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SENT ELECTRONICALLY

Chip Weber, Acting Forest Supervisor (comments-eastern-superior@fs.fed.us)

Attn: School Trust Land Exchange

Superior National Forest

8901 Grand Avenue Place

Duluth, MN 55808

Re: School Trust Land Exchange Scoping - Superior National Forest

Dear Acting Forest Supervisor Weber:

These comments are submitted on behalf of WaterLegacy, a Minnesota non-profit organization formed to protect Minnesota water resources and the communities that rely on them. Our comments address the two decisions to be made for this project, according to the School Trust Land Exchange Scoping Package Superior National Forest (Scoping Package, p. 7): Which actions, if any, should be approved? Will the project have a significant impact that requires preparation of an Environmental Impact Statement?

I. OVERVIEW

WaterLegacy strongly opposes the United States Forest Service (Forest Service) proposal to turn over up to 39,000 acres of the Superior National Forest to the State of Minnesota in exchange for 30,000 acres of State School Trust lands within the Boundary Waters Canoe Area Wilderness (BWCAW), which proposal has been called the "School Trust Land Exchange Project" (Land Exchange). WaterLegacy also opposes any future exchange of State School Trust lands within the BWCAW for federal lands in the Superior National Forest, which potential exchange for a total of 83,000 total acres of State lands within the BWCAW could place at least that many acres of Superior National Forest at risk of exploitation by the State of Minnesota for mining, intensive and unsustainable logging, and loss of public lands. We strongly believe that the land exchange action proposed by the Forest Service in its Scoping Package should not be approved.

WaterLegacy opposes the current proposed Land Exchange and any future land exchange of Superior National Forest lands with School Trust lands in the BWCAW because by purpose, intent, underlying Minnesota laws and state policies, the former federal lands will be managed, exploited and sold to maximize revenue. Any Superior National Forest land changing from federal to state ownership will be subject to different management practices and reasonably foreseeable changes in land use. Tens of thousands of acres of federal land would be subject to potentially significant environmental impacts from surface mining, unsustainable logging, and sale to private parties. The Land Exchange and resulting changes in management and land use would directly conflict with the goals for the Superior National Forest, including the Forest Service stated goals for the project, and would adversely affect environmental values, recreation, tourism, tribal rights, and human health.

In addition, the management and land use changes from any transfer of Superior National Forest lands to the Minnesota School Trust that lead WaterLegacy to oppose the exchange require preparation of an environmental impact statement (EIS). When reasonably foreseeable indirect and cumulative effects of changes in ownership, management and land use are considered, it is clear that the increased exploitation of up to 39,000 acres of federal forest lands has the potential to result significant impacts on the environment. The vulnerability of the federal lands to adverse environmental impacts is underscored by the fact that approximately 7,800 acres (19%) of the federal parcels fall within the Recreation Use in a Scenic Landscape and Semi-Primitive Motorized Recreation Management Areas. (Scoping Package, p. 3) Although the Scoping Package does not disclose the number of acres of “high” and “outstanding” biodiversity areas in the Superior National Forest that would be impacted by the Land Exchange, review, other commenters have estimated that approximately 6,400 acres of high or outstanding biodiversity would be transferred from federal forest stewardship to state usage to maximize revenue.

## II. DISCUSSION

### 1. Federal Law Requires the Forest Service to Analyze Reasonably Foreseeable Direct and Indirect Consequences of the Land Exchange, Including Changes in Management and Land Use.

The National Environmental Policy Act (NEPA) requires preparation of an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c). Governing regulations adopted by the U.S. Forest Service direct, “If the responsible official determines, based on scoping, that the proposed action may have a significant environmental effect, prepare an EIS.” 36 C.F.R. § 220.6(c). Sale or exchange of land with a state agency is only entitled to diminished review if “resulting land uses remain essentially the same” because the agency has “similar resource management objectives and practices.” 36 C.F.R. § 220.6(d)(7)(ii). This exception does not apply to the proposed Land Exchange.

NEPA regulations adopted by the Council on Environmental Quality (CEQ) require an analysis of “the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented.” 40 C.F.R. §1501.16. This analysis shall pertain both to direct effects and their significant and indirect effects and their significance. *Id.* Both direct and indirect effects under NEPA are explicitly defined:

*Effects* include: (a) Direct effects, which are caused by the action and occur at the same time and place. (b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems. 40 C.F.R. §1508.8.

Case law applying these regulations requires that the Forest Service complete an environmental impact statement (EIS) for the proposed Land Exchange due to the indirect as well as direct effects of a change from federal to state ownership of forest lands.

First, federal agencies are *not* entitled to assume that land use doesn't change when federal land is proposed for an exchange. In *Center for Biological Diversity v. U.S. Department of the Interior*, 623 F.3d 633 (9<sup>th</sup> Cir. 2010), the Bureau of Land Management (BLM) prepared an EIS, but assumed that there was no need to evaluate the comparative environmental consequences of mining because they would be the same whether the land exchange or the no action alternative was chosen. *Id.* at 640. The Court of Appeals emphasized that under federal ownership a Mine Plan of Operation (MPO) would be required, a management requirement that would change if the exchange was approved.

The Court held, "The BLM's assumption in the FEIS that the environmental consequences of the land exchange alternative and the no action alternative would be the same was arbitrary and capricious." *Id.* at 642. The Court explained:

[B]ased on the information now reasonably available, the BLM must make a meaningful comparison of the environmental consequences of Asarco's likely mining operations with and without the requirement that MPOs be prepared by Asarco and approved by the BLM -- that is, with and without the proposed exchange. In the absence of such a comparison in the FEIS, the BLM has not conducted the "hard look" that NEPA requires. Rather, the BLM has averted its eyes from what is in plain view before it.

We therefore conclude that the BLM acted arbitrarily and capriciously, and violated NEPA, by failing to take a "hard look" at the likely environmental consequences of the land exchange. *Id.* at 646.

The Forest Service must evaluate both the direct and indirect effects of the change from federal ownership to a Minnesota School Trust management regime. *Siskiyou Regional Educ. Project v. United States Forest Service*, 1995 U.S. Dist. LEXIS 20716 (D. Or. September 20, 1995), *slip op.* 33-34 ("The Forest Service is required to consider direct and indirect effects when applying NEPA.")

Indirect effects of a federal action on the environment include the effects of development under a range of reasonable development forecasts. *See e.g. Davis v. Coleman*, 521 F.2d 661(9<sup>th</sup> Cir. 1975); *Mullin v. Skinner*, 756 F. Supp. 904 (E.D. N. Car. 1990). Failure to prepare an EIS analyzing the impact upon the environmental resources of the federal lands and surrounding lands in the event development occurs is "arbitrary and capricious." *Greer Coalition, Inc. v. United States Forest Serv.*, 2007 U.S. Dist. LEXIS 15283, 65 ERC (BNA) 1658, *slip op.* 17-21 (D. Ariz., February 28, 2007)

The EPA has stated, "reasonably foreseeable future actions need to be considered even if they are not specific proposals." Where the future actions are private in nature, planning documents should be analyzed if they are available, but "In all of these cases, the best information should be used to develop scenarios that predict which future actions might reasonably be expected as a

result of the proposal.<sup>1</sup>

2. Under Minnesota Law, Policy and Practice, it is Virtually Certain that the Transfer of Superior National Forest lands to State School Trust Ownership will Alter Management and Land Use.

The Scoping Package implies that there is a benefit to the environment from securing federal ownership of Minnesota School Trust lands held within the BWCAW. (Scoping Package, p. 5). However, this statement is misleading. School Trust lands within the BWCAW are, have been and will continue to be managed as wilderness under the BWCA Wilderness Act irrespective of the proposed action. The Scoping Package admits, "Because of the location of the nonfederal parcels, they have not been actively managed by the State and as such take on the characteristics of the surrounding wilderness. . . The wilderness resource is managed to retain its enduring value, for uses and activities compatible with wilderness character." (*Id.* p. 3)

However, changes in law, management and practices if Superior National Forest lands were to be transferred to Minnesota School Trust ownership virtually guarantee that there would be significant adverse environmental impacts to these federal lands.

#### Federal Mining Restrictions

First, legal restrictions (the Weeks Act of 1911) that prevent open-pit mining on Superior National Forest land would be removed. Corresponding provisions of the Superior National Forest Plan Resource Management Plan ("Forest Plan") would be eliminated, including the standard, "Minerals S-UB-6: Federal mineral exploration and development activities that disturb the surface are not permitted." (Forest Plan, Ch. 3, p. 3-29).

#### Federal Management for Multiple Uses

Next, federal laws and policies protecting Superior National Forest lands for multiple uses, including recreation, protection of habitat and biodiversity, sustainable forestry, hunting and fishing would be lost. The Forest Plan's overarching principle, as required by the Multiple-Use Sustained Yield Act and the National Forest Management Act, "requires that National Forest System land be managed for a variety of uses on a sustained basis to ensure in perpetuity a continued supply of goods and services to the American people." (Forest Plan, Ch. 1, p. 1-5). Under this authority, the Forest Plan states, "The Forest Service will manage the Superior National Forest for multiple uses. (Forest Plan, Principle 4, p. 1-9).

The Forest Plan contains many specific management principles and practices to protect natural resources that would be lost should the proposed Land Exchange be approved, including but not limited to the following:

- "Management activities do not reduce existing quality of surface or groundwater or impair designated uses of surface and ground water." (Forest Plan D-WS-4, p. 2-10)
- "Improve and protect watershed conditions to provide the water quality, water quantity, and soil productivity necessary to support ecological functions and intended beneficial

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<sup>1</sup> EPA, Consideration Of Cumulative Impacts in NEPA Review of Documents, EPA 315-R-99-002/May 1999, p. 13, <http://www.epa.gov/compliance/resources/policies/nepa/cumulative.pdf> last visited May 10, 2015.

water uses.” (Forest Plan, O-WS-1, p. 2-12)

- “Wetland impacts will be avoided whenever possible.” (Forest Plan, G-WS-13, p. 2-15)
- “Wetlands will be managed to prevent the reduction of their water quality, fish and wildlife habitat, and aesthetic values. Management actions will not reduce water quality within a wetland, or upstream or downstream of a wetland, unless restoration of natural conditions is the primary goal of the activity.” (Forest Plan, G-WS-15, p. 2-15)
- “[M]aintain the characteristics of mature or older native upland forest vegetation communities and promote the maintenance or development of interior forest habitat conditions.” (Forest Plan, O-VG-17, p. 2-24)
- “Contribute to the conservation and recovery of federally-listed, proposed, or candidate threatened and endangered species and the habitats upon which these species depend.” (Forest Plan, D-WL-3(c), p. 2-27)
- “In mature or older upland forest types managed to maintain large patches (>300 acres of all types) manage patches to maintain the characteristics of mature or older native upland forest vegetation communities and promote the maintenance or development of interior forest habitat conditions.” (Forest Plan, O-VG-17, p. 2-24)
- “Provide structure, composition, connectivity, function, and spatial patterns of aquatic and terrestrial habitats that maintain or restore opportunities for species to interact, disperse, and migrate and to reduce negative impacts associated with forest habitat fragmentation.” (Forest Plan, D-WL-3(h), p. 2-28)
- “Maintain, protect, or improve habitat for all threatened and endangered species by emphasizing and working toward the goals and objectives of federal recovery plans and management direction in the Forest Plan. (Forest Plan, O-WL-4, p. 2-29)
- “Maintain and, where necessary and feasible, restore sufficient habitat connectivity to reduce mortality related to roads and to allow lynx to disperse within and between LAUs [lynx analysis units] and between LAUs and Boundary Waters Canoe Area Refugium on NFS land.” (Forest Plan, O-WL-11, p. 2-29)
- Objective: “Maintain, protect, or improve habitat for all sensitive species.” (Forest Plan, O-WL-18, p. 2-31)

### Federal Obligations to Tribes

The Superior National Forest is located on lands ceded to the United States under the Treaty of 1854 between the United States government and Chippewa Tribes<sup>2</sup>. Federal trust obligations to tribes based on this Treaty and pertinent federal laws, regulations and provisions of the Superior National Forest Resource Management Plan would be lost through the transfer of ownership to the Minnesota School Trust.

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<sup>2</sup> Tribal rights to hunt and fish in ceded territories are retained to the Tribes in Article 11, of 1854 Treaty with the Chippewa. See <http://www.glifwc.org/TreatyRights/TreatyChippewa09301854Print.pdf> last visited May 10, 2015.

Federal regulations governing the Forest Service recognize federal trust obligations. “The Forest Service shares in the federal government's overall trust responsibility for federally recognized American Indian tribes.” 36 C.F.R. § 219.15(a)

The Federal Land Policy and Management Act (FLPMA) requires that the Secretary of Agriculture must “coordinate land use plans for lands in the National Forest System with the land use planning and management programs of and for Indian Tribes.” 43 U.S.C. §1712(b).

In addition, the National Historic Preservation Act (NHPA) and regulations implementing NHPA require tribal consultation to determine the nature and existence of historic properties, including those of traditional religious and cultural importance. 36 C.F.R. § 800.2(c)(2)(ii)(A). Federal agencies are obligated to gather information from Indian Tribes to assist in identifying properties, including those located off tribal lands, which may be of religious and cultural significance and eligible for the National Register. 36 C.F.R. § 800.4(a)(4). Among other responsibilities, a federal agency is required to use “good faith effort to carry out appropriate identification efforts,” which may include background research, consultation and oral history interviews as well as field sampling. 36 C.F.R. § 800.4 (b)(1).

Courts have invalidated federal actions where tribes were not consulted to identify historic properties of significance and mitigate any adverse impacts on such historic properties. *Muckleshoot Indian Tribe v. United States Forest Serv.*, 177 F.3d 800 (9<sup>th</sup> Cir. 1999). Violation of statutory procedural requirements in itself may violate the minimum fiduciary obligation to tribes. *Pit River Tribe v. United States Forest Serv.*, 469 F.3d 768, 787-788 (9<sup>th</sup> Cir. 2006).

The Forest Service Manual also requires protection of treaty rights as property rights. “The Forest Service must administer lands subject to off-reservation treaty rights in a manner that protects Tribes’ rights and interests in the resources reserved under treaty.” F.S.M. §1563.01(d). The Forest Service Manual further states, paraphrasing case law, “Treaty rights must be interpreted as the Tribes understood them at the time of treaty signing and ambiguous treaty provisions are to be interpreted in the Tribe’s favor. Treaty rights are held by the sovereign Tribes who signed the treaties.” F.S.M. §1563.01d.

The Superior National Forest Resource Management Plan contains specific provisions requiring that forest management sustain tribal culture and minimize adverse impacts on tribal economic well-being and usufructuary rights, as follows:

- “Lands within the Forest serve to help sustain American Indians’ way of life, cultural integrity, social cohesion, and economic well-being.” (Forest Plan, Ch. 2, p. 2-37)
- “Superior National Forest facilitates the exercise of the right to hunt, fish and gather as retained by Ojibwe whose homelands were subject to treaty in 1854 and 1866 (10 Stat. 1109 and 14 Stat. 765). Ongoing opportunities for such use and constraints necessary for resource protection are determined in consultation with the following Ojibwe Bands: Fond du Lac, Grand Portage, and Bois Forte.” (Forest Plan, Ch. 2, p. 2-37)
- “Forest management activities will be conducted in a manner to minimize impacts to the ability of Tribal members to hunt, fish, and gather plants and animals on Forest Service administered lands. (Forest Plan, Ch. 2, p. 2-38)

### Federal Restrictions on Sale

Perhaps the most striking protections of the Superior National Forest that would be lost were the proposed Land Exchange to be approved are the restrictions on sale and exchange of lands under the Federal Land Policy and Management Act (FLPMA). Federal law would not permit sale of Superior National Forest lands to a private buyer without congressional action to specifically approve the sale. 43 U.S.C. §1713(c). Even when a land exchange is proposed, FLPMA prohibits cash payments to equalize the value of non-federal lands in excess of 25 percent. 43 U.S.C. §1716(b). FLPMA also forbids land exchanges unless the "public interest will be well served." 43 U.S.C. §1716(a). Federal regulations under the FLPMA require that determining the public interest is not merely to maximize revenue; natural resource objectives must be considered including, "protection of fish and wildlife habitats, cultural resources, watersheds, and wilderness and aesthetic values." 36 C.F.R. §254.3(b)(1).

### Minnesota School Trust Lands Management

Unlike federal provisions applicable to the Superior National Forest, no state law precludes any type of mining or intensive forestry practices on School Trust lands or requires that such lands be managed for a variety of uses on a sustained basis. In fact, under the Minnesota Constitution, Minnesota statutes, management practices adopted by the Minnesota Department of Natural Resources (Minnesota DNR) and the stated intentions of state officials promoting the proposed Land Exchange, the resource management objectives and practices for School Trust lands are to generate maximum revenue, irrespective of natural resources values and recreation goals. The Minnesota School Trust management objectives and practices are strikingly dissimilar from those of the Forest Service for the Superior National Forest.

The Minnesota Constitution requires that proceeds from School Trust lands be deposited into the Permanent School fund. The Constitution requires that funds be invested to secure a "maximum return." (Minnesota Constitution; Article XI; Section 8). Although this provision might have been interpreted by the State to require a maximum return only on invested funds, Minnesota has chosen a much broader interpretation to maximize revenue in both exchange and management of school trust land.

The Minnesota statute enacted to expedite the exchange of a portion of state-owned lands located within the BWCAW prioritizes maximizing revenue; "An exchange of state land under this section shall give priority to exchanges that provide the most opportunity for revenue generation for the permanent school fund." Minn. Stat. §92.80, Subd. 3.

The Minnesota DNR has interpreted governing law this to mean that School Trust lands themselves shall be managed to generate maximum revenue. The Commissioner has stated that managing School Trust lands for maximum revenue gain takes precedence over natural resource and recreation management goals:

*"Under the law, the primary management priority for School Trust lands is to maximize their long term economic return... in those circumstances where there is an unresolvable conflict between maximizing long term economic return and protecting natural resources and recreation values, the DNR must give precedence to long term economic return in its management duties on School Trust lands." (MN DNR; Operational Order #121, Feb. 23, 2012)*

Proponents of the proposed Land Exchange have made no secret of their intentions regarding management and land use changes should the exchange be approved. In an April 30, 2015 article in Business North, Frank Ongaro, executive director of Mining Minnesota, was quoted as saying “an exchange is better than a land sale from an industry standard” because the exchange would leave the Forest Service out of the equation and allow the DNR to manage state minerals. Mr. Ongaro said Mining Minnesota approves of the land exchange, “to provide opportunities for further lands being managed by the state as we look at long-term mineral exploration and future projects.”<sup>3</sup>

Exchange proponent State Rep. David Dill (DFL-Crane Lake) promotes the following management plan for forest lands that would be obtained in the exchange: “What are we supposed to do, hold land so people can walk on it and see a partridge? No – we are going to cut the trees on it, and we should mine it.” *Id.* This statement is consistent with the management plan Rep. Dill proposed in 2012, discussing the land exchange proposal at the Minnesota Legislature, “we should mine, log and lease the hell out of that land that we get in the change.”<sup>4</sup>

In practice, maximization of revenue on Minnesota School Trust timber lands typically results in short rotation, single species forest management contrary to the ecosystem-based management practiced by the Superior National Forest. The Minnesota DNR manages School Trust forest lands differently than other DNR forest lands, which are managed using ecological principles in order to qualify for Forest Stewardship Council (FSC) certification. The aggressive management practices for School Trust forest lands have resulted in challenges to FSC certification of forest products from Minnesota state forests.<sup>5</sup>

#### Minnesota School Trust Lands Sale to Private Parties

Even more dramatic than the differences between federal and state management of public forest lands is the long-term vulnerability of the forest land as a public resources if the Land Exchange is approved. Should the Exchange be approved, limits on sale of federal lands under the Federal Land Policy and Management Act (FLPMA) would no longer apply, with no similar State constraint on sale of public lands. Were Superior National Forest lands to be exchanged for land within the BWCAW and placed under Minnesota School Trust ownership and management, it is reasonably foreseeable that the majority of those lands could be lost to public access and public use through sale to private parties.

The Minnesota DNR website<sup>6</sup> explains that when Minnesota became a State in 1858, lands in every township were granted to Minnesota from the federal government to support schools. This grant ultimately resulted in 2.9 million acres being given to the state for the use of the public schools. The federal government made two other federal land grants to Minnesota in the 1860s; totaling 8,106,503 acres of school trust lands. However, over the years, most of this land was sold off to generate revenue for public schools. Today, the Minnesota DNR explains, only 2,515,146 acres of school trust lands remain of the original 8,106,503 acres, *a reduction in public acreage of 69 percent.*

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<sup>3</sup> Kate Jackson, *DNR and USFS move forward with proposed land exchange*, Business North April 30, 2015, <http://www.businessnorth.com/exclusives.asp?RID=6690>, last visited May 10, 2015.

<sup>4</sup> Recording at <http://www.waterlegacy.org/sites/default/files/Media/DavidDillMineLogLeasetheHell.mp3>, last visited May 10, 2015.

<sup>5</sup> Personal communication with forester Matthew Tyler on May 12, 2015.

<sup>6</sup> MDNR, School Trust Lands, [http://dnr.state.mn.us/aboutdnr/school\\_land/index.html](http://dnr.state.mn.us/aboutdnr/school_land/index.html), last visited May 10, 2015.

It is reasonably foreseeable, in fact virtually certain, that if the Land Exchange were to be approved, lands transferred to the Minnesota School Trust would be managed for intensive mining and logging. Lands that are now public forest lands could be sold off to mining companies and other private developers, eliminating public and tribal access, interfering with treaty rights, and impairing tourism and recreation economies as well as degrading water quality, habitats and natural resource values

3. The Proposed Land Exchange is Inconsistent with Forest Service Policies, the Stated Goals for the Project, and Federal Responsibilities to Tribes.

An exchange of federal land may only be completed after a determination is made “that the public interest will be well served.” 36 C.F.R. §254.3(b). Among other findings, the public interest determination must include a specific finding that “The intended use of the conveyed Federal land will not substantially conflict with established management objectives on adjacent Federal lands, including Indian Trust lands.” 36 C.F.R. §254.3(b)(2)(ii). The Forest Service Handbook also states that an exchange should be rejected unless “the intended use of the conveyed Federal land would not substantially conflict with established management objectives on adjacent Federal lands, including Indian trust lands.” F.S.H. 5409.13, § 33.41b.

A federal land exchange that is inconsistent with forest resource management plans should be rejected pursuant to 36 C.F.R. §254.3(f), which states, “The authorized officer shall consider only those exchange proposals that are consistent with land and resource management plans.” As discussed in section 2 above, Minnesota’s intended use of the federal lands for mining and maximum revenue, including potential sale of the federal lands is inconsistent with the management objectives of adjacent Superior National Forest lands.

The Scoping Package suggests that the proposed exchange meets five of the seven U.S.D.A. Forest Service Strategic Plan FY 2007-2012 Goals. (Scoping Package, p. 5). But this statement is disingenuous.

Contrary to the Scoping Package assertion, the proposed Land Exchange would not meet Goal Two to “Provide and sustain benefits to the American people.” (*Id.*) Transfer of federal lands to the Minnesota School Trust program may result in maximum revenue in the short term, but the State’s history of selling off nearly 70 percent of School Trust lands suggests that any benefits from the Land Exchange would not be sustained over time.

There is nothing in the proposed Action that would promote Goal Three, “Conserve Open Space. . . Maintain the environmental, social, and economic benefits of forest and grasslands by reducing and mitigating their conversion to other uses.” (*Id.*) Minnesota’s clearly stated intent to develop mines, including surface mines, on the federal lands, is directly contrary to this goal, as is the state policy of selling public lands to private developers to generate revenue.<sup>7</sup>

Similarly, both the legal requirements and management objectives of the Minnesota DNR with respect to School Trust lands demonstrate that the outcome of the proposed Action is likely to undermine, rather than support Goal Four, to “Sustain and Enhance Outdoor Recreation

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<sup>7</sup> See MDNR, School Trust Lands, Generating Revenue, [http://dnr.state.mn.us/aboutdnr/school\\_land/revenue.html](http://dnr.state.mn.us/aboutdnr/school_land/revenue.html) last visited May 10, 2015.

Opportunities” and ensure that a “variety of high-quality outdoor recreational opportunities on the Nation’s forests and grasslands are available to the public.” (*Id.*) Although the Scoping Package suggests, “Acquiring lands within the BWCAW enhances outdoor recreation experiences by eliminating the threat of conversion to uses incompatible with wilderness values,” (*Id.*) there is no such threat. However, there is a real and foreseeable risk upon transfer of federal lands to State School Trust management that outdoor recreation will be degraded through mining projects and the sale of public lands to private entities.

Consolidation of federal ownership within the BWCAW may be an administrative benefit of the proposed Action, as suggested by Goal Five. However, federal purchase of state inholdings within the BWCAW would provide the same benefit. As explained previously, there is no current risk that nonfederal lands in the BWCAW will be managed for uses inconsistent with wilderness values, so the alleged benefit from removing this risk is illusory.

Finally, there is no indication that the proposed Land Exchange would improve the way in which urban America is engaged with Forest Service programs in the BWCAW. On the other hand encouraging mineral extraction and maximum revenue production in Superior National Forest lands transferred to the State may reduce the engagement and access of urban citizens to the “long-term environmental, social, economic’ and other types of benefits provided by the Forest Service,” which is the outcome sought under Goal Six. (*Id.*, p. 6)

The benefits and harms of the proposed Action and their relationship to applicable laws, policies, plans and goals for the United States Forest Service can only be rigorously evaluated after an EIS is prepared that considers both the change in management practices and the impacts on the natural and human environment that would result from the proposed Land Exchange.

4. An Environmental Impact Statement is Required to Analyze Potentially Significant Environmental Impacts of the Land Exchange on the Natural and Human Environment.

The Scoping Package provides virtually no information regarding the affected environment and the changes to that affected environment that are reasonably foreseeable should the Land Exchange be approved.

As explained in section 2 of these comments, State School Trust lands management and practices are markedly divergent from federal law, management and practices for the Superior National Forest. As a result of these differences in law, policy, management and practices, the proposed Land Exchange would foreseeably increase mining uses, including surface mining; intensify logging practices and result in transfer of public lands to private ownership for industrial uses and other development.

Specific analysis is required to determine the nature of Superior National Forest resources that would be impacted by the change in ownership, legal regime, management and practices. A detailed environmental impact statement (EIS) analysis is needed to determine the degree to which the proposed Land Exchange would decrease biodiversity, affect endangered sensitive species, reduce old growth forests, destroy wetlands, pollute air, surface water and drinking water, impair public access for recreation and access for the exercise of tribal usufructuary rights, adversely affect local economies reliant on recreation and tourism, impair human health, increase

global climate change and disproportionately impact environmental justice communities. Some important information required for this analysis is summarized below:

Mining. The Forest Service School Trust Land Exchange materials available to the public (Land Exchange Public Record)<sup>8</sup> provide no mineral character analysis for the Superior National Forest lands proposed to be released to the State for mineral exploitation. Missing information includes the nature and potential of ferrous, non-ferrous and other minerals located on the various parcels of federal land, the history of exploration for minerals on the federal parcels, and the proximity of federal parcels to mineral findings, exploration or mining company ownership on nearby or adjacent land.

Logging. The Land Exchange Public Record is devoid of analysis of timber and wildlife management potential for Superior National Forest lands proposed to be released to the State for intensive timber harvesting, including existing inventory data detailing tree composition (basal area by species), age, and productivity (e.g. site index), and locations of old growth forests. The Record does not indicate which federal parcels have been previously harvested and under what practices, does not disclose the rotation ages and silvicultural systems used to manage maturing stands, and does not identify where federal parcels may be adjacent to lands on which more intensive logging has taken place and/or adjacent to lands owned by private logging concerns.

Biodiversity and Climate Change. The Land Exchange Public Record does not disclose which federal lands are classified as “high” or “outstanding” biodiversity areas. The Record does not identify which areas provide critical habitat for rare, endangered, or threatened species or species of concern. The Record doesn’t even provide basic information identifying the ecosystem classification of the federal land that would be transferred to School Trust management and control, such as the type and nature of wetlands and uplands. Such information is needed to identify potential ecological services valuation impacts resulting from the change in management of Superior National Forest lands.

Recreation and Access. Information in the Land Exchange Public Record about the nature of recreation uses and resources that would be affected by the proposed exchange is meager. Although the Scoping Package summary generally states that approximately 7,800 acres (19%) of the federal parcels fall within the Recreation Use in a Scenic Landscape and Semi-Primitive Motorized Recreation Management Areas (Scoping Package, p. 3), the Record doesn’t identify where those uses are located or whether they are in areas more or less likely to be subject to mining, development or private sale. The Record does not disclose where hiking and recreational vehicle trails, trout streams, scenic areas or areas most highly valued for outdoor recreation and tourism are located on the federal lands.

Water Quality. The Land Exchange Public Record provides no information from which it could be determined which surface water and groundwater resources would be affected by the change in management if the Land Exchange is approved. The Record does not identify ecologically significant surface waters, such as headwaters, wooded wetlands, and outstanding resource value waters on or downstream of the federal parcels. The Record also

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<sup>8</sup> U.S.D.A. Forest Service, School Trust Land Exchange, <http://www.fs.usda.gov/project/?project=45943>, last visited May 10, 2015.

does not identify location of drinking water resources, such as drinking water wells or municipal water supplies, on or downstream of the federal land where a change in management practices could affect the quality of drinking water and impact human health.

Tribal and Subsistence Resources. The Land Exchange Public Record provides no information on tribal historical and cultural resources located on the federal lands. The Record neither identifies species of plants and animals on the federal lands known to be significant to tribes, nor the subsistence resources downstream of the federal lands used by tribal members, such as stands of natural wild rice and fishing rivers, streams and lakes, that may be impaired by management changes on the federal parcels. By providing no information on mineral resources or adjacent developments, the Record does not identify where sale of lands by the State to private parties would be most likely, impairing tribal as well as general public access to those lands.

Human Health and Environmental Justice. The information gaps described above also have implications for human health and environmental justice. Impairment of biodiversity, recreation, public access, local tourism economies, water quality, and subsistence resources may all adversely affect human health and have the potential for a disparate adverse impact on tribal and low-income communities.

An EIS must also evaluate the cumulative impacts of the proposed Land Exchange and other actions within the Superior National Forest and affected watersheds and airsheds. A cumulative impact is “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” 40 C.F.R. §1508.7.

The Forest Service is required to account for the specific quantitative and cumulative effects of the proposed land exchange and impacts to forests. *Muckleshoot Indian Tribe v. United States Forest Service*, 177 F.3d 800, 809-810 (9th Cir. 1999)(failure to account for the specific and cumulative impacts of a land exchange with a timber company violated NEPA); *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Management*, 387 F.3d 989 (9th Cir. 2004)(failure to provide quantitative and detailed analysis of cumulative impacts on forests resulting from timber sales violated NEPA).

Although federal agencies have considerable discretion to define the scope of NEPA review, “connected, cumulative, and similar actions must be considered together” to prevent an agency from dividing a project into multiple actions that collectively have a substantial impact on the environment. *Native Ecosystems Council v. Dombeck*, 304 F. 3d 886, 894 (9th Cir. 2002) Federal regulations require that “two or more agency actions must be discussed in the same impact statement where they are ‘connected’ or ‘cumulative’ actions.” 40 C.F.R. §1508.25.

The Scoping Package supports EIS analysis of the potential environmental impacts of future federal land exchange proposals as well as federal purchase options for the remaining 53,000 acres of School Trust inholdings in the BWCAW as a connected action. It is acknowledged that the current Land Exchange proposal is only the first phase of a larger action: “*The initial phase of the project* would exchange one-third of state-offered lands in the BWCAW, approximately

30,000 acres, for an equal value of federal lands to be selected from a pool of approximately 39,074.65 acres.” (Scoping Package, p. 1, emphasis added)

#### CONCLUSION - WATERLEGACY LAND EXCHANGE SCOPING RECOMMENDATIONS

1. The United States Forest Service should reject the proposed Land Exchange and any future exchange of Superior National Forest lands for School Trust lands within the BWCAW.
2. The United State Forest Service should prepare an Environmental Impact Statement (EIS) prior to the proposed Land Exchange.
3. The EIS for the proposed Land Exchange should analyze the environmental impacts of the following Actions:
  - A. The “No Action” alternative.
  - B. Federal purchase of School Trust lands within the BWCAW, retaining all Superior National Forest lands under federal ownership and management.
  - C. The proposed Action, placing up to 39,000 acres of Superior National Forest lands under the different laws, policies and practices applicable to Minnesota School Trust lands.
4. To assess reasonably foreseeable environmental impacts, the EIS should analyze its environmental impacts of the proposed Land Exchange under variable scenarios, such as the following:
  - A. More Intensive Development: mining of all lands with high or moderate mineral potential, intensive logging of all lands with suitable forest resources, and sale to private parties at 125 percent of Minnesota’s historic sell-off rate.
  - B. Less Intensive Development: mining of 50 percent of all lands with high or moderate mineral potential, intensive logging of 50 percent of lands with suitable forest resources, and sale to private parties at 125 percent of Minnesota’s historic sell-off rate.
5. The EIS for the proposed Land Exchange should analyze cumulative impacts of the proposed Action and other reasonably foreseeable actions, including:
  - A. Historic, existing and proposed ferrous, non-ferrous mining and other mining activities affecting natural resources in affected watersheds and airsheds.
  - B. Historic, existing and proposed logging affecting the Superior National Forest and proximate forest resources.
  - C. Historic, existing and proposed development activities affecting wetlands acreage, type and function as compared to pre-settlement days.
  - D. Historic, existing and proposed development activities affecting tribal resources in the 1854 Treaty ceded territories.
  - E. Historic and proposed land exchanges affecting federal lands in the Lake Superior and Rainy River Basins, including any potential future exchange for 53,000 additional acres of School Trust lands within the BWCAW.

6. The EIS for the proposed Land Exchange should analyze at least the following environmental impacts and propose ways to avoid, minimize and mitigate such impacts:
  - A. Changes in land use and public ownership.
  - B. Impacts on wetlands acreage, type, function and quality.
  - C. Impacts on surface water quality, including wetlands, streams, lakes and rivers.
  - D. Impacts on sensitive or significant surface waters, including trout streams, waters of outstanding resource value, wild rice waters, headwater streams and estuaries.
  - E. Impacts on quality and quantity of groundwater.
  - F. Impacts on residential and municipal sources of drinking water.
  - G. Impacts on chemical contaminants in plants and animals consumed by human beings, including arsenic in wild rice and methylmercury contamination of fish.
  - H. Impacts on areas of high and outstanding biodiversity and special designation areas.
  - I. Impacts on aquatic and terrestrial plant and animal communities, including natural stands of wild rice, old growth and closed canopy forests and wooded wetlands.
  - J. Impacts of land sales, mining, and unsustainable forestry on long-term timber supply.
  - K. Impacts on habitat, critical habitat and wildlife corridors for endangered, threatened, at risk and of concern species.
  - L. Impacts on climate change as a result of energy use for development and from the loss of carbon sequestration.
  - M. Impacts on air quality.
  - N. Noise.
  - O. Impacts to recreation uses, including but not limited to hiking, use of vehicle trails, hunting and fishing, and impacts to scenic values.
  - P. Impacts to tribal and general public access for hunting, fishing, ricing and gathering of other plants.
  - Q. Impacts to local economies based on outdoor recreation and tourism.
  - R. Impacts to tribal historic, cultural, treaty and downstream reservation resources.
  - S. Impacts to environmental health and environmental justice.
  - T. Ecosystem services valuation to quantify impacts.

WaterLegacy appreciates the political pressure for quick action on the proposed Land Exchange irrespective of public opposition and without taking the time to analyze the significant potential environmental impacts of this change in ownership, legal constraints, policies, management and practices. We hope that the Forest Service will reject the Land Exchange.

Should the Forest Service lack sufficient conviction of sufficient evidence at this time to simply disapprove the project, WaterLegacy hopes that the Forest Service's integrity and respect for governing law will result in a rigorous and candid EIS analyzing the direct, indirect and cumulative effects of the proposed Land Exchange of School Trust inholdings in the BWCAW for up to 39,000 acres of federal Superior National Forest lands.

Sincerely yours,



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