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MAY 04 2010

PATRICK E. DUFFY, CLERK

By _____
DEPUTY CLERK, MISSOULA

**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,)

vs.)

UNITED STATES FOREST SERVICE;)
U.S. DEPARTMENT OF)
AGRICULTURE; TOM TIDWELL, in his)
official capacity as Regional Forester for)
the Northern Region; PAUL BRADFORD,)
in his official capacity as Forest Supervisor)
of the Kootenai National Forest; and)
ED SCHAFER, in his official capacity as)
Secretary of the U.S. Department of)
Agriculture,)

Defendants,)

CV 05-107-M-DWM
CV 08-028-M-DWM
(consolidated)

OPINION

SCANNED

and,)
)
)
 REVETT SILVER COMPANY,)
)
 Defendant-Intervenor.)
)
)
 _____)

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.)
 _____)

I. Introduction

The Plaintiffs in these consolidated environmental record review cases are a

coalition of environmental advocacy groups led by the Rock Creek Alliance. They seek review under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706, of federal agency actions and the associated planning documents relating to the approval of the Revett Silver Company’s proposed mining operation near Rock Creek and the Clark Fork River in the Cabinet Mountain Wilderness on the Kootenai National Forest. The lead case, CV 05-107-M-DWM, names the United States Forest Service as the principal Defendant and advances claims under the Endangered Species Act (“ESA”) (Counts I and II¹), the National Environmental Policy Act (“NEPA”) (Count III), the Clean Water Act and the Forest Service Organic Administration Act of 1897 (the “Organic Act”) (Count IV), and the National Forest Management Act (“NFMA”) (Count VI).² The planning documents challenged under the lead case are the 2001 Final Environmental Impact Statement, the 2003 Record of Decision, the Plan of Operations, the 2007

¹Count II of the Amended Complaint in the lead case (Doc. No. 52) is a claim under Section 9 of the ESA alleging unlawful take by the Forest Service of ESA-listed grizzly bears and bull trout due to the Forest Service’s reliance on an invalid biological opinion. The Plaintiffs do not mention their Section 9 claim in any of their six summary judgment briefs filed in these consolidated cases; it is assumed that they intend to rely on their argument that the relevant biological opinion is invalid under Section 7 of the ESA, expecting that if the Court finds the biological opinion invalid, it will take the next step and conclude that the Forest Service’s actions will result in unauthorized take under Section 9.

²The Amended Complaint in the lead case alleges six claims, but contains an error in the numbering. The final two claims in sequence are both numbered Count V. See Doc. No. 52 at 33-34. For purposes of this document, the final claim (the NFMA claim) is referred to as Count VI. The Plaintiffs have abandoned Count V, which raised claims under the Organic Act and the Surface Resources Act of 1955. See Doc. No. 70.

Determination Letter from Forest Supervisor Paul Bradford to Revett, and the three Supplemental Information Reports issued by the Forest Service in 2007. Revett is a permissive intervenor in the lead case. See Doc. No. 25.

The companion case, CV 08-28-M-DWM, also features the Rock Creek Alliance as the lead Plaintiff. The companion case alleges only ESA Section 7 claims and names the Fish and Wildlife Service as the Defendant. While there are ESA claims alleged in the lead case, it is through the companion case that the Plaintiffs launch their challenge to the Fish and Wildlife Service's "no jeopardy" findings with regard to ESA-listed grizzly bears and bull trout. Count I of the Complaint in the companion case alleges an ESA Section 7 claim relating to grizzly bears, while Count II alleges a similar claim relating to bull trout. The planning documents challenged in the companion case are the 2006 Biological Opinion and 2007 Supplement issued by the Fish and Wildlife Service. Revett was allowed to intervene as a matter of right in the companion case. See Doc. No. 16 in CV 08-28-M-DWM.

In both cases, the Plaintiffs ask the Court to declare that the agencies have violated the relevant statutes and to enjoin them from authorizing any activity relating to the mine until they have complied with all applicable statutes and regulations. Plaintiffs also seek an award of reasonable fees, costs, and expenses, including attorney's fees. The cases are ripe for resolution on all parties' cross-

motions for summary judgment.³

The Court heard oral argument on the pending summary judgment motions at a hearing on March 17, 2010, and issued a dispositive Order on March 29, 2010. This opinion sets forth the Court's reasoning.

II. Background

A. The Rock Creek Mine Project

The Rock Creek Mine Project is a proposed underground copper and silver mine located near Noxon, Montana, on 1,560 acres consisting of 749 acres of private land and 811 acres of national forest lands within the Rock Creek drainage. 05-107 AR 91A-2 at 2-3.⁴ The projected "potential area of disturbance" covers 482 acres, including 140 acres of national forest lands. *Id.* at 3. The project will involve construction of a preliminary evaluation adit, followed by an underground copper and silver mine, a mill/concentrator complex, water lines, waste lines, power lines, a tailings paste plant and storage facility, a wastewater treatment

³The Court's Order consolidating the cases (Doc. No. 61) largely failed to achieve its desired effect. The Plaintiffs and Revett apparently interpreted the lack of explicit instructions limiting the parties to a single brief as an invitation for each of them to file two motions for summary judgment supported by separate briefs, each containing the maximum number of pages allowed under then-applicable Local Rule. The Federal Defendants followed the spirit of the Order rather than exploiting its letter, and filed a single motion for summary judgment and accompanying brief. The result is a total of 16 briefs in the case, many of which heavily incorporate citations and argument from the associated statements of uncontroverted facts and statements of genuine issues, constituting hundreds of pages of legal argument and supporting materials.

⁴Citations to the administrative record in the lead case are in the following format: 05-107 AR [notebook number]-[document number] at [page number].

facility, and a railroad loadout facility. Id. at 7-9. The planned mine is to be constructed using the “room-and-pillar” method, whereby pillars of ore will be left intact to support the rock ceiling above a mined room. Id. at 9. The planned life span of the mine, from evaluation to reclamation, is 30 to 37 years. Id. at 3. The stated purpose and need for the project is to “construct, operate, and reclaim all facilities necessary to mine, remove and transport economically mineable minerals from the Rock Creek deposit.” Id. at 1.

Revett owns 99 patented lode mining claims covering 1,686 acres within and 123 acres adjacent to the Cabinet Mountain Wilderness. 05-107 AR 91A-2 at 2. Revett also holds 189 unpatented lode mining and mill site claims and/or tunnel site claims and owns 754 acres of private land within the project area. Id. at 10. These claims were acquired by Revett (formerly Sterling Mining Company) from ASARCO, which had earlier acquired the property rights from original holder Bear Creek Mining Company. 05-107 AR 88-2 at 1-3. The ore reserves that Revett has proposed to mine under the Rock Creek Project are contained in the company’s 99 patented claims. 05-107 AR 91A-2 at 10.

The mine project has been approved to take place in two phases. Phase I consists of the construction of an evaluation adit; Phase II would involve construction of the mine and related facilities, and later reclamation. 05-107 AR 91A-2 at 6-7. The planned evaluation adit is a 6,700 foot-long shaft measuring 20

feet high by 16 to 18 feet wide and requiring 18 to 24 months to complete. 05-107 AR 130-27 at 2-4, 2-9. The purpose of the evaluation adit is to gather information about the orebody as well as data on ground water quality and water flow, geochemical data, and rock mechanics data. 05-107 AR 91A-2 at 7. During Phase I, support facilities would be constructed both at the adit site and several miles off-site on Revett-owned land. Facilities proposed for the adit site include a temporary steel shop building, two propane generators, and an above-ground propane tank. 05-107 AR 88-2 at 2-98. Construction on Revett's land would include office trailers, a garage and warehouse, a water treatment facility, lined ponds, an employee parking lot, and a 500-gallon above-ground fuel tank. 05-107 AR 130-27 at 2-4, 2-7; 05-107 AR 88-2 at 2-95 to 2-100. The adit would be accessed by existing roads and employ a maximum of 45 workers. 05-107 AR 130-27 at 2-4. The evaluation adit is expected to disturb 8.3 acres of land. 05-107 AR 88-2 at 2-98.

Phase II, the construction and operation of the mine, may not begin until after the evaluation adit is complete and Revett has submitted relevant empirical data to the Forest Service and updated its Plan of Operations accordingly. 05-107 AR 91A-2 at 8. Before going forward with Phase II, Revett must submit and receive agency approval of modified and/or updated reclamation and monitoring provisions for its Plan of Operations. Id. The company must also submit a

reclamation performance bond and final design and mitigation plans to be implemented during mine construction. Id. The Record of Decision calls for the responsible agencies to conduct a technical panel review of the information obtained during the evaluation audit to determine if the data is consistent with conclusions reached in the Final Environmental Impact Statement, and to order any additional studies that the agencies deem necessary. Id. Revett must also implement reasonable and prudent mitigation and conservation measures and adhere to terms and conditions contained in the 2006 Biological Opinion and 2007 Supplement, and must implement all mitigation and modifications outlined in Alternative V of the Final Environmental Impact Statement and the Record of Decision. Id.

Revett's myriad obligations to take future action based on the information obtained from the evaluation audit substantiate that the Forest Service's 2003 Record of Decision is not the final step in agency approval of Phase II. The Record of Decision states:

The agencies have determined the information collected to date is adequate and do not expect any new circumstances or different results from future monitoring data. If agencies' review of the evaluation audit information leads them to determine there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts, the agencies will conduct an appropriate level of supplemental analysis before [Revett] will be allowed to proceed with constructing the mine, mill, and all other associated facilities.

05-107 AR 91A-2 at 8.

Before it can act Revett must receive written permission from the agencies to proceed with Phase II of the Mine project. Id. Appendix K to the Final Environmental Impact Statement specifies that approval of Phase II is not a foregone conclusion, stating, “It is conceivable that a temporary or permanent shutdown of operations could occur from permit compliance situations requiring enforcement and violation abatement actions, such as failure to adhere to mine rock sampling and testing protocol, or improper implementation of approved mitigations where needed.” 05-107 AR 89-1 at K-6. Elsewhere the Final Environmental Impact Statement says the following in describing the Acid Rock Drainage and Metals Leaching Plan contained in Appendix K: “This plan includes provisions for waste rock handling during adit construction as well as contingency needs should premature project closure occur before mine construction and development begins.” 05-107 AR 88-2 at 2-100.

B. Federal Agency Planning and Review

ASARCO, Revett’s predecessor, began the application process for the Rock Creek Mine Project on May 6, 1987. The Forest Service and the Montana Department of Environmental Quality (“Montana DEQ”) issued a Draft Environmental Impact Statement for the project in 1995. 05-107 AR 85. The same agencies produced a Supplemental Draft Environmental Impact Statement in

1998. 05-107 AR 86, 87. The Final Environmental Impact Statement was issued in September 2001. 05-107 AR 91A-2 at 3. In preparing the 2001 Final Environmental Impact Statement the Forest Service consulted with the Fish and Wildlife Service; the Environmental Protection Agency; the Army Corps of Engineers; the Montana Department of Fish, Wildlife and Parks; the Montana Department of Transportation; the Montana Hard Rock Mining Impact Board; Sanders County; and Lincoln County. Id. at 15-18.

The 2001 Final Environmental Impact Statement considered five alternatives in detail:

Alternative I – No action; the project would be denied or bought out by public agencies.

Alternative II – Revett's proposed plan.

Alternative III – Revett's proposed plan with agency-initiated modifications and additional mitigations.

Alternative IV – All of the modifications and mitigations in Alternative III plus relocation of mine adits and mill site.

Alternative V – Most of the modifications and mitigations from Alternative III together with those from Alternative IV relating to the relocation of the mill site, and several additional modifications and mitigations, including: use of a tailings paste disposal system; enclosure of the rail loadout facility; and relocation of the evaluation adit support facilities away from Rock Creek. Alternative V was analyzed as the preferred alternative.

05-107 AR 88-2 at 2-13 to 2-15. The Forest Service issued a Record of Decision

in December 2001 selecting Alternative V with modifications. 05-107 AR 91A-1 at 3.

The 2001 Final Environmental Impact Statement lists the federal, state, and local “Permits, Licenses and Approvals” upon which any mining plan adopted by the Forest Service must be premised. 05-107 AR 88-2 at 1-5 to 1-7. Among the required documents is a biological opinion from the United States Fish and Wildlife Service. Id. at 1-5. The Final Environmental Impact Statement incorporated the then-existing 2000 Biological Opinion issued by the Fish and Wildlife Service. 05-107 AR 88-2 at 1-9; 05-107 AR 89-1 Appendix E. The Fish and Wildlife Service withdrew the 2000 Biological Opinion in March of 2002, to settle a legal challenge to the adequacy of the document. AR 05-107 91A-2 at 3. The Forest Service responded by withdrawing its 2001 Record of Decision. 05-107 AR 114-18. A new Biological Opinion was issued in 2003. 05-107 AR 120-1. The Forest Service then issued its still-operative 2003 Record of Decision approving Revett’s proposed Plan of Operations through the adoption of Alternative V with modifications. 05-107 AR 91A-2 at 3.

The Rock Creek Alliance led a coalition of Plaintiffs in challenging the 2003 Biological Opinion in this Court. The disposition of that claim remanded the 2003 Biological Opinion to the Fish and Wildlife Service, finding that the agency’s no-jeopardy conclusion with regard to grizzly bears was arbitrary and

capricious due to the agency's inadequate consideration of the effects of the mine on the imperiled female grizzly bear population. Rock Creek Alliance v. U.S. Fish and Wildlife Service, 390 F. Supp. 2d 993, 1009 (D.Mont. 2005). The Court also concluded that the agency failed to meet its procedural obligation to consider the cumulative effects of the action on the listed bull trout distinct population segment. Id. at 1010.

The Fish and Wildlife Service replaced the remanded 2003 Biological Opinion with its 2006 Biological Opinion. 05-107 AR 126-1. After the Forest Service requested re-initiation of consultation, and in response to new information, the Fish and Wildlife Service issued a Supplement to the 2006 Biological Opinion in 2007 (the "2007 Supplement"), in which it concluded that the re-initiation of formal ESA consultation was not required.⁵ 05-107 AR 126-2 at 3. The 2006 Biological Opinion and the 2007 Supplement reach a "no jeopardy/no adverse modification" conclusion as to bull trout and a "no jeopardy" conclusion as to grizzly bears, and are the targets of the Plaintiffs' ESA claims in these cases. On December 10, 2007, Forest Supervisor Paul Bradford sent a Determination Letter to Revett stating that the Forest Service had reviewed the 2006 Biological Opinion and 2007 Supplement and concluded that the documents did not present

⁵The Forest Service sought to re-initiate consultation because of the change in the environmental baseline resulting from this Court's December 13, 2006 decision setting aside the 2004 Kootenai National Forest Plan amendment on access. See Cabinet Resource Group v. United States Fish and Wildlife Service, 465 F. Supp. 2d 1067 (D. Mont 2006).

