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***Rock Creek Alliance v. U.S. Forest Service*, 703 F. Supp. 2d 1152, 2010 U.S. Dist. LEXIS 43880, 2010 WL 1872864 (D. Mont. May 4, 2010).**

Matt Pugh

ABSTRACT

A coalition of environmental advocacy groups challenged the U.S. Forest Service, U.S. Fish and Wildlife Service, and the U.S. Department of Agriculture's approval of a mining project near Noxon, Montana. The proposed mine would operate partially on national forest land and involve tunneling beneath the Cabinet Mountains Wilderness to extract copper and silver. The plaintiffs challenged the mine approval by advancing claims under the Endangered Species Act, National Environmental Policy Act, Clean Water Act, Organic Administration Act, and the National Forest Management Act. The court entered summary judgment for the defendants on all but two counts. Minor changes must be made to the planning and review documents on remand before the mine project is allowed to proceed.

I. INTRODUCTION

This consolidated environmental record review case tested the U.S. Forest Service, U.S. Fish and Wildlife Service and the U.S. Department of Agriculture's approval of a controversial mining project near Noxon, Montana.²⁸⁰ The proposed project would take place in the Kootenai National Forest and involve tunneling beneath the Cabinet Mountains Wilderness to extract copper and silver.²⁸¹

The plaintiffs, a coalition of environmental advocacy groups, challenged the decision by bringing one action against the Forest Service and the Department of Agriculture (the lead case)

²⁸⁰ *Rock Creek Alliance v. U.S. Forest Serv.*, 703 F. Supp. 2d 1152, 2010 U.S. Dist. LEXIS 43880 at ** 3-7 (D. Mont. May 4, 2010).

²⁸¹ *Id.* at **7-8.

and a second action against the Fish and Wildlife Service (the companion case).²⁸² The cases were consolidated into one matter involving five counts.²⁸³ Counts I and II advanced arguments under the Endangered Species Act (ESA) in relation to bull trout and grizzly bear management.²⁸⁴ Count III alleged procedural violations of the National Environment Policy Act (NEPA).²⁸⁵ Alleged violations to the Clean Water Act and the Forest Service Organic Administration Act of 1897 (Organic Act) were the focus of Count IV.²⁸⁶ The plaintiffs dropped Count V, so the final claim was Count VI pertaining to the National Forest Management Act (NFMA).²⁸⁷

II. FACTUAL BACKGROUND

The application process for the Rock Creek Mine Project began in 1987.²⁸⁸ The project had the potential to disturb 140 acres of national forest land and 342 acres of private land owned by Revett Silver Company (Revett).²⁸⁹ Portions of Rock Creek are designated critical habitat for bull trout; also, grizzly bears are thought to live in the area.²⁹⁰

The mine plan calls for implementation in two phases.²⁹¹ Phase I involves the construction of an evaluation adit.²⁹² The evaluation adit is a 6,700 foot-long mine shaft measuring twenty feet high.²⁹³ The shaft will extend underneath portions of the Cabinet Mountains Wilderness, and will be used to gather data on the deposit.²⁹⁴ If Phase I is completed, Revett would be required to update its Plan of Operations and receive agency

²⁸² *Id.* at **3-5.

²⁸³ *Id.*

²⁸⁴ *Id.* at *17.

²⁸⁵ *Id.* at *18.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at **5 n. 2, 19.

²⁸⁸ *Id.* at *12.

²⁸⁹ *Id.* at *7.

²⁹⁰ *Id.* at **107, 151.

²⁹¹ *Id.* at *9.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

approval based on the empirical data discovered during that phase.²⁹⁵ Upon approval, Phase II includes the actual operation of the mine, construction of support facilities, and reclamation work after the productive life of the mine has lapsed.²⁹⁶

III. PROCEDURAL BACKGROUND

The U.S. Forest Service and the Montana Department of Environmental Quality issued a Final Environmental Impact Statement on the Rock Creek Mine Project in 2001, presenting five alternative courses of action for consideration.²⁹⁷ The Forest Service ultimately selected Alternative V.²⁹⁸ This option added several additional agency-initiated modifications and mitigations, including relocation of mine facilities away from Rock Creek.²⁹⁹ The 2001 decision was withdrawn by the Forest Service after a supporting Biological Opinion issued by the Fish and Wildlife Service was withdrawn in response to a legal challenge.³⁰⁰

The Forest Service relied on a subsequent Biological Opinion in 2003 in issuing its approval of Alternative V.³⁰¹ This 2003 decision was challenged by a coalition of environmental groups led by the Rock Creek Alliance, who brought suit in U.S. District Court for the District of Montana. In 2005, the court found that the Fish and Wildlife Service's "no jeopardy" conclusion regarding impacts to the grizzly bear population inadequately considered adverse effects on the imperiled female grizzly bear population.³⁰² Additionally, the court determined that the agency committed procedural errors in reviewing the cumulative effects of the mine on the listed bull trout distinct population segment.³⁰³ For these reasons, the Biological Opinion was remanded to

²⁹⁵ *Id.* at *10.

²⁹⁶ *Id.* at *9.

²⁹⁷ *Id.* at *13.

²⁹⁸ *Id.* at *14.

²⁹⁹ *Id.*

³⁰⁰ *Id.* at *15.

³⁰¹ *Id.*

³⁰² *Id.* (citing *Rock Creek Alliance v. U.S. Fish & Wildlife Serv.*, 390 F. Supp. 2d 993, 1009 (D. Mont. 2005)).

³⁰³ *Id.*

the Fish and Wildlife Service and the mine project was stalled pending further review.³⁰⁴ After reviewing the revised 2006 Biological Opinion and 2007 Supplement, the Forest Service stood by its 2003 approval of the project because the documents contained no significant new or different information.³⁰⁵

A consortium of environmental advocacy groups, again led by the Rock Creek Alliance, challenged the agencies' approval of the project.³⁰⁶ Revett exercised its right to intervene in this matter.³⁰⁷ The court issued its opinion on the consolidated case on May 4, 2010.³⁰⁸

IV. ANALYSIS

A. Consolidated Counts I and II: ESA

In Count I, the plaintiffs contended that the Forest Service violated Section 7 of the ESA by allowing “irreversible and irretrievable commitments of resources” before the Forest Service completed the required consultations with the Fish and Wildlife Service.³⁰⁹ The defendants argued that the 2006 Biological Opinion and 2007 Supplement satisfied the consultation requirements under Section 7.³¹⁰ At issue was whether the Fish and Wildlife Service’s conclusions can be considered complete when they are contingent on the agency’s subsequent approval of monitoring and mitigation actions called for in the approved plan.³¹¹

The plaintiffs took issue with the Fish and Wildlife Service’s decision to allow Revett to acquire the 566 acres of grizzly bear mitigation habitat after the construction of the mine is complete but before operations begin.³¹² The plaintiffs also argued that to protect bull trout, the

³⁰⁴ *Id.*

³⁰⁵ *Id.* at *16.

³⁰⁶ *Id.* at *3.

³⁰⁷ *Id.* at *6.

³⁰⁸ *Id.* at *7.

³⁰⁹ *Id.* at *17.

³¹⁰ *Id.*

³¹¹ *Id.* at *60.

³¹² *Id.* at *160.

sediment mitigation plans must be reviewed and approved before the project can go forward.³¹³

The groups were concerned the company would abandon the mine before obtaining mitigation lands.³¹⁴ However, due to its resources and the economic incentive to recoup its investment, the court was convinced Revett will acquire the mitigation land.³¹⁵

The plaintiffs next challenged the “no jeopardy” finding relating to the Yaak-Cabinet grizzly population. As one of only four remaining populations of the species, numbering between 30 and 40 individuals, this grizzly population faces a high extinction risk.³¹⁶ Additionally, analyses indicate a 91 percent probability that this population is declining.³¹⁷ Of the fifteen grizzlies occupying the Cabinet Mountains, estimates suggest only five are females of reproductive age.³¹⁸ Two or three of those females possibly have home range within the action area.³¹⁹

The Forest Service’s mitigation plan required at least six female grizzly bears to be relocated to the Cabinet Mountains.³²⁰ This action is expected to more than offset the expected loss of one reproductive female or the displacement of two females for one breeding cycle.³²¹ The court agreed with the Fish and Wildlife Service’s conclusion that the relocation plan and mitigation lands eliminate the likelihood that the proposed action would diminish the survival and recovery of grizzly bears, and may in fact improve conditions.³²² The court granted summary judgment for the defendants on all ESA Section 7 claims relating to grizzly bears.³²³

³¹³ *Id.* at *61.

³¹⁴ *Id.* at *160.

³¹⁵ *Id.* at **160-162.

³¹⁶ *Id.* at *151.

³¹⁷ *Id.* at *152.

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.* at *153.

³²¹ *Id.*

³²² *Id.* at *166.

³²³ *Id.* at *167.

Five segments of Rock Creek have been designated critical habitat for bull trout and all are located near mine facilities.³²⁴ Despite this fact, the Fish and Wildlife Service concluded in its 2007 Supplement to the 2006 Biological Opinion that the Rock Creek Mine project is “not likely to destroy or adversely modify bull trout critical habitat.”³²⁵ The agency further determined that “due to the small size of Rock Creek critical habitat in relation to the total designated critical habitat, the value of overall critical habitat for recovery will not be appreciably diminished.”³²⁶ The Fish and Wildlife Service argued that its discussion of recovery and survival took place on the “core area” level, which is the appropriate scale on which to gauge recovery.³²⁷ The court found that the discussion of the habitat’s value to recovery “minimal but sufficient.”³²⁸

The plaintiffs further contended that the Fish and Wildlife Service’s “no adverse modification” conclusion was unsupported.³²⁹ An adverse modification determination is appropriate when an action “appreciably diminishes the value of critical habitat, either for survival or recovery.”³³⁰ By the agency’s own admissions, this project could decrease the habitat’s ability to support several life stages of bull trout.³³¹ The court granted summary judgment in favor of the defendants and determined that:

degradation, or even elimination, of critical habitat on a small scale does not constitute adverse modification, provided (1) the affected area is insignificant relative to the total designated critical habitat; (2) the localized effects are fully discussed in the biological opinion; and (3) the use of a large-scale analysis does not mask multiple site-specific effects that pose a significant risk to the species when considered in the aggregate.³³²

³²⁴ *Id.* at *108.

³²⁵ *Id.*

³²⁶ *Id.* at *114.

³²⁷ *Id.* at **116-117 n. 32.

³²⁸ *Id.* at *117.

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.* at *120.

³³² *Id.* at **130-132.

While noting that its decision could leave a species subject to “death by a thousand pinpricks,” the court also sided with the agency and granted the defendants summary judgment on the “no jeopardy” determination for bull trout.³³³ The court found the agency had expanded its review of the status of the species across its range and applied the proper level of analysis.³³⁴

Count II, which alleged claims under Section 9 of the ESA, was entirely dependent on a favorable ruling under Section 7, so the court found for the defendants on those issues.³³⁵

B. Count III: NEPA

Count III relied on four main arguments: (1) the Final Environmental Impact Statement lacked critical information resulting in an unreliable environmental baseline;³³⁶ (2) not all reasonable alternatives were considered;³³⁷ (3) the Forest Service failed to take the requisite “hard look” by deferring its mitigation analysis;³³⁸ and (4) the Forest Service failed to analyze Revett’s revised Plan of Operation allowing wastewater to be discharged into groundwater.³³⁹ NEPA does not outline any requirements relating to the outcome of the agency’s decision, but it mandates the procedural steps an agency must take in reaching its decision.³⁴⁰

The plaintiffs identified language in the 2003 Biological Opinion stating “[t]he current level of information present on Rock Creek bull trout is minimal and additional information on fish presence, absence, migration and demographic characteristics are necessary to fully assess the condition of bull trout in this watershed.”³⁴¹ Although the 2006 Biological Opinion and 2007 Supplement provided additional information on the bull trout population, the court determined

³³³ *Id.* at **150-151.

³³⁴ *Id.* at *150.

³³⁵ *Id.* at **167-168.

³³⁶ *Id.* at **74-75.

³³⁷ *Id.* at *56.

³³⁸ *Id.* at *58.

³³⁹ *Id.* at **79-80.

³⁴⁰ *Id.* at *53.

³⁴¹ *Id.* at *74.

the agency could not update a NEPA study with a non-NEPA Supplemental Information Report issued four years after the project was approved.³⁴² The court stated that to allow a decision based on admittedly inadequate information is contrary to the purposes of NEPA and results in an “arbitrary and capricious” decision.³⁴³ The court granted summary judgment on this issue in favor of the plaintiffs and remanded it to the Forest Service to either issue a supplemental environmental impact statement considering the updated bull trout information, or withdraw the 2001 Final Environmental Impact Statement and 2003 Record of Decision and produce replacement documents in compliance with NEPA standards.³⁴⁴

The court next determined the second NEPA argument, that not all reasonable alternatives were considered, was neither supported by the record nor consistent with NEPA standards.³⁴⁵ The plaintiffs argued that the Forest Service was required to consider the possibility of only approving the evaluation adit portion of the plan.³⁴⁶ However, NEPA requires that connected actions be evaluated together.³⁴⁷ Because both phases of the project are inextricably connected, the court granted summary judgment on this issue in favor of the defendants.³⁴⁸

The third NEPA issue in this case involved the Forest Service’s decision to postpone a full sediment mitigation plan until more information was available from the completion of Phase I of the project.³⁴⁹ Despite the fact the agency did not produce a final mitigation plan regarding sediment concerns, the court determined the agency satisfied NEPA requirements based upon: (1) its general knowledge of water quality threats; and (2) its efforts to develop a sediment source

³⁴² *Id.* at **75-78.

³⁴³ *Id.* at *78.

³⁴⁴ *Id.*

³⁴⁵ *Id.* at **59-60.

³⁴⁶ *Id.* at *56.

³⁴⁷ *Id.* at *57.

³⁴⁸ *Id.* at *60.

³⁴⁹ *Id.* at **60-61.

reduction plan using the WATSED model.³⁵⁰ The agency was not required to measure the precise effects of sediments until after Phase I was completed and more information was known.³⁵¹ Accordingly, summary judgment on this issue was entered in favor of the defendants.³⁵²

The final NEPA issue involved wastewater discharge. The approved plan dictated that wastewater from the mine adit would travel through a pipeline and be discharged into the Clark Fork River.³⁵³ New information after the approval suggested it may not be possible to secure easements for the pipeline.³⁵⁴ Since there was no reason to anticipate the change in discharge location at the time of approval and the Montana Department of Environmental Quality had not yet acted on the revision, the court found the plaintiffs' argument premature and entered summary judgment in favor of the defendants.³⁵⁵

C. Count IV: Clean Water Act and Organic Act

The plaintiffs argued that the increased sedimentation in Rock Creek violated the Clean Water Act and Montana water quality standards requiring protections to fisheries.³⁵⁶ The plaintiffs acknowledged that they failed to comply with the notice requirement of the Clean Water Act, but argued that it did not apply because their claim was brought pursuant to the Administrative Procedure Act and 33 U.S.C. § 1323(a).³⁵⁷ The court determined that the mine's alleged violations involved point-source pollution and therefore arose under the citizen suit

³⁵⁰ *Id.* at **73-74. The Forest Service's "R-1 WATSED" is an ecological model used to predict sedimentation levels.

³⁵¹ *Id.* at *73.

³⁵² *Id.* at *74.

³⁵³ *Id.* at *78.

³⁵⁴ *Id.* at *79.

³⁵⁵ *Id.* at *80.

³⁵⁶ *Id.* at **22-23.

³⁵⁷ *Id.* at *26.

provision of the Clean Water Act.³⁵⁸ The plaintiffs' failure to comply with the notice requirement deprived the court of subject matter jurisdiction, and the claim was dismissed.³⁵⁹

The claim under the Organic Act contended that the Forest Service failed to take “all practicable measures to maintain and protect fisheries and wildlife habitat” by approving a plan that would likely violate water quality standards.³⁶⁰ According to the 2007 Supplement, sediment loading is expected to increase 46 percent in the West Fork of Rock Creek mostly, and possibly entirely, during Phase I of the project.³⁶¹ Despite this fact, the approved plan lacked any mitigation requirements during Phase I.³⁶² This highly problematic oversight rendered the decision arbitrary.³⁶³ The court held it was feasible and practical to extend the mitigation efforts required for Phase II into Phase I to reduce the environmental impacts of sediment loading, and such efforts were necessary to comply with the Organic Act.³⁶⁴ Summary judgment was granted in favor of the plaintiffs on this aspect of the Organic Act claim, but summary judgment was entered in favor of the defendants on the mitigation, monitoring and permitting requirements as approved for Phase II of the project.³⁶⁵

D. Count VI: NFMA

The Kootenai National Forest Plan incorporates the Inland Native Fish Strategy management standards for protecting fish populations from adverse planning actions.³⁶⁶ The plaintiffs argued that the standards and guidelines of the Inland Native Fish Strategy were not

³⁵⁸ *Id.* at *28.

³⁵⁹ *Id.* at *29.

³⁶⁰ *Id.*

³⁶¹ *Id.* at **30-32.

³⁶² *Id.* at **35-36.

³⁶³ *Id.* at *45.

³⁶⁴ *Id.* at **44-45.

³⁶⁵ *Id.* at **45, 52.

³⁶⁶ *Id.* at *87.

properly considered to minimize negative impacts to the Rock Creek population of bull trout.³⁶⁷ The court found the plaintiffs' reading of the Fish Strategy as banning all activity detrimental to bull trout populations or habitat too narrow and determined that it is not to be used to "lockout" any project in Conservation Areas.³⁶⁸ Compliance with the Fish Strategy requires only proper analysis prior to the initiation of projects.³⁶⁹ The court failed to reach a decision on this issue because it could not determine the location of the waste dump area in relation to the Conservation Area located in the mill site.³⁷⁰ The court ordered the Forest Service to include a map clarifying this matter on remand.³⁷¹

V. CONCLUSION

After years of litigation and agency review, this decision has moved the Rock Creek Mine project one step closer to fruition. It appears the necessary changes can be made to the planning and review documents on remand, and Phase I of the mine project could begin within the next few years.

³⁶⁷ *Id.* at *92.

³⁶⁸ *Id.* at *93.

³⁶⁹ *Id.*

³⁷⁰ *Id.* at **97-98.

³⁷¹ *Id.*