



February 13, 2007

R. Mark Wilson
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U.S. Fish and Wildlife Service
Montana Ecological Services Field Office
585 Shepard Way
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Re: Administrative Procedure Act Petition to Withdraw October 11, 2006 Biological Opinion
on the Effects of the Rock Creek Mine.

Pursuant to 5 U.S.C. § 555(b) and 50 C.F.R. § 402.16, Rock Creek Alliance, Trout Unlimited, Alliance for the Wild Rockies, Sierra Club, Earthworks, Cabinet Resource Group, and Pacific Rivers Council petition the United States Fish and Wildlife Service (“FWS”) to immediately withdraw the October 11, 2006, Biological Opinion for the Proposed Actions Associated with Plan of Operations for the Revett RC Resources Incorporated Rock Creek Copper/Silver Mine (“2006 BiOp”), and to request reinitiation of formal consultation with the U.S. Forest Service under Section 7 of the Endangered Species Act, 16 U.S.C. § 1536(a)(2). FWS has received new information undermining the agency’s analysis of the effects of the Mine on threatened bull trout and grizzly bears. Development of the Mine under the 2006 BiOp could begin as early as this spring. Accordingly, if FWS does not take the action requested in this petition by March 13, 2007, petitioners will be forced to take legal action.

I. BACKGROUND

A. Bull Trout

Under a settlement agreement to renew its license from the Federal Energy Regulatory Commission (“FERC”) to operate several dams on the Clark Fork River, Avista Utilities (“Avista”) agreed to provide for fish passage for threatened bull trout at several of these dams. Avista has begun to implement its Fish Passage/Native Salmonid Restoration Plan with a trap-and-haul operation to capture and truck a limited number of bull trout and release them below the dams. The program also seeks to trap returning adult fish to the base of the dams and transport them to areas where they return to their natal streams for spawning. Avista is also engaged in a longer-term process of evaluating structural fish passage facilities at these dams.

In the 2006 BiOp, FWS concluded that the Rock Creek Mine will not jeopardize the continued existence of bull trout nor destroy or adversely modify its critical habitat. In making these determinations, FWS relied heavily on its recent decision to “consolidate” formerly separate bull trout core areas in the Lower Clark Fork River as the basis for its conclusion that bull trout in Rock Creek and in the Lower Clark Fork River are faring better because they now

form an enlarged core area. 2006 BiOp at B-8 to B-13. FWS's sole basis for concluding that these formerly separate core areas should be consolidated into one core area is its presentation and interpretation of preliminary scientific data from Avista's fish passage efforts to date. See, e.g., 2006 BiOp at B-9 to B-11.

On December 22, 2006, Avista sent a letter to FWS commenting on the 2006 BiOp. See Exhibit 1 (letter from Robert D. Anderson, Avista Director of Environmental Affairs to R. Mark Wilson, Field Supervisor, FWS). In that letter, Avista stated that it had concerns about "the accuracy and adequacy of the BO . . . [Which] led us to conclude that the BO has significant errors, misrepresentations, and inadequacies." Id. at 1. Avista's letter documents several instances in which its own data from the trap-and-haul program were inaccurately and/or misleadingly presented, or where FWS drew unsupported conclusions from the data.

B. Grizzly Bears

The 2006 BiOp's conclusions regarding the displacement effects that the Mine will have on grizzly bears relied extensively on the U.S. Forest Service's 2004 amendments to the Land and Resource Management Plans for the Kootenai, Lolo and Idaho Panhandle National Forests. These amendments established individual road density standards for each Bear Management Unit contained within the affected forests. The 2006 BiOp concluded that displacement impacts of the Mine "would be moderated by Forest Plan standards that address habitat condition and displacement." 2006 BiOp at A-58. The 2006 BiOp further relied on the fact that, under the referenced forest plan amendments, "open and total motorized route access would be managed at levels similar to or better than the average reported in grizzly bear research in the [Cabinet-Yaak Ecosystem]," and that habitat connectivity in the project area would be improved because the Kootenai forest plan amendment "requires that 20 of 22 BMUs (91 percent) in the [Cabinet-Yaak Ecosystem] reach at least 55 percent core area or more (the average female home range core size)." Id. at A-106, A-107. The BiOp determined that such "maintenance or re-establishment of habitat connectivity" was among the factors that the Service concluded would "more than offset impacts of the mine." Id. at A-107.

Now, however, the forest plan amendments that the 2006 BiOp relied upon are no longer in effect. In a December 13, 2006 ruling, the United States District Court for the District of Montana set aside these forest plan amendments and remanded them to the Forest Service for reconsideration in a new analysis. See Cabinet Resource Group v. U.S. Fish & Wildlife Serv., No. CV-04-236-M-DWM, slip op. at 65 (D. Mont. Dec. 13, 2006). Accordingly, the forest plan amendments that the 2006 BiOp relied upon to "moderate" the impacts of the Mine, and to contribute to offsetting the Mine's impacts, are no longer in force. Moreover, it is unknown when, or if, the forest plan amendments will be re-issued in the form relied upon by the Service in the 2006 BiOp.

II. FWS MUST REINITIATE CONSULTATION

The new developments detailed above require the Service to reinitiate consultation with the Forest Service concerning the Rock Creek Mine. The ESA's implementing regulations state

that the federal agencies must reinitiate consultation if “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(b). The duty to reinitiate consultation lies with both the action agency and the consultation agency. Environmental Protection Information Center v. The Simpson Timber Co., 255 F.3d 1073, 1076 (9th Cir. 2001).

A. Bull Trout

Avista’s concerns about the agency’s inaccurate use of Avista data represent precisely the kind of new information that triggers FWS’s duty to reinitiate consultation. First, Avista’s letter demonstrates that the 2006 BiOp overstates the number and significance of returning adult bull trout (i.e., fish transported upstream) from its trap and haul program. For example, FWS states that in 2003, “four migratory-sized bull trout were captured or radio-tagged (radio tagged) in the Rock Creek drainage.” Exhibit 1 at 2 (citing 2006 BiOp at B-41). This statement “is misleading, incorrect, and incorrectly cited.” Id. Instead, only two adult-sized bull trout were captured in Rock Creek in 2003 and both originated from the reservoir, -- i.e., they were not returns from Avista’s transport program. Similarly, Avista demonstrates that in 2004, only six – not ten as FWS states – transported adult-sized bull trout were found in Rock Creek. Id. Only 2 of these fish actually made it to the spawning area of the stream. Id. See also id. at 3 (“only two transported adults were tracked to the upper perennial nursery area.”).

Second, Avista clarifies that its data on downstream transported fish do no support a conclusion that its trap-and-haul program has “improved and partially restored the adfluvial component of Rock Creek bull trout.” Id. at 3 (quoting 2006 BiOp at B-2). To the contrary, Avista states that “there is insufficient data supporting the contention that downstream passage has had any effect.” Exhibit 1 at 3 (emphasis added).¹

Based on Avista’s concerns about the use and limitations of its own data, FWS has a duty to immediately reinitiate consultation because a significant underpinning of its no-jeopardy determination for bull trout – the alleged “reconnection” of populations within the Lower Clark Fork River by the trap-and-haul program – at best relies on an incorrect interpretation of data. See, e.g., Carlton v. Babbitt, 26 F.Supp. 2d 102, 109-110 (D.D.C. 1998) (holding that FWS’s

¹ In the 2006 BiOp, FWS determined that the Mine will increase sedimentation by up to 38% in Rock Creek, with even higher sediment levels entering the West Fork. 2006 BiOp at B-72. The agency found the Mine “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. at B-89. Avista correctly noted that the agency’s analysis of the impacts of this increased sedimentation did not account for the fact that this time period is “approaching the complete life cycle for the migratory life history for bull trout, [and] may be sufficient to cause this life history form to become extinct for the Rock Creek population.” Exh. 1 at 3. The local adaptation to the highly variable environment in Rock Creek (with its intermittent streams flows in many years) means that migratory bull trout in Rock Creek are disproportionately significant and are unlikely to be reestablished by bull trout from streams in the area. Id.

dismissal of explicit limitations in scientific data it relied upon was arbitrary and capricious). FWS must consider the effects that these inaccuracies have on its analysis and no-jeopardy conclusion for bull trout.

B. Grizzly Bears

FWS equally must reinitiate consultation with the Forest Service to address the absence of expected mitigations resulting from the invalidation of the 2004 forest plan amendments setting road density standards in grizzly bear habitat. As discussed supra, while the 2006 BiOp relied on these forest plan amendments to moderate the Mine's displacement impacts and to improve habitat connectivity sufficiently to offset the negative consequences of the Mine, the forest plan amendments have since been invalidated and remanded by a federal court. Where, as here, "anticipated mitigation efforts have been delayed and may not take place at all," reinitiation of consultation is required. Sierra Club v. Marsh, 816 F.2d 1376, 1388 (9th Cir. 1987).

III. CONCLUSION

For the foregoing reasons, petitioners request that the FWS immediately withdraw its 2006 BiOp addressing the Rock Creek Mine and request reinitiation of consultation with the Forest Service concerning the impacts of the mine on bull trout and grizzly bears. Please advise undersigned counsel as soon as possible of your response to this petition. Absent responsive action by March 13, 2007, petitioners will have no choice but to initiate legal action to ensure that the bull trout and grizzly bear are adequately protected against the threats posed by the Rock Creek Mine.

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