



December 12, 2019

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***VIA ELECTRONIC AND CERTIFIED MAIL***

**Re: Sixty-Day Notice of Violations of the Endangered Species Act by Failing to Reinitiate Consultation Concerning the Impacts of the Rock Creek Mine on Grizzly Bears and Approving the Rock Creek Mine's Evaluation Phase**

Dear Officials of the U.S. Departments of Agriculture and Interior:

On behalf of Rock Creek Alliance, Earthworks, Montana Environmental Information Center, Defenders of Wildlife, Center for Biological Diversity, Sierra Club, and Ksanka Kupaqa

Xa'łéin (the Ksanka Crazy Dog Society), we hereby provide renewed notice in accordance with the citizen suit provision of the Endangered Species Act (“ESA” or the “Act”), 16 U.S.C. § 1540(g), that the U.S. Forest Service and U.S. Fish and Wildlife Service (“FWS”) are in violation of the ESA for failing to reinitiate consultation under ESA section 7, 16 U.S.C. § 1536, concerning the impacts on grizzly bears from implementation of the Rock Creek Mine project in Sanders County, Montana.

On August 28, 2018, we sent FWS and the Forest Service a 60-day notice of intent to sue, and on January 25, 2019, we filed suit, alleging that “FWS’s determination in the 2017 Grizzly Bear Supplement [to its 2006 biological opinion concerning the impacts of the Rock Creek Mine] that no new information warrants reinitiation of consultation is arbitrary, capricious, and violates the ESA and its implementing regulations,” and that “[b]y issuing a Record of Decision authorizing the first phase of the Rock Creek Mine project without considering [new grizzly bear] mortality data and reinitiating formal consultation to address them, the Forest Service likewise acted arbitrarily, capriciously, and in violation of the ESA and its implementing regulations.”

Subsequently, and while litigation was pending, FWS issued a November 20, 2019 “Supplement to the Biological Opinions on the Effects of the Rock Creek Project on Bull Trout, Designated Bull Trout Critical Habitat, and Grizzly Bear.” This 2019 Supplement did not alter the 2017 Supplement’s determination that no new information regarding the mine’s impact to grizzly bears warrants reinitiation of consultation, and does not justify the agencies’ failure to reinitiate consultation to address new grizzly bear mortality data. To the extent that FWS or the Forest Service may now seek to invoke the 2019 Supplement in Ksanka Kupaqa Xa'łéin v. United States Fish and Wildlife Service, 19-20-M-DWM (D. Montana), as a supplemental rationale for the agencies’ conclusion that reinitiation of consultation is not required, or as support for the Forest Service’s Record of Decision authorizing the first phase of the Rock Creek Mine project, we hereby provide notice of our intent to challenge the 2019 Supplement as arbitrary, capricious, and in violation of the ESA and its implementing regulations.

## **I. LEGAL BACKGROUND**

Section 7(a)(2) of the ESA imposes on federal agencies such as the Forest Service a substantive duty to ensure that actions they authorize or carry out are not likely to jeopardize listed species or destroy or adversely modify critical habitat designated for such species. 16 U.S.C. § 1536(a)(2). Such “action agencies” must discharge this obligation in consultation with the appropriate expert fish and wildlife agency, which is FWS in the case of grizzly bears. See id.; 50 C.F.R. § 402.01(b). Where, as in the case of the Rock Creek Mine, a proposed action is expected to adversely affect a listed species or its critical habitat, the agencies must follow the ESA’s formal consultation procedures, which culminate in the issuance of a biological opinion reflecting FWS’s determination of whether the proposed action will jeopardize the survival or recovery of a listed species or destroy or adversely modify a listed species’ designated critical habitat. See 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.02, 402.14. In approving a proposed action, the Forest Service may not rely on a legally flawed biological opinion or fail “to discuss information that would undercut the [biological] opinion’s conclusion.” Ctr. for Biological

Diversity v. U.S. Bureau of Land Mgmt., 698 F.3d 1101, 1127-28 (9th Cir. 2012); accord Save Our Cabinets v. U.S. Fish & Wildlife Serv., 255 F. Supp. 3d 1035, 1063 (D. Mont. 2017).

The agencies' obligations under ESA section 7 do not end with FWS's issuance of a biological opinion for a particular action. Instead, "[r]einitiation of formal consultation is required and shall be requested by the [action] agency or by the [Fish and Wildlife] Service" where, *inter alia*, "new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered." 50 C.F.R. § 402.16. "The duty to reinitiate consultation lies with both the action agency and the consulting agency." Salmon Spawning & Recovery All. v. Gutierrez, 545 F.3d 1220, 1229 (9th Cir. 2008) (citing 50 C.F.R. § 402.16). "Reinitiation of consultation requires ... the FWS ... to issue a new Biological Opinion before the agency action may continue." Envtl. Prot. Info. Ctr. v. Simpson Timber Co., 255 F.3d 1073, 1076 (9th Cir. 2001) (citing Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441, 1451 (9th Cir. 1992)).

## II. ESA CONSULTATION HISTORY FOR THE ROCK CREEK MINE

The Rock Creek Mine is a copper/silver mine project proposed beneath and adjacent to the Cabinet Mountains Wilderness in northwest Montana. The project would involve mining beneath the wilderness area and construction of ore- and waste-processing facilities on adjacent lands. These facilities would process up to 10,000 tons of ore per day for as long as 30 years. Mining waste would be housed permanently on site in a tailings storage facility covering more than 300 acres. Among other adverse environmental impacts, mine development is predicted to increase the risk of human-caused mortality of grizzly bears within the highly imperiled Cabinet-Yaak population.

FWS completed its first biological opinion for the Rock Creek Mine on December 15, 2000, in which it concluded that the project would jeopardize the survival and recovery of grizzly bears. In light of its jeopardy determination for grizzly bears, FWS developed a reasonable and prudent alternative consisting of additional mitigation requirements intended to address the combined threats to grizzly bears from developing both the Rock Creek Mine and the nearby Montanore Mine; those measures were incorporated into the Forest Service's 2001 ROD approving the project. In March 2002, however, FWS withdrew its biological opinion in response to litigation and the Forest Service subsequently withdrew its ROD.

FWS issued a second biological opinion on May 9, 2003. FWS concluded that the Rock Creek Mine would not jeopardize grizzly bears. The Forest Service issued a ROD approving the project in June 2003. However, on March 28, 2005, the U.S. District Court in Montana set aside and remanded the 2003 biological opinion for ESA violations. See Rock Creek All. v. U.S. Fish & Wildlife Serv., 390 F. Supp. 2d 993 (D. Mont. 2005).

FWS issued a third biological opinion for the project on October 11, 2006, in which it again concluded that the Rock Creek Mine would not jeopardize grizzly bears.<sup>1</sup> FWS issued a supplement to the 2006 biological opinion in September 2007 to address new information concerning conditions for grizzly bears in the project area.<sup>2</sup>

On March 17, 2015, Rock Creek Alliance, Earthworks, and the Idaho Council of Trout Unlimited requested that FWS reinitiate ESA section 7 consultation on the Rock Creek Mine. The groups contended that reinitiation of consultation was necessary for FWS to consider new information showing, among other things, that the number of human-caused grizzly bear mortalities in the Cabinet-Yaak Ecosystem (“CYE”) had increased between 2007-2015 despite implementation of the key conflict-reduction measures called for in the 2006/2007 biological opinion. These increasing mortalities called into question FWS’s conclusion in the 2006/2007 biological opinion that such measures would more than offset the increased mortality risks from the mine. FWS responded to that request on May 15, 2015. FWS asserted that it cannot require reinitiation of consultation and stated that FWS and the Forest Service would determine whether reinitiation is required based on the Forest Service’s then-forthcoming Supplemental Environmental Impact Statement for the project.

On March 21, 2017, the Forest Service requested reinitiation of formal consultation on the Rock Creek Mine’s impacts on bull trout in light of information showing that mine development would cause baseflow depletions of streams in the Rock Creek and Bull River drainages as well as the designation of additional bull trout critical habitat in the project area in 2010. Neither the Forest Service’s reinitiation request nor FWS’s response indicated that the agencies would evaluate new information concerning the mine’s threats to grizzly bears.

Accordingly, on August 22, 2017, Rock Creek Alliance, Earthworks, Montana Environmental Information Center, Defenders of Wildlife, the Idaho Council of Trout Unlimited, Clark Fork Coalition, Sierra Club, and the Center for Biological Diversity sent FWS a letter requesting that the agencies expand the apparent scope of their section 7 consultation to address evidence generated since 2007 that undermined FWS’s conclusion regarding the ability of conflict-reduction measures in the mine mitigation plan to more than offset increased human-caused mortality risks for grizzly bears. The groups further requested that FWS respond to direction regarding a parallel issue in the Montana federal district court’s 2017 ruling invalidating the biological opinion for the nearby Montanore Mine. In its opinion, the district court held that FWS acted arbitrarily and capriciously in concluding that developing the

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<sup>1</sup> U.S. Fish & Wildlife Serv., Biological Op. on the Effects to Grizzly Bears, Bull Trout, and Bull Trout Critical Habitat from the Implementation of Proposed Actions Associated with Plan of Operation for the Revett RC Res. Inc. Rock Creek Copper/Silver Mine (Oct. 2006) (“2006 BiOp”).

<sup>2</sup> U.S. Fish & Wildlife Serv., Supp. to the Biological Op. on the Part A: Effects to Grizzly Bears from the Implementation of Proposed Actions Associated with Plan of Operation for the Revett RC Resources Inc. Rock Creek Copper/Silver Mine (Sept. 2007); U.S. Fish & Wildlife Serv., Biological Op. on the Part B: Effects to Bull Trout from the Implementation of Proposed Actions Associated with Plan of Operation for the Revett RC Res. Inc. Rock Creek Copper/Silver Mine (as amended Sept. 2007) (“2007 Bull Trout BiOp Supp.”).

Montanore Mine would cause no more than one grizzly bear mortality, despite FWS's admission that it lacked quantitative evidence to support its predictions of grizzly bear mortalities and mitigation-plan benefits. Save Our Cabinets, 255 F. Supp. 3d at 1059-60, 1063. The groups' letter explained that this ruling also applies to the Rock Creek Mine, which would affect the same grizzly bear population and which relies on the same unsupported estimates of mortality and mitigation effectiveness.

On November 1, 2017, FWS issued a supplement to its 2006/2007 biological opinion for grizzly bears that updated basic species information and articulated FWS's conclusion that reinitiation of formal consultation concerning the mine's impacts on grizzly bears is not warranted.<sup>3</sup> The 2017 Grizzly Bear Supplement did not address the information concerning grizzly bear mortality risks and mitigation effectiveness cited in the 2015 and 2017 letters requesting reinitiation of consultation. The Supplement also did not address the substance of the Montana federal district court's decision rejecting FWS's parallel grizzly bear analysis for the Montanore Mine.

On August 28, 2018, we sent FWS and the Forest Service a 60-day notice of intent to sue, and on January 25, 2019, we filed suit, alleging that "FWS's determination in the 2017 Grizzly Bear Supplement that no new information warrants reinitiation of consultation is arbitrary, capricious, and violates the ESA and its implementing regulations." Compl. ¶ 98 Ksanka Kupaqa Xa'łéin v. United States Fish and Wildlife Service, 19-20-M-DWM (D. Montana).

On September 30, 2019, while litigation was pending, the Fish and Wildlife Service recommended that the Forest Service formally reinitiate consultation on the Rock Creek Mine Evaluation Project on the basis that, while the 2017 Revised Biological Opinion evaluated the effects of both the Rock Creek Mine's evaluation and operation phases, the Forest Service's 2018 Final Record of Decision approved only the evaluation phase. This reinitiation of consultation resulted in a November 20, 2019 "Supplement to the Biological Opinions on the Effects of the Rock Creek Project on Bull Trout, Designated Bull Trout Critical Habitat, and Grizzly Bear." The 2019 Supplement provided an update on the status of grizzly bears since the 2017 Supplement, including noting that there were 4 known human-caused grizzly bear mortalities in the Cabinet-Yaak population in 2018 and 2 so far in 2019. It did not disturb the 2017 Supplement's finding that reinitiation of formal consultation concerning new information on the mine's impacts on grizzly bears is not warranted.

### **III. THE AGENCIES' DISREGARD OF NEW INFORMATION CONCERNING GRIZZLY BEAR MORTALITY RISKS**

In its 2006 grizzly bear biological opinion, FWS recognized that "[t]he most prominent direct and indirect effects on grizzly bears from the implementation of the proposed Rock Creek Mine project would stem from the influx of mine employees into th[e] relatively remote [project] area" and the associated increase in human-caused mortality risk for grizzlies.<sup>4</sup> Accordingly,

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<sup>3</sup> U.S. Fish & Wildlife Serv., Supp. No. 2 to the 2006 Biological Op. on the Effects to Grizzly Bears from the Rock Creek Mine Project (Nov. 1, 2017) ("2017 Grizzly Bear Supplement").

<sup>4</sup> 2006 BiOp at A-68, A-70.

FWS’s no-jeopardy determination in that biological opinion—which remains the operative grizzly bear biological opinion as supplemented by FWS in 2007 and 2017 (and now 2019)—depends upon FWS’s conclusion that conflict-reduction strategies in the mine’s mitigation plan would more than offset the increased risks of human-caused mortality associated with the mine. See, e.g., 2006 BiOp at A-76 (“With reasonable certainty, we expect that implementation of [the conflict-reduction] measures would result in a net decrease in the potential for conflict and in the actual number of conflicts between grizzly bears and people that would arise in the CYE, with or without the Rock Creek mine project.”); A-104 (“We reasonably expect that the measures taken to reduce potential for human-caused mortality, within and outside the action area, would result in no net increase, and more likely a net decrease, in overall human-caused grizzly bear mortality rates within the CYE . . .”); A-105 (concluding anticipated take from mine would not jeopardize CYE grizzlies because “the net reduction in existing and anticipated future grizzly bear mortality rates” from conflict-reduction measures, in conjunction with habitat improvements and population augmentation, would “more than offset” the mine’s adverse effects). In this regard, FWS placed unique weight on the anticipated effectiveness of public education and outreach efforts, management measures for bear attractants, and conflict resolution work that would be implemented by two bear management specialists assigned to the CYE as part of the mine’s mitigation plan. See, e.g., id. at A-77 – A-78 (“The importance of these new [bear specialist] positions cannot be overstated.”); A-80 (“As a result of the agency bear specialist and law enforcement positions, we expect . . . a net reduction in the overall existing mortality risks to grizzly bears on both national forest and private lands within the action area and across the CYE.”). In 2017 and 2018, the Forest Service affirmed and relied upon FWS’s conclusions regarding mitigation plan effectiveness in Supplemental Environmental Impact Statements for the project.<sup>5</sup>

The types of conflict-reduction measures called for in the Rock Creek Mine mitigation plan are a necessary component of any strategy to reduce the unacceptably high levels of human-caused mortality that threaten the CYE grizzly bear population—even without mines on the landscape. However, the track record from a “test run” of the key conflict-reduction measures in the mitigation plan over the past decade critically undermines the agencies’ conclusions that such measures would more than offset the significant increased risk of grizzly bear mortality associated with the Rock Creek Mine. Since 2007, the Rock Creek Mine proponent has funded a Montana Fish, Wildlife and Parks grizzly bear management specialist position as called for by the mine mitigation plan. That specialist has implemented the very public education and outreach, management of bear attractants, and conflict resolution measures touted by the agencies as adequate to achieve a net reduction in human-caused grizzly bear mortality across the CYE as the Rock Creek Mine project moves forward. Contrary to the agencies’ prediction, however, the rollout of these conflict-reduction efforts over a ten-year period has not coincided with a reduction in the number of human-caused grizzly bear mortalities in the CYE—even without the Rock Creek Mine on the landscape. Instead, FWS’s own data show that the number of human-caused mortalities in the U.S. portion of the Cabinet-Yaak grizzly bear recovery zone increased during the ten years after the grizzly bear management specialist began work in 2007:

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<sup>5</sup> U.S. Forest Serv., Final Supp. Emtl. Impact Statement for the Rock Creek Project at 4-174 – 4-175 (July 2017); U.S. Forest Serv., Final Supp. Emtl. Impact Statement for the Rock Creek Project at 4-188 – 4-189 (July 2018).

16 known human-caused mortalities occurred in that ten-year time period compared with 13 during the preceding ten years.<sup>6</sup>

These data contradict the agencies' conclusions that conflict-reduction measures in the Rock Creek Mine mitigation plan will be sufficient to more than neutralize the increased mortality risk from the mine, and further indicate that the project may expose grizzly bears to human-caused mortality risks "to an extent not previously considered." 50 C.F.R. § 402.16(b). We accordingly filed suit on the basis that the agencies' refusal in the 2017 Supplement to reinitiate consultation in light of these data violated the ESA, and that the Forest Service's approval of the Rock Creek Mine's evaluation phase without accounting for these data likewise violated the ESA. Ksanka Kupaqa Xa'łéin v. United States Fish and Wildlife Service, 19-20-M-DWM (D. Montana).

The 2019 Supplement does not alter the 2017 Supplement's formal conclusion that reinitiation of consultation regarding the impacts of the mine to grizzly bears is not warranted. Nor does it provide any rational support for the 2017 Supplement's conclusion. If anything, the 2019 Supplement's updated mortality data showing that 4 more known human-caused mortalities occurred in 2018 and 2 occurred so far in 2019 only underscores the need for reinitiation of consultation. The only other "new" information cited in the 2019 Supplement that was not discussed in the 2017 Supplement are references to Kasworm, W.F., et al., 2018, Cabinet-Yaak grizzly bear recovery area 2017 research and monitoring progress report, U.S. Fish and Wildlife Service, Missoula, Montana ("Kasworm"); Annis, K.M. 2019, Grizzly and black bear management report Cabinet-Yaak Ecosystem 2018 annual report, Montana Fish, Wildlife and Parks, Region One, Libby Montana ("Annis"); and Proctor, Michael, et al., Conservation of threatened Canada-USA trans-border grizzly bears linked to comprehensive conflict reduction Human-Wildlife Interactions 12(3):348-371, Winter 2018 ("Proctor").

The 2018 Kasworm report provides an additional year of data from 2017, but its conclusions and analysis are not meaningfully different from the data in front of FWS in the 2017 Supplement. Accordingly, for the reason the 2017 Kasworm report and 2017 Supplement did not support the agencies' decision not to reinitiate consultation, the 2018 Kasworm report falls short as well.

FWS in the 2019 Supplement for the first time contends that "Annis (2019) and Proctor et al. (2018) indicate that even partial implementation of the mitigation measures prevented

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<sup>6</sup> See Kasworm et al., Cabinet-Yaak Grizzly Bear Recovery Area 2017 Research and Monitoring Progress Report 16-17, tbl.1. U.S. Fish & Wildlife Serv., Missoula, Mont. 101 (2017, in prep.). Further, as this FWS report acknowledges, "[u]se of known human-caused mortality counts probably results in under-estimates of total human-caused mortality"; "[n]umerous mortalities identified by this study were reported only because animals wore a radio-collar at [the time of] death." Id. at 10, 32. Indeed, the report estimates that 11 additional, unreported grizzly bear mortalities occurred from 2007-2016. See id. at 32, tbl. 11. While this estimate of unreported mortalities includes the Canadian portion of the CYE, see id., it indicates that the magnitude of increase in human-caused mortalities since the grizzly bear management specialist's work began likely is even larger than described above.

conflicts and helped reduce mortality rates.” 2019 Supplement at 12; see also id. at 11 (“Analysis supporting the efficacy of grizzly bear conflict specialists for this and nearby grizzly bear habitats was reported by Proctor et al. 2018.”). However, the Annis paper is merely an updated compilation of grizzly management activities that occurred in 2018. And while the Proctor paper does assert that the human-bear conflict reduction program has led to a decrease in human-caused mortality, the paper’s conclusion is not supported by its underlying data. Among other serious flaws, the authors interpreted data as showing trends that were not statistically significant. Also concerning, the authors smoothed data by calculating averages over multi-year time periods (3-year window), which portrayed trends in mortality that in actuality were not robust given the short timeframe of analysis. Moreover, the authors themselves acknowledge “that these populations were small and isolated, and with a number of factors contributing to excessive mortality and lack of effective habitat.” Yet they link causation of decline in mortality to the conflict mitigation specialist without explicitly testing other confounding variables, such as berry availability, that correlate strongly to bear mortality. Accordingly, FWS’s new-found, and post hoc, reliance on these documents offers no rational justification for the conclusion reached in the 2017 Grizzly Bear Supplement.

#### IV. CONCLUSION

To the extent that the Forest Service and FWS may now seek to rely on the 2019 Supplement in Ksanka Kupaqa Xa’łéin v. United States Fish and Wildlife Service, 19-20-M-DWM (D. Montana), as a post hoc rationalization for the 2017 Supplement’s conclusion that no new information regarding the mine’s effect on grizzly bears warrants reinitiation of consultation, and for the Forest Service’s Record of Decision approving the first phase of the Rock Creek Mine project, we intend to challenge the 2019 Supplement as arbitrary, capricious, and in violation of the ESA and its implementing regulations.

Sincerely,



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