

Testimony Before
House Natural Resources Subcommittee on Oversight and Investigations
ESA Consultation Impediments to Economic and Infrastructure Development
March 28, 2017

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Introductory Statement

Chairman Labrador, Ranking Member McEachin and members of the Committee, I would like to sincerely thank you for inviting me to testify before you today on this very important issue. My name is Doug Stiles and I am General Manager for Hecla Montana, a wholly owned subsidiary of Hecla Mining Company. Hecla Mining Company (NYSE: HL) is the oldest precious metals mining company in North America and was established in 1891 in northern Idaho's Silver Valley. We are the United States largest primary silver producer, third largest producer of lead and zinc, and a leading gold producer. We currently have US operations and projects in Alaska, Idaho, Colorado and Nevada and over the past two years completed the acquisition of the proposed Rock Creek and Montanore silver-copper mining projects in Montana.

We appreciate this committee's attention and willingness to listen to various perspectives on how the ESA consultation process is, or in some cases is not, working as intended. Hecla Mining Company, the people who depend upon natural resource extraction to support themselves, and the very species that the ESA was enacted to protect, are encouraged by possible policy changes to improve the consultation process. We firmly believe that improved agency coordination and more efficient permitting processes can ensure the protection of threatened or endangered species and allow responsible natural resource development; these are not mutually exclusive goals. For example, Hecla Mining Company's Greens Creek Mine in Southeast Alaska is located partially within the Admiralty Island National Monument and adjacent to the Kootznoowoo Wilderness Area. The project is home to the largest density of brown bears in North America (ESA threatened grizzly bears in the lower 48) and five species of Pacific salmon. For 30 years, this mine has operated in harmony with, and had little impact on, the natural environment. We understand what it takes to operate in environmentally sensitive areas. It is with this backdrop that I will now describe the ESA consultation process has contributed to the tortuous permitting process that has befallen the proposed Rock Creek and Montanore mining projects in Northwest Montana.

The Rock Creek and Montanore projects have been in the permitting process for more than 30 years. Like our Greens Creek mine, these projects are in an environmentally sensitive area, home to ESA listed species grizzly bears and bull trout. The surface effects of both projects are adjacent to the Cabinet Mountains Wilderness area and partially located on land managed by the US Forest Services (FS), with each project requiring consultation with the Fish and Wildlife Service (FWS) on threatened and endangered species. The consultation processes have been lengthy, topics of litigation and contributed significantly to the long permitting delays experienced with these projects. The case studies on the ESA consultation process from these two projects will be illustrative to the committee and serve to highlight what we see as key consultation issues that, if properly addressed, could not only expedite the permitting process

but also provide greater protection for local communities and the species that the ESA is supposed to protect.

While each project has seen its own unique permitting challenges, the combined permitting experience highlights four key consultation deficiencies.

- **There are no consequences for failure to adhere to the statutory timeline.** The statutory timeframes for completion of formal consultation and issuance of a biological opinion were not met in either of the cases described below.
- **A single individual within the agency with a personal bias or agenda can have an outsized effect on the consultation process.** As highlighted by the Rock Creek experience, the transfer of one biologist resulted in almost a 12-month delay in the consultation process. Other issues regarding individual personnel and specific agendas are evident in the Montanore record and other projects with which I have been involved. The opinion of one person within the agency can drive consultation biases which then require significant time and resources to unwind, if that is even possible.
- **Projects mired in long permitting review timelines can get further saddled with “new information” that triggers renewed ESA consultation and yet further delay.** This issue applies to both ESA consultation and the National Environmental Policy Act (NEPA) permitting process. This is one of the key reasons why the Rock Creek project has been in permitting for over 30 years despite the proposed action not significantly changing and the agencies repeatedly confirming a “not likely to jeopardize” threatened or endangered species finding.
- **The Rock Creek project highlights the damage our litigious permitting process has inflicted.** Near constant litigation combined with the need to review anew all resource areas every time any part of a decision is remanded, only lengthens the process and brings fresh litigation fodder to the table.

Rock Creek – Project Description and Background

The Rock Creek Project (Rock Creek) is a proposed underground copper/silver mine located in Sanders County, Montana. Rock Creek was first proposed by Asarco in 1986 with the filing of a Plan of Operations with the US Forest Service. This disturbance footprint is less than 500 acres with most (300+ acres) occurring on private property located within an existing disturbance and utility corridor.

The ore body lies beneath the Cabinet Mountains Wilderness and was discovered prior to passage of the Wilderness Act of 1964. The Act provides the right to mine valid existing mining claims. The characteristics of the ore body are unique in that the host mineralization is quartzite or, after processing, beach sand. Rock Creek also is unique in that another mine (the Troy Mine) located approximately 14 air miles away within the same ore body, was permitted, constructed, and operated for almost 30 years with no significant environmental impacts. In fact, water quality from the Troy Mine shows no evidence of acidification and the closure plan that was updated and approved by both State and Federal agencies (including the EPA) does not require active water treatment. As with almost any natural resource development project in the US, the Rock Creek project has been opposed by a collection of litigants almost since day

one. The proposed project also has not changed substantially in the 30+year permitting process.

Formal ESA consultation on the Rock Creek mine began in 1998 – almost 20 years ago; however, the project record indicates that interagency communication regarding potential project effects to threatened species began as early as 1986. From this perspective, both the FS and FWS have been looking at the potential impacts to threatened and endangered species at Rock Creek for over 30 years. Given the length of time this project has been under review you may think that the project impacts must be significant. Nothing could be further from the truth. As described above, the mine is underground in a benign ore body with less than 500 acres of total surface disturbance, none of which is within the Wilderness and most is some 3 miles away from the wilderness boundary.

In 2011, the 9th Circuit Court of Appeals reviewed the 2007 biological opinion. In their unanimous decision upholding the FWS decision, the 9th Circuit stated that the mitigation plan was so robust that the Fish and Wildlife Service concluded that it *“would in fact improve conditions over the long-term over the existing conditions, ultimately promoting the recovery of the [local] grizzly bear population.”* Getting to this point; however, required decades of Agency review including numerous delays and litigation – all for a project which has not significantly changed in description since conceptually proposed in 1984 and formally proposed in 1987. A chronology of key ESA-related consultation and associated litigation follows.

- On July 31, 1998, the FS, as action agency, initiated formal consultation with the FWS regarding effects on grizzly bears and bull trout. On December 19, 2000 (2.5 years later) the FWS issued its first biological opinion for the project. Only after repeated requests from the company to the Montana congressional delegation, State agencies, and FWS leadership did the FWS provide the staff and resources necessary to complete the initial biological opinion. Per historical documentation, at least 12 months of this delay can be attributed to the transfer of one FWS employee, the biologist leading the effort, and the lack of FWS urgency in replacing that one individual. In the case of the Rock Creek project, the statutory ESA requirement for a 90-day consultation period was ignored.
- On May 9, 2003, the FWS issued a new biological opinion resulting from threatened litigation which concluded no jeopardy opinions for grizzly bear and bull trout. The grizzly bear biological opinion included a mitigation plan which required Rock Creek to acquire 2,450 acres of FWS identified mitigation land to compensate for project impacts, among other substantial mitigation measures. At this point, consultation had been underway for almost 5 years without having seen the inside of a courtroom.
- On July 10, 2003, the same collection of litigants who threatened to sue in 2001 again filed suit against the FWS. This time; however, the FWS chose to defend their work and the matter proceeded to the US District Court for Montana. On March 28, 2005, the court set aside and remanded the 2003 BO back to the FWS for reconsideration.
- On October 11, 2006, the FWS re-issued a biological opinion based on further consideration in accordance with the 2005 court remand and considering “new information” that became available since the previous 2003 biological opinion was issued. In other words, the FWS not only responded to issues raised by the court in the

2005 remand, but they also included any “new information” that may have been found since the 2003 biological opinion was issued – a consistent and chronic cause of permitting delays under both NEPA and the ESA.

- On September 2007, the FWS issued a supplemental biological opinion which reiterated the previous “no jeopardy” opinions and concluded that formal consultation was not required.
- On March 26, 2010, the US District Court upheld the FWS biological opinion while remanding portions of the EIS back to the FS for reconsideration. Plaintiffs subsequently appealed the to the 9th Circuit Court of Appeals.
- On November 16, 2011, the 9th Circuit unanimously upheld the District Court decision affirming the 2007opinion. After 3 biological opinions, 1 supplemental biological opinion, and 5 legal challenges (including one trip to the 9th Circuit which stated that grizzly bears are better off with the proposed mining project), not only did the conclusions not change, but the FWS consultation history is not yet complete.
- On February 15, 2017, the FWS again initiated formal consultation on the Rock Creek project because of “new information” and an expansion of bull trout critical habitat that happened in 2010. Both the “new information” and expansion of critical habitat resulted from the lengthy permitting timeframes associated with project. Because the last supplemental biological opinion was completed in 2007 – 10 years ago – without a Record of Decision, Rock Creek is forced to undergo again another round of formal consultation and new or supplemental biological opinion for reasons related mostly to the length of time it has taken the Agencies to complete project permitting.

The latest round of ESA consultation resulted from a supplemental EIS process the FS began to address the District Court remand back in 2010. In that 2010 ruling, the court found only 4 relatively minor issues that the FS were instructed to address. However, because the EIS was last completed in 2001, the FS decided it was necessary to update the impact assessment of all key resource areas. As one can imagine, technology and rules had changed during the preceding 10 years which has resulted in a supplemental EIS taking over 6 years – it began in 2011 and is ongoing today - longer than most initial EIS’s in spite of the fact that updated modeling (required only because of technological advances in computer modeling) showed less impacts to ground water quantity than the original EIS. This highlights one of the key issues with the permitting/litigation /permitting cycle prevalent in almost all natural resource projects today – even when projects have been assessed, updating impact assessments for no other reason than the passage of time frequently result in extended permitting timeframes and fresh litigation fodder.

Montanore – Project Description and Background

The Montanore Project (Montanore) also is located in Northwest Montana approximately five air miles from Rock Creek within the same, benign geological formation. Also like Rock Creek, Montanore is a proposed underground copper/silver mine with limited surface footprint and has been in the permitting process for decades. Project permitting has taken many regulatory turns resulting not from changes to the project’s Proposed Action, but from changes in the position of the Agencies with respect to how impact analyses should proceed. While I

understand the focus of this hearing is on the ESA consultation process, I would like to review some of the NEPA history and decisions made by the FS - the ESA action agency.

The permitting process for the Montanore project began in 1989. In that year, Noranda (project proponent) obtained an exploration license from the State of Montana to conduct surface disturbance activities on 18 acres of private property and construct underground exploration facilities. Work commenced soon after obtaining the exploration license and included the construction of limited buildings and approximately 14,000 feet of an underground exploration tunnel. Construction ceased in 1991; however, project permitting efforts continued.

In 1993, the FS issued a Record of Decision approving further exploration, construction, operation, and reclamation of the full mining project. **To summarize, by the end of 1993, Noranda had received all key permits necessary to fully develop the Montanore mine,** they had completed surface disturbance on 18 acres of private property and they had developed approximately 14,000 feet of an underground exploration tunnel. For reasons not exactly known, Noranda stopped project development in 1993 and let many of the acquired permits expire. In 2002, Noranda notified the USFS that it was relinquishing its “authorization to operate” (1993 Record of Decision) the Montanore Project.

- In January, 2005 – only 3 years after the operating permits were relinquished – new owners of the Montanore Project submitted plans to both the FS and Montana DEQ to restart exploration activities that had been halted in 1991. In early August 2006, the FS determined that a road use permit, and associated NEPA, would be needed to re-initiate exploration activities on private property. The FS determined that an Environmental Assessment (EA) would be appropriate for the requested road use permit. The decision to complete an EA on just the exploration activities precipitated initial FWS ESA consultation, which is chronicled below.
- On August 9, 2006, the FS began informal consultation with the FWS on the pending Montanore project. Following several meetings between the two agencies to discuss the project, the FS submitted a biological assessment (BA) to the FWS.
- On October 16, 2006, the FS requested concurrence from the FWS with their findings of “not likely to adversely affect” either grizzly bear.
- On May 4, 2007, the FWS initiates formal consultation with the FS on the Montanore project as the FWS did not agree with the initial findings of the BA despite several meetings between the two agencies from August to October. In correspondence to the Forest Supervisor, FWS states that a final biological opinion is due “*135 days later on September 16, 2007*”.
- On September 28, 2007, the FWS submitted a draft biological opinion to the FS which found “not likely to jeopardize the continued existence of grizzly bear” – the same conclusion reached by the FS one year earlier. At this point, the opinion covered only the first phase of the Montanore Project which evaluated activities occurring on previously disturbed private property.
- On December 14, 2007, the FWS submitted a second draft biological opinion which continued to find “not likely to jeopardize the continued existence of grizzly bear”.

- On May 23, 2008, the FWS submitted a third draft biological opinion which continued to find “not likely to jeopardize the continued existence of grizzly bear”.
- Sometime in 2008, the FS determined that the entire Montanore mining project was a “connected action”, and the best NEPA approach was to complete a new EIS on the entire Montanore project – exploration, mine construction, operation, and reclamation. Recall that an EIS and associated Record of Decision was completed in 1993 on this very same project. This decision by the FS led to a stoppage of FWS consultation work following the May, 2008 biological opinion pending release of a draft EIS.
- In May 2009, informal consultation was initiated with FWS comments on the Draft EIS.
- Between May 2009 and July 2011, at least 8 meetings and associated correspondence transpired between the agencies as the FS consulted with the FWS in preparation of its biological assessment (BA) which would kick-off the formal consultation process.
- On July 5, 2011, the FS provided the FWS with a BA and requested formal consultation on the Montanore project.
- On February 17, 2012 (7 months later) the FWS determined that the BA supplied by the FS was inadequate, despite over two years of coordination with the FS in preparation of the BA.
- On February 25, 2013, after at least 7 additional meetings between the agencies, the FWS accepted the BA and began formal consultation.
- On March 31, 2014, the FWS released the final biological opinion for the Montanore Project, almost 5 years since the beginning of information consultation AFTER completing a biological opinion on part of the project from 2006 – 2008.

The regulatory processes described above have been complicated, expensive, and time consuming. The companies involved with these permitting efforts have spent millions of dollars and invested countless hours to permit these two projects as have the lead Federal agencies.

Key Issues from Rock Creek and Montanore ESA Consultation

At this point, it is worth summarizing the key issues identified above as impediments to the Rock Creek and Montanore ESA consultation processes.

1. Although the ESA contains statutory timeframes for completion of formal consultation and issuance of a biological opinion, they were not met in either of the cases described above. There are no consequences to the agency for failure to adhere to the statutory timeline. Both the ESA consultation and NEPA processes need defined timelines with consequences for not adhering to those timelines. The consultation processes endured by our projects have spanned decades.
2. Individual technical staff within the FWS can have an outsized effect on the consultation process as highlighted by the Rock Creek experience, where the transfer of one biologist resulted in almost a 12-month delay in the consultation process. In both projects, the FWS came to the same conclusions as the FS in determining no jeopardy, but it required years of further review to get to that point. In none of these processes were State agencies or project proponents, who have strong scientific expertise and are required to implement certain stipulations, involved in any meaningful way. States possess broad trustee and police powers over fish, wildlife and plants and their habitats. Unless

preempted by Federal authorities, States possess primary authority and responsibility for protection and management of fish wildlife and plants and their habitats.

3. The Rock Creek project highlights an issue for not only ESA consultation but NEPA permitting as well: the requirement to incorporate “new information” identified during an active permitting process. The Rock Creek project has been in permitting for over 30 years and in great part this is due to the repeated consultation conducted under the ESA because of “new information”. Nevertheless, the conclusion of these assessments has not changed nor has the proposed project. Arguably, the only change over the course of the 30-year permitting process has been the passage of time.
4. The Rock Creek project highlights the extreme economic damage that our litigious permitting process has inflicted. A study by SNL Metals (2016)¹ shows that every 7 to 10-year delay in project permitting decreases the net present value of a project by over 30%. Near constant litigation with existing incentives to litigate combined with the need to review anew all resource areas every time any part of a decision is remanded by a court only lengthens the process and brings fresh litigation fodder to the table.

Policy Considerations

To address the issues highlighted above, we present the following recommended policy changes that we believe would significantly reduce impediments to economic and infrastructure development for the Committee’s consideration.

Reform the Equal Access to Justice Act

The one area that would have the greatest overall impact on improving and streamlining the permitting process is legal reform. While we present other recommendations for policy changes, almost every permitting challenge encountered is either directly or indirectly the result of litigation. The Rock Creek and Montanore case studies demonstrably illustrate how ESA process and litigation has been a detriment to both economic development and the species that the ESA is supposed to protect. A key driver to this litigation has been the Equal Access to Justice Act (Act). The Act was originally intended to present small business owners and individuals access to the court system, but has been abused by non-profit organizations pursuing procedural litigation on emotional issues in return for excessive attorney’s fees in cases totally disconnected from the Act’s original purposes. The Act has been fuel for the fire to grind to a halt federal agency decision making, wear out project proponents, and reduce much needed economic development. But the costs to the government for such litigation go beyond award of legal fees, and include staff resources in preparing and supporting litigation, re-doing environmental impact statements or ESA biological opinion, etc. A 2011 study found

¹SNL Metals & Mining (2015). *Permitting, Economic Value and Mining in the United States*. Prepared for the National Mining Association.

that for every \$1.00 paid out in fee award, the Department of Justice spend \$1.83 in personnel and administrative costs². The costs to the action agency were not included in this estimate.

While reforms to the Act have been proposed over the years, now is time to again consider changes to return the Act to its original intent. Congress should consider:

- Clarify direct and personal monetary interest in the adjudication,
- Reduced exemptions to the statutory cap on attorney's fees, and
- Revise the net worth cap.

These measures would put a serious damper on how much EAJA pays out in cases while retaining a reasonable fee for most cases, including most EAJA uses such as small business, Social Security and Veteran's Claims claimants.

More Reliance on the Action Agency Biological Assessment Conclusions

In many cases, the Action Agency's (the Forest Service in our case) initial biological assessments reach the same conclusion as the biological opinion well in advance. Like State wildlife agencies, the Action Agencies possess technical expertise with local, on-the-ground experience. In the Montanore example, the record indicates that significant consultation delay occurred because individuals with the FWS held firm beliefs the project should not move forward even though the FS experts had reached a different conclusion. More reliance on those Action Agency conclusions and expertise in concert with State inclusion would significantly shorten the consultation process and help to avoid situations where one person's beliefs impede timely project decision making. To remove impediments to economic and infrastructure development, Congress should consider:

- Requiring the consultation agency to follow the conclusions derived from biological assessments. In cases where the consultation agency may not agree with biological assessment findings, the consultation agency should be required to defend their position through a peer panel which includes the Action Agency and State experts.

Streamline Re-initiation of Consultation

In cases where an Agency has completed either a consultation process or NEPA assessment, any changes that must be assessed should only focus on those specific items that have changed. There should be statutory or regulatory prohibition on having to assess anew the entire project. In the cases described above, decades have been spent assessing impacts already evaluated and revisiting settled decisions simply because of the passage of time and Agency fear of litigation.

In the cases described above, continued project permitting delays have negatively impacted both the rural communities of northwest Montana, but also the threatened species themselves.

²U.S Gov't Accounting Office, GAO-11-650 (2011). *Environmental Litigation; Cases Against EPA and Associated Costs Over Time*. Cited in: Baier, Lowell E, (2012). *Reforming the Equal Access to Justice Act, Journal of Legislation: Vol 38: Iss. 1, Article 1*. Available at <http://scholarship.law.nd.edu/jleg/vol38/iss1/1>

Recall that both the FWS and 9th circuit stated that the Rock Creek project grizzly bear mitigation plan is, in fact, a recovery plan that improves prospects for the species. To streamline the permitting process, Congress should consider:

- Requiring in statute that once project impacts have been assessed through the issuance of a final NEPA document (EIS, EA) and/or biological opinion, future assessments due to legal remand or other administrative process need only look at those specific items that were remanded or otherwise administratively modified. Changes to the proposed action by the project proponent would not be subject to this exclusion.
- Reviews due only to the “passage of time” or “fear of litigation” should not be valid reasons for further Agency analysis.

Inclusion of States in the ESA Consultation Process

In most cases, State wildlife agencies are charged with implementing ESA mitigation plans but have no meaningful input into the consultation process. The State wildlife agencies also have much more local, on the ground knowledge than their sister Federal counterparts; however, current ESA statute minimizes the involvement of State agencies in the consultation process. This not only leaves key consultation expediting resources off the table, but removes a valuable source of local species knowledge and mitigation plan implementation expertise. Congress could consider:

- Requiring the consultation agencies expand their policy on State cooperation beyond the current scope. Presently, State involvement during consultation is limited to providing the consultation agency with an “information update” prior to preparation of the final biological opinion.

Improve the Overall Permitting Process

Project permitting delays result from more than just the ESA consultation process. Meaningful permitting reform requires a holistic review of key permitting processes followed by the implementation of policy or legislation designed to strip system inefficiencies and incentivize timely completion of agency work. To that end, Congress should consider:

- Swift passage of *The National Strategic and Critical Minerals Production Act of 2017* which was introduced earlier this year by Representative Mark Amodei (R-NV) in partnership with Senator Dean Heller (R-NV).”
- Action Agency line officer annual performance review should include timely processing and implementation of 1) mining projects and 2) adherence to statutory process completion deadlines. Neither are currently included in annual review of FS line officers or district ranger performance assessments when considering promotion or raises.

Conclusion

Removing permitting impediments to economic and infrastructure development starts with litigation reform and continues through to streamlining the various agency permitting processes. As demonstrated by the Rock Creek and Montanore projects, natural resource project permitting in the US is a broken system with devastating economic and species impacts. Hecla Mining Company and many other responsible miner operators continue to demonstrate

that mining is compatible with the environment – we’ve been doing for 30 years at our Greens Creek mine in Alaska and it was clearly demonstrated by the Troy Mine in NW Montana.

Society demands responsible stewardship of our natural resources and those demands are often carried over to project approval requirements – as demonstrated by the grizzly bear recovery program requirement for the Rock Creek project. In many cases, project approval would improve conditions for a threatened species while also bringing much needed economic development to rural America. Instead of providing these multifaceted societal benefits, these projects are mired in a 30-year + permitting process. It is long past time to fix the broken natural resource permitting process.