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Lawsuit against PolyMet land exchange raises potent issue of taxpayers' rights

By [Ron Meador](#) | 02/07/17



Photo by William M. Steigerwaldt for the U.S. Forest Service

An appraisal valued the Forest Service land at \$3.658 million. WaterLegacy thinks the value could be much higher.

WaterLegacy's challenge to the PolyMet land exchange, prerequisite for its NorthMet copper/nickel mine near Babbitt.

Ho-hum, right? Another incremental step in PolyMet Mining Corp.'s forward march brings another environmentalist effort to roll boulders into its path. Not the first challenge to the land exchange since the U.S. Forest Service **gave it final approval** on Jan. 9. Not even a challenge on the overall merits of the exchange — just some procedural points.

situation. Here are three:

- Rather than raising intricate, science-based environmental objections to the land exchange — as the Center for Biological Diversity has said it will do, in asserting that the trade authorizes destruction of habitat important to protected species — WaterLegacy is stating a problem that can be measured in dollars. Better yet, taxpayer dollars.

It asks whether the Forest Service did its duty to the public financial interest by getting fair market value for the portion of the Superior National Forest it is trading away. Then it makes a powerful, easily grasped and documented case that the land may be worth many times the \$550 per acre value set by the agency.

- The result not only looks like a “sweetheart deal” for PolyMet, in the words of WaterLegacy’s attorney, Paula Maccabee, but raises a potential problem that the mining company can’t solve by simply writing a bigger check. If a court agrees with Maccabee, both the Forest Service and the company are back at Square One on the land exchange — and PolyMet’s way forward could be really tough.

Under the law, the feds can trade away the acreage PolyMet wants for private land that aligns with its management objectives for the Superior, but they can’t simply sell it. If a court agrees that the Forest Service undervalued its land, PolyMet would have to find more private land — maybe a *lot* more — with willing sellers, and in just the right locations, to put on the scales.

- Finally, Maccabee makes a strong case that all information about the financial aspects of the land exchange — from the instructions given to the appraisers through the final valuations — were shielded from public view in a process that is supposed to be open to public review and comment.

Maccabee’s court filings say she made freedom-of-information requests for appraisal-related materials beginning in December 2012; in response, she says, the Forest Service either rejected the requests or produced documents so heavily redacted that only tables of contents and the like remained. That did not change until the appraisals were finally produced last October — about 10 months after the last deadline for public comment on the land exchange.

Maccabee told me she knows of no one else who gained access to the appraisal information during the process, either. In an article in his Timberjay last week, [Marshall Helmberger](#) reported that he, too, filed FOI requests about two years ago and has yet to receive a reply.

An important result of those decisions, Maccabee said, is that there is no way the outcome can be challenged except in a lawsuit.

“Going to court is always a last resort, especially for a small nonprofit like WaterLegacy,” she said. “It’s expensive, it’s time-consuming, it’s difficult. But in this matter there is no post-decisional review available under the Administrative Procedures Act. With some agencies, there is an opportunity to appeal a final decision within the agency. Not here.”

Agency, company keep mum

I asked the Forest Service last week if it wished to discuss these allegations, or to explain how such a central aspect of the proposed exchange was kept secret during a public-comment process in which officials claim to take considerable pride, but because the matter is in litigation the agency declined to talk with me.

I also asked Bruce Richardson, who fields press queries for PolyMet, if I was correct in my surmise that if a court should send the land-exchange back for a do-over, PolyMet would potentially have to come up with additional land to make a new trade work. He declined to answer that question, but offered a comment I quote in full:

We have confidence in the Forest Service appraisals, which followed well-established federal guidelines by the U.S. Department of Justice. After years of review and analysis, the Forest Service has determined the land exchange is in the best public interest.

And there Richardson has put his finger on what will likely be the key point in a court review:

- Did the Forest Service follow established procedure sufficiently closely to be granted judicial deference in its decision? Or, as the lawsuit says, did it simply fail to consider the public's interest in getting fair market value for the federal land being traded away?

Maccabee told me there is precious little case law on agencies' responsibilities, in land exchanges, under the Federal Land Management Policy Act, although an audit by the General Accounting Office (now Government Accountability Office) some years back faulted a number of deals that gave away public land at bargain rates.

But in the court of public opinion, I think she is making a strong case with points like these:

- Although the 6,650 contiguous acres of Forest Service land would become the locus of what PolyMet promises will be an exceptionally valuable mining operation, they were appraised for its value as land used for timber harvest (as were the 6,690 acres of private land, in four parcels, that PolyMet is putting up in trade). This fails to meet the law's requirement that land be appraised at its "highest and best use."
- The eventual price of \$550 per acre (\$3.658 million in total) was well below values even the service's appraiser cited for sales of comparable properties, which ranged from \$624 to \$2,556 per acre, and averaged \$1,654. (It was also below the \$615 per acre valuation of the land PolyMet would trade, so the service intends to make a \$425,000 cash equalization to PolyMet as part of the trade.)
- In the opinion of an independent appraiser retained by WaterLegacy to review his work, the Forest Service's appraiser should have looked well beyond the timber-sale comparables he cited to actual purchases of forest land by mining companies; the review points to examples of companies paying premiums of 85 percent to 500 percent above prices paid by ordinary purchasers.

For example, in Aitkin County, "Kennecott Exploration Company has been actively acquiring certain properties for potential copper mining. Similar to the other groupings, Kennecott, on average, paid \$3,885 per acre compared to \$1,149 per acre for land purchased by private non-mining buyers."

Overall, the review finds that an appraisal based on timber values “is not reasonable and results in an opinion that is not credible.”

For her part, Maccabee declined to estimate where a reasonable appraisal would set the valuation.

We have to take this a step at a time. The law requires equal exchange, it requires valuation according to highest and most profitable use, it requires comparable sales based on private market data.

Today's issue is that this appraisal doesn't conform to the uniform appraisal standards and doesn't comply with the law. So we need a new appraisal, and what will be the consequences is kind of tomorrow's issue.

Larger principles at stake

I will say I am sympathetic to the Forest Service, probably more so than Maccabee, on one point in this land-exchange tangle: the agency’s stated opinion that something much larger and important to the American public than the NorthMet project is at stake in this deal.

The land PolyMet wants came into federal ownership in the early 1900s under the Weeks Act, which enabled the government to buy private land to expand the national forests, even if the mineral rights had already been severed and sold separately. And that’s the case here — PolyMet controls the mineral rights, but can’t get to the ore because the Weeks Act prohibits surface mining in a national forest.

So the Forest Service has worried that if PolyMet were to sue the government for access to its minerals, the Weeks Act itself might come under attack and be invalidated by the courts. Certainly a bad outcome.

On the other hand, if this land exchange passes muster as is, despite the government's apparently valuing its land at what seems to be a giveaway price — well, that’s not such a great precedent to be setting for federal land protection, either.

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For those interested in seeing more details of the case, we've downloaded from the federal court file PDFs of [Maccabee's complaint](#), the [Forest Service's final appraisal](#), and the [review of that appraisal obtained by Maccabee from another appraiser](#).