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# Save Our Cabinets v. U. S. Fish & Wildlife Service

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*Save Our Cabinets v. U. S. Fish & Wildlife Service*, \_\_\_ F. Supp. 2d \_\_\_, 2017 U.S. Dist. LEXIS 82252, 2017 WL 2345667 (D. Mont. May 30, 2017)

**Jaclyn R. Van Natta**

The latest sequel in Montana mining cases, *Save Our Cabinets v. U.S. Fish & Wildlife Service*, concerns the U.S. Fish & Wildlife Service's and the U.S. Forest Service's approval of the Montanore Mining Project in the Kootenai National Forest, and its potential effects on two of Montana's endangered species. Agreeing with the plaintiffs, the court held the mining project would jeopardize the continued existence of both the bull trout and grizzly bear species, and that approval of the Project violated the ESA. The court held the U.S. Forest Service's approval of the mining project arbitrary and capricious, leaving the wilderness area untrammelled.

## **II. INTRODUCTION**

The plaintiffs in this case were Save Our Cabinets, Earthworks, and Defenders of Wildlife (collectively "Plaintiffs").<sup>1</sup> The defendants were the U.S. Fish and Wildlife Service ("FWS") and U.S. Forest Service ("USFS") (collectively "Federal Defendants").<sup>2</sup> Montanore Minerals Corporation ("Montanore") intervened as a defendant.<sup>3</sup> In *Save Our Cabinets v. United States Fish & Wildlife Service*, Plaintiffs challenged Federal Defendants' March 2014 Biological Opinion and the 2016 Record of Decision regarding the Montanore Mine Project ("Project").<sup>4</sup> Plaintiffs argued that Federal Defendants' determination, that the Project would not jeopardize bull trout, grizzly bears, or their habitats, violated the ESA on six separate bases.<sup>5</sup> The United States District Court for the District of Montana granted the Plaintiffs' motion for summary judgment on all but one of the asserted claims.<sup>6</sup>

## **II. FACTUAL & PROCEDURAL BACKGROUND**

The Project is "an underground copper and silver mine in the Cabinet Mountains Wilderness Area ("Wilderness") in the Kootenai National Forest."<sup>7</sup> Starting in 2006, Montanore sought authorization from the USFS to begin operating the Project.<sup>8</sup> The FWS released its Biological

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1. *Save Our Cabinets v. U. S. Fish & Wildlife Service*, \_\_\_ F. Supp. 2d \_\_\_, 2017 U.S. Dist. LEXIS 82252 (D. Mont. May 30, 2017).

2. *Id.* at \*1-2.

3. *Id.* at \*2.

4. *Id.*

5. *Id.* at \*7-8.

6. *Id.* at \*2.

7. *Id.* at \*3.

8. *Id.* at \*6.

Opinion in March of 2014 and the USFS issued a Record of Decision on February 12, 2016, approving the Project.<sup>9</sup>

The court foresaw that the Project’s negative effects would most significantly impact grizzly bears and bull trout,<sup>10</sup> listed as threatened species in 1975<sup>11</sup> and 1999<sup>12</sup>, respectively. The 2014 Biological Opinion concluded that “[t]he Project [was] expected to adversely affect bull trout local populations and critical habitat” by decreasing bull trout distribution, limiting their reproductive success, and reducing their overall population numbers.<sup>13</sup> Further, “the [FWS] concluded that the Project [was] not likely to jeopardize the continued existence of the listed entity of grizzly bears.”<sup>14</sup>

There are six grizzly bear recovery zones in the lower-48 states, one of which is the Cabinet-Yaak Ecosystem and site of the Project.<sup>15</sup> “In the entire Cabinet Yaak recovery area in the last 30 years there have been a total of 65 known grizzly bear mortalities . . . 49 were human caused.”<sup>16</sup> Plaintiffs took issue when the FWS concluded that only one grizzly bear would perish due to the Project “over the 30-year life of the mine.”<sup>17</sup> Plaintiffs argued that the same mitigation plans the FWS relied on to predict grizzly bear mortality were already in place, and bear mortality was currently at “slightly more than 2 bears per year.”<sup>18</sup>

Within the United States, the coterminous bull trout population is divided into five interim recovery units.<sup>19</sup> These interim recovery units are necessary to maintain bull trout distribution and genetic and phenotype diversity “to ensure the species’ resilience to changing environmental conditions.”<sup>20</sup> “Bull trout critical habitat is divided into 32 critical habitat units, each of which encompasses one or more core areas.”<sup>21</sup> A core area “includes a group of one or more local bull trout populations that, collectively, represents a biological functioning population of bull trout and is the best unit to consider for the purposes of recovery planning and risk analysis.”<sup>22</sup>

The Montanore Project falls within “the Columbia River interim recovery unit and affects two of the unit’s 90 core areas: the Kootenai River and the Lower Clark Fork River.”<sup>23</sup> Of the eight local populations in the Kootenai River, three are affected by the Project: Libby Creek, West

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9. *Id.* at \*7-8.

10. *Id.* at \*8.

11. *Id.* at \*56.

12. *Id.* at \*12.

13. *Id.* at \*13.

14. *Id.* at \*56.

15. *Id.* at \*55.

16. *Id.* at \*59.

17. *Id.* at \*57.

18. *Id.* at \*58.

19. *Id.* at \*42-43.

20. *Id.* at \*19.

21. *Id.* at \*42.

22. *Id.* at \*18.

23. *Id.* at \*19.

Fisher Creek, and Bear Creek.<sup>24</sup> Of the fourteen local populations affected in the Lower Clark Fork River, two are affected: Rock Creek and the East Fork Bull River.<sup>25</sup> “The [FWS] found the Project [would] permanently reduce the functional ability of critical habitat to satisfy bull trout conservation needs . . . to a significant degree” but “because the affected areas represent a fraction of critical habitat across the Columbia River interim recovery unit,” the viability of the bull trout populations in question would not be at risk.<sup>26</sup>

The 2014 Biological Opinion concluded that the Project would have adverse effects on bull trout by reducing “numbers, distribution, and reproduction of bull trout in local area streams.”<sup>27</sup> Libby Creek, Rock Creek, and East Fork Bull River were expected to be the most effected by the Project.<sup>28</sup> However, after analyzing core area populations, the FWS concluded that the Project’s impacts would likely be isolated, and have no real implications on survival and recovery of the species, as a whole.<sup>29</sup> Plaintiffs found several miscorrelations between Federal Defendants’ findings and their approval of the Project.<sup>30</sup>

### III. ANALYSIS

The court articulated that findings deemed “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law” by a reviewing court shall be held unlawful, and set aside.<sup>31</sup> Under the ESA, federal agencies are required “to afford priority to the declared national policy of saving endangered species.”<sup>32</sup> The FWS issued a biological opinion “using the best scientific and commercial data available” to determine whether the Project would “jeopardize the survival” of bull trout and grizzly bears and whether the Project would “destroy or adversely modify” the species’ critical habitat.<sup>33</sup> Plaintiffs challenged the Federal Defendants’ actions on six separate counts.

#### A. *No-Jeopardy Determination (Count 1)*

Unlike in *Save Our Cabinets*, “[i]n *Rock Creek II*, [the] court concluded that the [FWS] met its ESA obligations both in terms of bull trout critical habitat and the agency’s no-jeopardy determination.”<sup>34</sup> The

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24. *Id.* at \*43.

25. *Id.*

26. *Id.* at \*43-44.

27. *Id.* at \*13.

28. *Id.*

29. *Id.* at \*15.

30. *Id.*

31. *Id.* at \*8-9.

32. *Id.*

33. *Id.* at \*10-11 (citing 16 U.S.C. §§ 1532(5)(A), 1533(a)(3)(A), 1536, 1536(a)(2); 50 C.F.R. §§ 402.2, 402.14(g)(4)).

34. *Id.* at \*23.

court concluded that *Rock Creek II* “was distinguishable from the present case in two primary ways: the magnitude of the anticipated negative effects and the importance the agency itself ascribes to the affected populations.”<sup>35</sup> While the bull trout population in *Rock Creek II* was determined to be stable and strong, the local bull trout populations in *Save Our Cabinets* were “functioning at risk or at unacceptable risk.”<sup>36</sup> Due to the “magnitude of the Project’s effects and the self-ascribed importance of the local populations at issue,” the court held that “the agency’s no jeopardy conclusion for bull trout was arbitrary and capricious.”<sup>37</sup>

### B. Critical Habitat (Count II)

Plaintiffs alleged that Federal Defendants failed to consider the status of bull trout critical habitat and the “abundance and diversity” of such habitat required to preserve the species.<sup>38</sup> The FWS relied on its previous conclusions addressed in *Rock Creek II* to show its “analysis was reasonable.”<sup>39</sup> The court concluded that the FWS “adequately considered the serious localized effects of the Project in light of the baseline for bull trout critical habitat,”<sup>40</sup> and “did not attempt to hide the local impacts of the action, but considered them in detail.”<sup>41</sup> Further, the FWS’s Biological Opinion supported these conclusions.<sup>42</sup> The court held in favor of Federal Defendants’ cross-motion as to Count II.

### C. Incidental Take Statement (Count III)

As required by the ESA, the FWS issued an incidental take statement because the Project was not expected to jeopardize bull trout “or destroy or adversely modify critical habitat, but [was] likely to result in incidental take.”<sup>43</sup> The definition of take is “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect a protected species or to attempt to engage in any such conduct.”<sup>44</sup> An incidental take statement establishes acceptable take levels, otherwise known as the “trigger” point; if the “trigger” point is reached, the FWS is required to reinitiate consultation.<sup>45</sup>

Plaintiffs argued that the FWS’s “incidental take statement [was] arbitrary and capricious in that it would not allow the [FWS] to halt the Project and reinitiate consultation” because the Project’s effects would not

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35. *Id.* at \*24.  
 36. *Id.* at \*26.  
 37. *Id.* at \*31.  
 38. *Id.* at \*42.  
 39. *Id.* at \*44-45.  
 40. *Id.* at \*49.  
 41. *Id.* at \*45.  
 42. *Id.* at \*49.  
 43. *Id.* at \*50.  
 44. *Id.*; (citing 16 U.S.C. § 1532(19)).  
 45. *Id.* at \*50

be observed until after the Projects completion.<sup>46</sup> The FWS must “specify the impact of such incidental taking, which may be done numerically, or, where impractical, through a surrogate.”<sup>47</sup> Because “it [was] difficult to estimate how many bull trout [were] in the vicinity of [the] Project . . . the agency used the extent and magnitude of stream flow depletions, warm water flow augmentation, and sediment loading as a surrogate to measure the amount and extent of take.”<sup>48</sup> Despite expecting adverse impacts, the FWS concluded “incidental take [was] not anticipated to be of the magnitude to decrease survival to the extent it would eliminate bull trout all together [*sic*] in any of the affected reaches.”<sup>49</sup>

Plaintiffs did not challenge the FWS’s incidental take statement, but instead: (1) “challenge[d] the agency’s reliance on baseflow reductions because of the uncertainty surrounding the extent of those reductions and the lengthy time period it [would] take for those effects to be known,”<sup>50</sup> and (2) allege[d] that “the incidental take statement [was] arbitrary and capricious in that it would not allow the [FWS] to halt the Project and reinitiate consultation.”<sup>51</sup>

The court concluded that the FWS’s use of a surrogate was not “by itself arbitrary and capricious because the extent of the baseflow reductions [would] not manifest until the Closure and Post-Closure Phases, [but] the Project’s reliance on baseflow reductions does not provide sufficient ‘triggers,’” and therefore it violated the ESA.<sup>52</sup>

#### *D. Grizzly Bears (Count IV)*

Plaintiffs disputed the FWS’s conclusion that the Project’s impact would cause the death of only one grizzly bear.<sup>53</sup> Plaintiffs further asserted that the human-caused mortality mitigation plan put forth by the FWS was arbitrary and capricious for three reasons: (1) per the Biological Opinion, there is “no empirical data available with which to accurately predict the number of grizzly bear mortalities as a result of the proposed mine over the 30-year life of the mine;”<sup>54</sup> (2) no data supported the FWS’s conclusion that “mitigation will prevent the human caused mortality of more than one female grizzly bear over a 30-year period;”<sup>55</sup> and (3) “the [FWS] failed to consider evidence that the planned mitigation measures would be inadequate to offset mortality threats.”<sup>56</sup>

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46. *Id.* at \*53-54.

47. *Id.* at \*51.

48. *Id.*

49. *Id.* at \*50-51.

50. *Id.* at \*51.

51. *Id.* at \*51-52.

52. *Id.* at \*54.

53. *Id.* at \*56.

54. *Id.* at \*57.

55. *Id.*

56. *Id.*

The court sided with Plaintiffs, agreeing that the FWS's determination that only one grizzly bear mortality would be caused by the Project was too heavily dependent on imprecise calculations due to lack of data.<sup>57</sup> Federal Defendants relied too strongly on mitigation plans to reduce bear mortalities, when, as Plaintiffs pointed out, these mitigation plans are already in place, and bear mortality is currently at "slightly more than [two] bears per year."<sup>58</sup>

Here the court sided with Plaintiffs, holding "the agency's no jeopardy determination for grizzly bears [was] arbitrary and capricious" because of its heavy reliance on mitigation measures to off-set the mortality rates from the mine's impacts.<sup>59</sup>

#### *E. Forest Service (Counts V, VI)*

By relying on the FWS's legally flawed Biological Opinion and conclusions to approve the Project, the court concluded the USFS violated the ESA.<sup>60</sup> According to the court, the USFS neglected its "independent obligation to ensure that actions it authorizes, such as the Montanore Project, would not jeopardize listed species or destroy or adversely modify their critical habitat."<sup>61</sup> Finally, the court held that the Forest Service's reliance on flawed Biological Opinions was "insufficient to independently support a no jeopardy determination," and therefore was found to be "arbitrary and capricious in violation of the ESA."<sup>62</sup>

### IV. CONCLUSION

The court in *Save Our Cabinets* held that Federal Defendants violated the APA by relying on flawed Biological Opinions and violated the ESA when they issued the 2016 Record of Decision approving the Project, because the Project would jeopardize the continued existence of both the bull trout and grizzly bear species. This case was noteworthy because it showed that: (1) endangered species have precedent over mining endeavors in Montana's Kootenai National Forest, and (2) under the APA and ESA, recycling Biological Opinions is not best practice. The viability of the species and the magnitude of the Project's effects ultimately determine the outcome on a case by case basis.

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57. *Id.* at \*62-63.

58. *Id.* at \*58.

59. *Id.* at \*66.

60. *Id.* (citing 16 U.S.C. § 1536(a)(2)).

61. *Id.* (citing 16 U.S.C. § 1536(a)(2)).

62. *Id.* at \*67.