at risk"); id. at B-66 (FWS's analysis "confirm[s] the deficient environmental baseline conditions for designated critical habitat in Rock Creek"). In other words, even though FWS has designated Rock Creek as critical habitat because it contains valuable "physical or biological features . . . essential to the conservation of the species," 16 U.S.C. § 1532(5)(A)(i)(I), critical habitat in Rock Creek is currently not fulfilling its role in supporting the survival and recovery of bull trout.

65. The Forest Service has determined that the Rock Creek Mine will add up to 400 tons of new sediment to Rock Creek from construction of the Mine (including the evaluation adit and the access road). This represents an increase in sedimentation of up to 38% in Rock Creek, with even higher sediment levels entering the West Fork. 2007 Supplement at B-73. See also FEIS, Appendix N at N-10 (predicting sediment "increase for the West Fork of 46 percent as a result of the evaluation adit" alone). This increased sedimentation will result primarily from road construction during the initial years of mine

development. FWS found that the increased sedimentation "could adversely affect all five sections of designated bull trout critical habitat" in Rock Creek and have "more than insignificant or inconsequential" effects on critical habitat. 2007 Supplement at B-84. The agency 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 Mine construction and operation. Id.

66. Nevertheless, FWS determined that the increased sedimentation from road construction and other activities associated with construction of the Rock Creek Mine would not destroy or adversely modify critical habitat in Rock Creek. 2007 Supplement at B-90- to B-91. FWS failed to explain how further degradation of critical habitat would not appreciably reduce the value of the critical habitat for bull trout survival in light of the fish's life cycle and already degraded habitat conditions.

67. ESA Section 7(a)(2) also requires FWS to determine whether the proposed action destroys or adversely modifies the essential features of critical habitat that are necessary for the recovery of the species. See 16 U.S.C. § 1532(5)(A)(i); Gifford Pinchot Task Force v. FWS, 378 F.3d 1059 (9th Cir. 2004). FWS in the 2006 biological opinion and 2007 Supplement did not evaluate either the impacts of the current degraded condition or the further degradation caused by the Mine to the value of Rock Creek critical habitat for bull trout recovery.

68. In short, construction of the Rock Creek Mine will result in even further degradation of already diminished critical spawning habitat for bull trout in Rock Creek.

As FWS recognized in designating Rock Creek as critical habitat, the stream contains the features (or PCE's) that must be preserved and enhanced to support bull trout survival and recovery. Despite this, FWS concluded that the Mine will not destroy or adversely modify this critical habitat's value for bull trout survival or recovery. That conclusion is arbitrary and contrary to law because FWS has failed to provide any credible scientific basis or rational analysis to support its conclusion that further degradation or elimination of this critical habitat is not "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species." 50 C.F.R. § 402.02 ("Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.")

FWS' NO-JEOPARDY FINDING FOR BULL TROUT

69. The biological effects of the Mine on bull trout have not changed since the 2003 biological opinion. FWS acknowledges in the 2006 biological opinion and 2007 Supplement that the proposed Rock Creek Mine will have a variety of adverse impacts on Rock Creek bull trout. FWS found that the affected fish: (1) would experience a loss of spawning habitat as a result of sedimentation from road-building, development, and other use of the area associated with the Mine; (2) would be at high risk of extinction from a catastrophic failure of the tailings impoundment; (3) would face impaired migration and limited distribution in the upper portion of the Rock Creek watershed because of chemical barriers created by heavy metals and other pollutants from the Mine's waste water discharge; and (4) would experience a disruption in the essential flow of cold groundwater upwellings in Rock Creek.

70. Just like it did in the 2003 biological opinion, FWS determined that Rock

Creek bull trout are "still largely isolated and at high risk of extirpation due to random events." 2007 Supplement at B-62. See also id. at B-70 ("Rock Creek bull trout . . . are considered at high risk of extirpation from localized catastrophic events due to the limited area inhabited by bull trout and the relatively low availability of high quality habitat in Rock Creek.").

71. Just like it did in the 2003 biological opinion, FWS again found that the Mine could eliminate bull trout in Rock Creek. FWS found that "[i]f direct loss of individuals or indirect adverse effects from additional habitat modifications occurs, this could reduce the likelihood of persistence of both [migratory and resident] forms of Rock Creek bull trout. Such effects increase the risk of extirpation of Rock Creek bull trout . . . ." Id. at B-70.

72. Just like it did in 2003, FWS downplayed the effects of losing bull trout in Rock Creek, by concluding that the effects of wiping out bull trout in Rock Creek would be "minor . . . because Rock Creek's contribution to the [Lower Clark Fork] core area population is relatively small." 2007 Supplement at B-70.

73. Unlike the 2003 biological opinion, however, FWS in the 2006 biological opinion and 2007 Supplement rested its efforts to minimize the impacts to bull trout on a novel and unexplained shift in the terminology that the agency uses to describe the bull trout in Rock Creek. FWS has responded to the Court's previous rejection of its conclusion that loss of the Cabinet Gorge subpopulation was acceptable by simply dropping the "subpopulation" classification from its analysis. Prior to the 2006 biological opinion and 2007 Supplement, FWS established the principle that loss of any subpopulation would jeopardize bull trout. This classification was based on the

biological evaluation of the status of the species supporting the listing and the ability of the species to withstand impacts to its constituent members. See 63 Fed. Reg. at 31,650. FWS had previously considered bull trout in Rock Creek to be one of two core areas that comprised the Cabinet Gorge subpopulation. The Cabinet Gorge subpopulation was one of 141 subpopulations within the Columbia River DPS.

74. FWS now classifies Bull Trout in Rock Creek as one of 14 "local populations" comprising an expanded "Lower Clark Fork Core Area." The "Lower Clark Fork Core Area" is an entirely new designation achieved by consolidating four previous subpopulations (including the Cabinet Gorge subpopulation). FWS then finds that this new "Lower Clark Fork Core Area" is one of 35 other core areas in the "Clark Fork River Management Unit." The Lower Clark Fork River Management Unit is, in turn, one of 23 "Management Units" in the Columbia River DPS.

75. Based on this reclassification, FWS concluded that the effects of the Mine – which have not changed since the last biological opinion and may admittedly cause the extinction of bull trout in Rock Creek – would not jeopardize bull trout in the Columbia River Basin DPS "even if the Rock Creek population were extirpated due to the remaining unaffected local populations in the Lower Clark River Core Area." 2007 Supplement at B-89.

76. While semantically confusing, the effect of FWS's change of classification terminology is unmistakable: Rather than representing the key core area within a subpopulation that if lost, would jeopardize the continued existence of the DPS, Rock Creek bull trout are now "merely" one of fourteen populations in a single core area that is itself only one of 35 core areas in a "management unit" that is only one of 23 within the

DPS. While FWS again recognizes the possible elimination of the biological entity previously known as the Cabinet Gorge subpopulation, it now discounts the significance of that potential loss based solely on a new organizational framework for the DPS. The biological facts and impacts of the Mine have not changed; only the labels.

77. FWS's decision to alter the terminology it uses to classify bull trout inexplicably contradicts the best available science that served as the basis for listing bull trout. 63 Fed. Reg. at 31,654 (FWS finding that "the best available information indicates that bull trout are in widespread decline across the historic range and restricted to numerous reproductively isolated subpopulations in the Columbia River basin"). FWS provides no reasoned explanation in the biological opinion (or in the documents it refers to) for the terminology change or for why it no longer considers the subpopulation structure underlying the listing relevant to bull trout health. The agency has further failed to rationally explain how the loss of a biological entity known as a subpopulation previously threatened to jeopardize the entire DPS, but now no longer does, no matter how it is labeled. Nor has FWS, in departing from the best available science applied in the listing decision, engaged in a formal rulemaking process or other procedures required to revise or alter that listing decision. 16 U.S.C. §§ 1533(a), (c).

78. Further, FWS's efforts to diminish the importance of bull trout in Rock Creek also hinge on the agency's "consolidation" of four previously-identified subpopulations of bull trout into a single "core area." This consolidation is not based on the best available science.

79. FWS's sole basis for concluding that these formerly separate subpopulations should be consolidated into a single core area is its presentation and

interpretation of preliminary scientific data from Avista Utilities' fish passage efforts to date. See, e.g., 2007 Supplement at B-8 to B-11 (claiming that a "significant level of functional connectivity has been reestablished" by Avista's program); App. D at 1-2 (July 14, 2006 Memorandum re: Consolidation of bull trout core areas on the Lower Clark Fork River stating that Avista "has made major progress in reconnecting upstream bull trout passage").

80. FWS based its conclusion on three factors. First, it noted that 174 adult bull trout have been successfully moved around Cabinet Gorge and Noxon dams as part of the Avista program. 2007 Supplement at B-9. Second, while acknowledging that the numbers "have not been large," it found that "some" fish that were transported over the dams "have successfully spawned in tributary streams." Id. Third, FWS found that "in 2006, for the first time" a single fish that was trapped and tagged as a juvenile in the neighboring "Bull River drainage was captured as an adult at the base of Cabinet Gorge Dam." Id.

81. In a December 22, 2006 letter, Avista Utilities strongly objected both to FWS's presentation of its data and to the conclusion that the agency drew from it in the 2006 biological opinion. Avista clarified, for example, that its data on downstream transported fish do not support a conclusion that its trap-and-haul program has "'improved and partially restored the adfluvial component of Rock Creek bull trout.'" December 22, 2006 Letter at 3 (quoting 2006 biological opinion at B-2). To the contrary, Avista stated that "there is insufficient data supporting the contention that downstream passage has had any effect." Id. Avista similarly demonstrates that in 2004, only six transported adult-sized bull trout were found in Rock Creek – not ten as FWS states in the

2007 Supplement at B-41. Of those fish, only 2 actually made it to the spawning area of the stream.

82. While FWS addressed some of the inaccuracies that Avista highlighted in that letter when it issued the 2007 Supplement, it did not change its conclusion that these four isolated subpopulations had been "functionally reconnected" by Avista's program.

83. Here again, while the process and terminology is confusing, the reason for the change is clear. FWS candidly admits that consolidating these four subpopulations into a single "core area" means that the "the likelihood of meeting the recovery goals for abundance and distribution are increased." 2007 Supplement, Appx. D at 2. See also 2007 Supplement BiOp at B-40 (consolidating these core areas results in "an incremental improvement to the vulnerability status for" bull trout in the Lower Clark Fork River). FWS's reliance on a small number of fish successfully transported in the course of only five years to declare these fragmented subpopulations "reconnected" fails to utilize the best available science and fails to provide a rational explanation for its conclusion. The agency's conclusion is especially problematic because Avista, the entity running the program and producing the data that FWS relies upon, disagreed with the agency's analysis and conclusions from that data.

84. In its prior opinion concerning the Rock Creek Mine, this Court held that FWS had failed to explain how it determined that the loss of the Cabinet Gorge subpopulation would not jeopardize the Columbia River DPS without having considered the status of the species throughout the DPS. FWS claims to have addressed this problem in the 2007 Supplement by listing in two spreadsheets a summary of each of the biological opinions it has issued for bull trout in the Columbia River DPS prior to 2003

and the opinions issued for the Clark Fork River Management Unit since that time. From this review, FWS concludes that "no actions that have undergone consultation were found to appreciably reduce the likelihood of survival and recovery of the bull trout in any core area" and that the agency is "not aware of any existing biological opinion within the range of bull trout with other than a no-jeopardy determination." 2007 Supplement at B-36 to B-37. FWS concludes that because no projects have harmed bull trout to such an extent as to jeopardize the continued existence of the species, it is confident that "the conclusions reached in the May 9, 2003 biological opinion were correct and should be used as the basis for this analysis in this biological opinion." Id. at B-37.

85. FWS's reasoning conflates a legal finding of "no jeopardy" with a finding that a project does "no harm." The latter was the focus of the previous litigation and of the Court's holding. Indeed, the point of considering the status of the species across its range is that individual projects can have individually small, but collectively damaging impacts to the species, gradually degrading the environmental baseline to the point that any further harm will jeopardize its continued existence. FWS must examine this collective harm – not merely note that none of the previous actions individually caused jeopardy – and it must evaluate as part of this analysis the amount of incidental take permitted by each project before it can draw a rational conclusion about whether the Mine's impacts on the status of the species will jeopardize its continued existence.

FIRST CLAIM FOR RELIEF

86. Plaintiffs incorporate by reference all preceding paragraphs.

87. In issuing its October 11, 2006, biological opinion and the 2007 Supplement for the Rock Creek Mine, FWS arbitrarily relied on a discount factor to conclude that only 2,350 acres of mitigation habitat was required to compensate for 7,044

acres of displacement impacts attributable to the mine, without similarly applying a discount factor to determine how many of the identified parcels of potential mitigation habitat would be required to secure 2,350 acres of fully effective grizzly bear habitat.

88. FWS also arbitrarily approved a schedule for acquisition of mitigation lands for the Rock Creek Mine that permits Revett to defer acquisition of significant portions of the mitigation habitat until after the mine is fully constructed. This schedule fails to insure that the Rock Creek Mine is not likely to jeopardize the continued existence of the CYE grizzly bear population.

89. FWS also arbitrarily concluded, without analysis of on-the-ground impacts to grizzly bears, that acquisition of as-yet-unidentified lands within the Cabinet-Yaak Grizzly Bear Ecosystem, as well as one identified parcel, will adequately address threats posed by habitat fragmentation and displacement of grizzly bears in the project area, including reproducing female bears with cubs.

90. FWS' conclusion that the proposed Rock Creek Mine will not jeopardize the Cabinet-Yaak grizzly bear population is not justified by the best available science and is arbitrary, capricious, an abuse of discretion, and otherwise contrary to the ESA, 16 U.S.C. § 1536(a)(2), in violation of the APA, 5 U.S.C. §§ 701-706.

SECOND CLAIM FOR RELIEF

91. Plaintiffs incorporate by reference all preceding paragraphs.

92. FWS has violated the requirements of ESA section 7 and its implementing regulations by arbitrarily, capriciously, and without any rational basis concluding in the 2006 biological opinion and the 2007 Supplement that the proposed action is not likely to destroy or adversely modify bull trout critical habitat. Moreover, FWS has failed to analyze the impacts of impairing further the critical habitat on the value of that habitat

and its ability to support recovery of bull trout. 16 U.S.C. § 1536(a)(2).

93. FWS's conclusion that extirpation of Rock Creek bull trout will not jeopardize survival and recovery of the Columbia River bull trout DPS ignores the best available scientific information and the agency's own prior findings that each bull trout subpopulation is critical to the survival and recovery of the Columbia River bull trout DPS. FWS's decision in the 2006 biological opinion and 2007 Supplement to abandon the subpopulation structure underlying the listing is not based on the best available science and is an irrational and unexplained departure from the agency's prior findings. FWS's decision to abandon the scientific basis for the listing in the 2006 biological opinion and 2007 Supplement also violates 16 U.S.C. §§ 1533(a) and (c).

94. FWS's conclusion that the Rock Creek Mine will not jeopardize the survival and recovery of the Columbia River bull trout DPS was based on an incorrect legal standard and failed to adequately assess all relevant factors, such as the current status and trends of the rest of the DPS, the harm to the DPS from past actions, the current threats facing the DPS, or even the amount of incidental take that it has permitted across the DPS.

95. FWS's conclusion that the proposed Rock Creek Mine will not jeopardize the survival and recovery of the Columbia River bull trout DPS nor destroy or adversely modify designated critical habitat is contrary to the best available scientific information and the agency's prior findings, and is arbitrary, capricious, an abuse of discretion, and otherwise contrary to the ESA, 16 U.S.C. §§ 1533(a), 1533(c), and 1536(a)(2), in violation of the APA, 5 U.S.C. §§ 701-706.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that the Court:

1. Declare that FWS has violated ESA § 7 and its implementing regulations in evaluating the impacts of the proposed Rock Creek Mine on grizzly bears in its October 11, 2006, biological opinion and September 27, 2007 Supplement;

2. Declare that FWS has violated ESA § 7 and its implementing regulations in evaluating the impacts of the proposed Rock Creek Mine on bull trout in its October 11, 2006, biological opinion and September 27, 2007 Supplement;

3. Set aside FWS's October 11, 2006, biological opinion and the September 27, 2007 Supplement for the Rock Creek Mine, including the incidental take statements contained therein, and enjoin FWS from authorizing any take of grizzly bears and bull trout, or modification of critical habitat for bull trout, pending compliance with the ESA;

4. Award plaintiffs their reasonable fees, costs, and expenses, including attorneys fees, associated with this litigation; and,

5. Grant plaintiffs such further and additional relief as the Court may deem just and proper, including, if necessary, preliminary injunctive relief.

Respectfully submitted this 29th day of February, 2008.

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