UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No.: 0:17-cv-00276 (JNE/LIB)

WATERLEGACY,

Plaintiff,

v.

USDA FOREST SERVICE, THOMAS TIDWELL, in his official capacity as Chief of the USDA Forest Service, and CONSTANCE CUMMINS, in her official capacity as Forest Supervisor of the Superior National Forest,

Defendants.

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

This case involves a proposal by the United States Department of Agriculture Forest Service ("Forest Service") to exchange 6,650 acres of contiguous federal land in the Superior National Forest in east-central St. Louis County, Minnesota for private lands. The stated intent and purpose of this land exchange is to enable PolyMet Mining, Inc. ("PolyMet") to develop Minnesota's first open-pit copper nickel mine. Plaintiff challenges the land exchange under the Administrative Procedures Act ("APA"), the Federal Land Policy and Management Act ("FLPMA"), implementing federal regulations, and National Forest Service directives as an unequal exchange based on an

appraisal that valued the federal lands only for timber investment, rather than for their highest and best use for mining related purposes.

Plaintiff's Motion for Preliminary Injunction requests that this Court preserve the *status quo,* restraining defendants from proceeding to transfer title of the federal lands to PolyMet and preventing any action that would change the management or degrade the character of these National Forest System lands pending resolution of plaintiff's claims.

Plaintiff WaterLegacy is a Minnesota non-profit organization founded to protect Minnesota's water resources, wetlands, wildlife, and habitats and the communities that rely on them, particularly from the threat of copper-nickel mining, also known as sulfide mining. Plaintiff's mission and the interests of its members would be directly affected by the PolyMet land exchange.

It is probable that plaintiff will succeed on the merits. The Forest Service final Record of Decision ("ROD") approving the exchange of Superior National Forest lands to PolyMet for an open-pit mine on lands in the ("PolyMet land exchange" or "PMLE") valued the federal lands at $550 per acre, based on an appraisal that considered only their use for timber investment, not the highest and best use of the lands for mining related purposes.

This appraisal was neither reasonable nor credible, given the intended use of the federal lands for the PolyMet open-pit mine, mining uses in proximity to the federal lands, a mineral report regarding the property's value for minerals, information in the appraisal that recent sales of land to mining companies in Northeastern Minnesota have sold at an average price of $1,645, and other readily available data confirming that

mining companies have paid a substantial premium for land in Northeastern Minnesota's private market. The Forest Service's reliance on this appraisal to undervalue the federal lands for the PolyMet land exchange was arbitrary, capricious, an abuse of discretion and an exceedance of statutory authority under the APA, and would result in an unequal exchange in violation of FLPMA.

Plaintiff and its members would suffer irreparable harm from the transfer of 6,650 acres of Superior National Forest land out of public ownership and changes in the management and character of high biodiversity federal lands, including cutting of mature forests, wildlife habitat destruction, road construction, grading and other construction or pre-construction activities, as well as the potential development of the PolyMet open-pit copper-nickel mine.

The balance of harms weighs in plaintiff's favor. The defendants would suffer no harm from the proposed injunction. Federal lands would continue to be managed in accordance with the Superior National Forest Land and Resources Management Plan and the Forest Service would not have to pay PolyMet the sum of $425,000 currently proposed in the exchange. Unlike the private party in many other land exchange cases, PolyMet would suffer no losses as a result of the proposed injunction. PolyMet has not begun construction and has received no permits to develop an open-pit mine on the federal lands.

The public interest favors plaintiff's request for a preliminary injunction. Since PolyMet has yet to demonstrate its ability to comply with FLPMA, let alone financial assurance or permit requirements, any economic benefits of the PolyMet land exchange

are uncertain. There is a strong public interest in preventing federal agencies from accepting less than fair market value for land they convey. Allowing defendants to transfer Superior National Forest lands to PolyMet before this litigation is resolved would allow irreparable harm to plaintiff and, potentially, never return any benefit to the public.

JURISDICTION AND STANDING

The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 43 U.S.C. § 1710(a)(6) (FLPMA policy on judicial review), and 5 U.S.C § 701-706 (judicial review provisions of the APA). The final Forest Service ROD approving the PMLE is a final action for which there is no other adequate remedy in a court. 5 U.S.C. § 704.

The Forest Service final ROD is a final decision. 36 C.F.R. §254.13(b). Post-decisional administrative appeals are only available to the holder of an authorization, an operator proposing to conduct mineral operations or a solicited applicant for a land exchange, and were not available to plaintiff. 36 C.F.R. §§ 254.13(b); 214.3.[1]

Plaintiff exhausted available pre-decisional remedies, pursuant to 36 C.F.R. Part 218, by filing objections to the Forest Service draft Record of Decision on January 4, 2016. As detailed in the affidavit of Paula Maccabee provided with this Motion, WaterLegacy's objections to the draft ROD included claims that the Forest Service failed

[1] Although 36 C.F.R. §§ 254.13(b), 254.14(b)(6) refer to a 36 C.F.R. part 215 or 36 C.F.R. part 251, subpart C appeal, a general post-decisional appeal process was repealed in Fed. Reg., Vol. 79, No. 147, pp. 44291-44293 (July 31, 2014) and these sections of 36 C.F.R. are now "reserved."

to appraise the federal lands according to their highest and best use or according to the UASFLA and that the Forest Service failed to establish the equal value of the exchange as required under FLPMA and its implementing regulations. Maccabee Affidavit ("Aff.") in Support of Motion, at 1-2, ¶ 1-2.

Plaintiff WaterLegacy has standing to pursue the FLPMA claims that are the subject of this action. WaterLegacy's purpose includes protecting Minnesota waters, wetlands, wildlife, habitat, and forest resources in the Superior National Forest, particularly from the threat of sulfide mining. Maccabee Aff., Docket Document ("Dkt.") 1-5 at 1, ¶ 1. The attached affidavits of Robert Tammen and Rory Scoles demonstrate that plaintiff's members would be directly affected by the PolyMet land exchange. Robert Tammen owns property in a Superior National Forest inholding within 20 miles of the proposed PMLE Superior National Forest federal land, and watches birds and wildlife from his land and other areas of the Superior National Forest near the subject property. Tammen Aff. at 2, ¶ 4-5. Mr. Tammen has enjoyed the aesthetic qualities of the PMLE lands from an aerial view and has canoed and conducted scientific investigations downstream of the subject property. *Id.,* at 2-3, ¶ 7-8.

Rory Scoles works as a wilderness guide, specializing in immersive wilderness experiences that include teaching plant and animal ecology, tracking, hunting, and traditional gear and transportation. Scoles Aff. at 1, ¶ 2. He and his family live one mile outside the Superior National Forest, depending on what they can hunt, fish and gather for the main staples of their diet. *Id*. at 2, ¶ 3. Mr. Scoles fishes, hunts, traps hares, gathers berries and hand harvests and roasts wild rice. *Id.* He hikes, camps, canoes, kayaks, snowshoes, cross-

country skis and guides back-country tours both in the summer and the winter in the Superior National Forest, near the lands that the Forest Service is proposing to exchange in order to allow PolyMet to build an open-pit copper-nickel mine. *Id*.

Mr. Scoles likes to canoe and wade in small rivers and creeks. He has canoed downstream of the proposed PolyMet mine site in the Partridge and St. Louis Rivers, and has portaged and explored a creek to canoe the whole length of the Partridge River. *Id.*, at 2, ¶4. Mr. Scoles has reviewed a map of the PolyMet Area of Potential Effect that was contained in the NorthMet Cultural Landscape Study Final Report. *Id*., at 2, ¶5; Cultural Landscape Photos & Map, Plaintiff's Exhibit ("Pl. Ex.") 5 at 4; foundation provided in Maccabee Aff. in Support of Motion, at 2-3, ¶ 4. Using this map, Mr. Scoles pinpointed where he has been on or near the site proposed for the PolyMet mine and land exchange and determined that on two occasions, he has canoed, hunted grouse and duck, and explored the woods on the proposed PolyMet mine site and the proposed PolyMet land exchange site. Scoles Aff. at 2, ¶5.

Organizations like WaterLegacy " 'can assert the standing of their members,' so long as (1) the individual members would have standing to sue in their own right; (2) the organization's purpose relates to the interests being vindicated; and (3) the claims asserted do not require the participation of individual members." *Sierra Club v. United States Army Corps of Eng'rs*, 645 F. 3d 978, 986 (8th Cir. 2011), *quoting Summers v. Earth Island Inst.,* 555 U.S. 488, 493, 129 S. Ct. 1142, 1149, 173 L. Ed. 2d 1 (2009). Only one plaintiff need show standing to support subject matter jurisdiction. *Sierra Club v. Army Corps, supra,* 645 at 986; *Watt v. Energy Action Educ. Found.,* 454 U.S. 151, 160-162, 102 S. Ct. 205, 70 L.

Ed. 2d 309 (1981); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp*., 429 U.S. 252, 263-64, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977). An association has standing when the interests at stake are germane to the organization's purpose. *Mo. Coalition for the Env't v. FERC*, 544 F. 3d 955, 957 (8th Cir. 2008).

Injury in fact for standing need " 'not be large . . . an identifiable trifle will suffice.' " *Sierra Club v. Army Corps, supra,* 645 at 988, *quoting Sierra Club v. Franklin Cnty. Power of Ill*. 546 F. 3d 918, 925 (7th Cir. 2008). *See also Lafleur v. Whitman*, 300 F. 3d 256, 270 (2nd Cir. 2002); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., Inc*., 73 F. 3d 546, 557 (5th Cir. 1996); *Conservation Council of North Carolina v. Costanzo*, 505 F. 2d 498, 501 (4th Cir. 1974) ("The claimed injury need not be great or substantial; an identifiable trifle, if actual and genuine, gives rise to standing.")

"The recreational or aesthetic enjoyment of federal lands is a legally protected interest, the impairment of which constitutes an actual particularized harm sufficient to create an injury in fact for purposes of standing. *Sierra Club v. Morton*, 405 U.S. 727, 734-735, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972); *Summers v. Earth Island Inst., supra,* 555 U.S. at 494 ("While generalized harm to the forest or the environment will not alone support standing, if that harm in fact affects the recreational or even the mere esthetic interests of the plaintiff, that will suffice."); *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc*., 528 U.S. 167, 181-184, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (Affiants' concerns about effects of discharge within miles of their property affected recreational, aesthetic and economic interests sufficient for standing).

FLPMA's declaration of policy ranks natural resource preservation among its principal goals, requiring that public lands be managed in a manner that will "protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values" and where appropriate, "that will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use." 43 U.S.C. § 1701(a)(8). Injuries of an environmental and aesthetic nature are sufficient to create an injury in fact for FLPMA claims. *Desert Citizens Against Pollution v. Bisson*, 231 F. 3d 1172, 1177 (9th Cir. 2000). *See also National Forest Preservation Group v. Butz*, 485 F. 2d 408, 410 (9th Cir. 1973) (Finding standing under to challenge a pre-FLPMA Forest Service land exchange).

Plaintiff's claims in this matter, like those of other claimants in land exchange cases, are not merely a generalized allegation of loss to taxpayers, but "an effort by land users to ensure appropriate federal guardianship of the public lands which they frequent," establishing plaintiff's standing under Supreme Court precedent. *Desert Citizens, supra*, 231 F. 3d at 1177-78, *citing Sierra Club v. Morton, supra*., 405 U.S. at 734. Plaintiff's claims that an unlawful transfer of land will deprive its members of aesthetic, recreational and other environmental interests in the land are within the "zone of interests" sought to be protected under FLPMA. *Desert Citizens, supra,* 231 F. 3d at 1179. Plaintiff is not required to challenge the PolyMet land exchange on other grounds in order to pursue a claim that FLPMA's equal exchange provisions have not been met. *Id*. at 1180.

Plaintiff seeks to enforce the requirements of FLPMA to protect the separate and concrete interests of its members who would be affected by the Forest Service's failure to comply with FLPMA appraisal and equal exchange requirements. In these papers and the documents previously filed with this Court, plaintiff has demonstrated 1) an injury in fact, 2) a sufficient causal connection between the injury and the conduct complained of, and 3) a likelihood that the injury will be addressed by a favorable decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); *Sierra Club v. U.S. Army Corps of Eng'rs*, *supra*, 645 F. 3d at 985-986.

The burden of causation and redressability is readily met in the challenge to improper agency action. *Iowa League of Cities v. EPA*, 711 F.3d 844, 870-871 (8th Cir. 2013), citing *Lujan*, 504 U.S. at 561-262. Petitioners need not show that the agency would alter the result after proper process, only that "there is some possibility" that the requested relief and remanding to the agency would prompt the agency to reconsider the decision that allegedly harmed the plaintiff's members. *Iowa League of Cities, supra,* 711 F. 2d at 871, *citing Massachusetts v. EPA*, 549 U.S. 497, 518, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007). *See also Am. Farm Bureau Fed'n v. United States EPA,* 836 F 3d 963, 969 (8th Cir. 2016).

A plaintiff challenging federal actions that violate FLPMA "need not establish with absolute certainty that adherence to the required procedures would necessarily change the agency's ultimate decision." *Desert Citizens*, *supra*, 231 F. 3d at 1179. Whether the private party and federal agency would, in fact, negotiate a new exchange after a proper appraisal "is sheer speculation." *Id*. A plaintiff "is not required to speculate as to what the ultimate disposition of the lands will be to establish that the injury will be redressed." *Id.* at 1188. The

Court concluded that an environmental group "has standing to sue to set aside a land exchange that does not fulfill the statutory and regulatory requirements in establishing the value of the federal lands to be lost to the use of its members." *Id*. at 1187-88.

Plaintiff, through its members, can establish individual injury to aesthetic, recreational, scientific, subsistence and economic interests from a final Forest Service action; plaintiff's purpose relates to the interests being vindicated; the claims asserted do not require the participation of individual members; and there is a sufficient causal connection between the requested relief and redress of the harms alleged by plaintiff. Plaintiff's claims and its motion for preliminary relief are properly before this Court.

PRELIMINARY INJUNCTION STANDARDS

The preliminary injunction requested by plaintiff meets this Circuit's test based on the application of four factors: (1) the probability of success on the merits; (2) the threat that the movant will suffer irreparable harm absent the restraining order; (3) the balance of harms; and (4) the effect on the public interest. *Richland/Wilkin Joint Powers Auth. v. U. S. Army Corps of Eng'rs*, 826 F. 3d 1030, 1036 (8th Cir. 2016).

PROBABILITY OF SUCCESS ON THE MERITS

Plaintiff meets the test for probability of success on the merits of its claims. In the Eighth Circuit, the standard of proof that plaintiff must generally meet is the "fair chance of prevailing" standard. *Richland/Wilkin, supra,* 826 F.3d at 1040. This standard is applicable to an agency project authorization, and a plaintiff is only required to meet a

more stringent test when the challenged action involves legislation or administrative rules developed with "the full play of the democratic processes." *Id*. at 1040-1041; *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732-33, 732 n.6 (8th Cir. 2008).

The Forest Service process for valuation of Superior National Forest lands for the PolyMet land exchange did not involve consideration in any open public process. In fact, the appraisal was shrouded in secrecy despite the best efforts of plaintiff. On June 22, 2013, early in the process of review of the PolyMet land exchange, plaintiff sought copies of the Forest Service appraisal under the Freedom of Information Act ("FOIA"). Maccabee Aff., Dkt. 1-5 at 3, ¶5. Plaintiff's FOIA request was denied by the Forest Service on September 16, 2013 and appealed by plaintiff on October 28, 2013. *Id*. No appraisal records were available to plaintiff or to the public during the comment period on the PolyMet draft environmental impact statement and proposed land exchange, which ended on March 13, 2014. *Id*.

More than a year later, on November 12, 2014, the Forest Service responded to plaintiff's FOIA appeal. Claiming exemption from disclosure, the Forest Service withheld 2,398 pages from production. Only 20 pages were produced without redaction, and these were non-substantive pages such as tables of contents. Another 50 partially redacted pages were produced. Due to the deficiencies in production, plaintiff could not determine how the appraisal had been conducted or consult with experts to understand whether the valuation complied with FLPMA and applicable standards. *Id*., at 3, ¶ 6.

Plaintiff continued to seek appraisal records. On July 30, 2015, when other documents reviewed by plaintiff suggested that the Forest Service had finalized an

appraisal for use in evaluating the PMLE, plaintiff filed another FOIA request with the Forest Service requesting a copy of the appraisal. *Id.* at 3, ¶7. On September 9, 2015, the Forest Service responded, again refusing to release appraisal records. Claiming exemption from disclosure, the Forest Service withheld 1,701 of the 1,775 pages responsive to plaintiff's request and redacted much of the substantive information on the few pages produced. *Id.*, at 3-4, ¶ 7. Plaintiff filed an appeal from this Forest Service decision on October 22, 2015, requesting expedited review so that appraisal information would be available prior to January 4, 2016, when the time for public objections to the Forest Service draft Record of Decision would expire. *Id*.

Although the Compass Land Consultants ("CLC") appraisal upon which the PMLE is based was approved by the Forest Service on July 8, 2015, it was not produced by the Forest Service until 10 months after the last opportunity for public objections to its proposed land exchange decision had lapsed. Plaintiff received a copy of the CLC appraisal on or about October 8, 2016. *Id*. at 2, ¶3, at 4, ¶ 7-8.

The Forest Service's withholding of its appraisal for the PolyMet land exchange until long after all public process for the PMLE had ended ensured that the equal valuation concerns which are the subject of plaintiff's complaint could not receive public scrutiny, let alone the full play of the democratic process. This litigation provides the first review of the Forest Service evidence and assumptions in valuing the federal lands.

MERITS OF CLAIMS - VIOLATION OF APA AND FLPMA

Plaintiff has demonstrated a fair chance of prevailing on its ultimate claims that the Forest Service approval the PolyMet land exchange was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and exceeded the authority of the Forest Service under FLPMA, requiring that the exchange be overturned and set aside under the APA. 5 U.S.C. § 706 (2)(A), (C).

The PolyMet land exchange is a proposal to exchange 6,650 contiguous acres of Superior National Forest for 6,690 acres of private lands on 10 non-contiguous parcels. Forest Service ROD, Pl. Ex. 1, Dkt. 1-1 at 10-11, 53, foundation provided in Maccabee Aff., Dkt. 1-5 at 1-2, ¶ 2. All of the federal lands proposed for exchange in the PMLE were purchased for National Forest purposes pursuant to the Act of March 1, 1911, also known as the Weeks Act, 16 U.S.C. § 515, and have Weeks Act status. 16 U.S.C. §521a. Forest Service ROD, Pl. Ex. 1, Dkt. 1-1 at 6. The Forest Service has taken the position that reserved mineral rights on the subject federal lands do not include the right to surface mine as proposed by PolyMet. *Id.* at 5.

In the absence of an exchange, the Forest Service "is not willing or able to authorize such private, surface mining operations on lands of the Superior National Forest due to the inconsistency between National Forest management objectives and PolyMet's intended mining operations." *Id*. The explicit "purpose and need for the land exchange is to eliminate the conflict between PolyMet's desire to surface mine" and Forest Service ownership and management of National Forest Service lands. *Id*.

The Forest Service acknowledges that the PolyMet NorthMet deposit located on the federal lands is part of a known copper-nickel platinum group complex and is the first

site in Minnesota proposed for commercial extraction of non-ferrous metals. According to the ROD, "PolyMet controls 100 percent of the NorthMet ore body through long-term mineral leases. The company proposes to build an open-pit mine to recover these metals." *Id*. at 7.

The Forest Service ROD valued the federal estate at $3,658,000 and proposed to make a cash equalization payment of $425,000 to PolyMet as part of the exchange. *Id*., at 11. This valuation was based on an appraisal performed by William M. Steigerwaldt, Compass Land Consultants, Inc. ("CLC"). The CLC appraisal narrative report for Federal Tract #1 the federal lands proposed to be exchanged in the PMLE is filed as Plaintiff's Exhibit 2, Dkt. 1-2, and foundation is provided in Maccabee Affidavit, Dkt. 1-5 at 2, ¶3. The CLC appraisal, upon which the Forest Service relied for the proposed PMLE, valued the subject federal lands at $550 per acre based only on their highest and best use for "timber investment." Appraisal, Pl. Ex. 2, Dkt.1-2 at 5, 41, pp. 2, 38.

The CLC appraisal upon which the Forest Service relied noted that the subject property is zoned Mining and Minerals, *Id*. at 19, p. 16; is influenced by "its proximity to area iron mines" among other factors *Id*. at 9, p. 6; and is "on the edge of active mining." *Id*. at 11, p. 8. The appraisal noted, "There is local mining activity, and new mine proposals and permit are in progress in this vicinity." *Id*. at 23, p. 20.

The appraisal cited a mineral report prepared for the Forest Service in 2010 and highlighted the compelling mineral potential of the federal property:

> The property sits in an area of platinum group metals (PGM) discovered in 1985. . PolyMet Mining, Inc. has taken the lead in mining efforts and has proposed a surface mine involving rocks of the Partridge River intrusive body. Due to the

> proximity of the subject mineral estate to these discoveries, there is a high mineral potential. The report concludes that the property may have significant value for copper, nickel, platinum group metals, and other minerals. The mineral potential is compelling, and it is recommend by the Bureau of Land Management that the United States reserve the mineral estate for property involved in the proposed land exchange. *Id*. at 18, p.15.

The appraisal acknowledged that the reservation of mineral rights had been interpreted by the Forest Service to indicate, "surface mining is not allowed and subjacent support to the surface is required. Without controlling both the surface and mineral estate, a mining use does not appear feasible." *Id.* at 23, p. 20.

The appraisal identified nine Northeastern Minnesota sales of land to mining companies by private parties from 2008 to 2012, with a price from $624 to $2,556 per acre and an average price of $1,645 per acre. *Id*. at 24, p. 21. The appraisal asserted that "based on the prices paid, many (if not all) of the sales appear to be highly motivated and speculative" and declined to consider these market sales in determining the highest and best use of the subject property or as comparable sales for valuation. *Id*. The appraisal considered no other private sales of land to mining companies or in Northeastern Minnesota to evaluate either the highest and best use of the property or to serve as comparable sales for valuation. *Id*. at 25, p. 22.

The five properties used for sales comparison in the CLC appraisal were all located in Wisconsin and Michigan, and several involved scattered lands and much larger acreage than the subject Minnesota federal property. *Id*. For all of the comparison sales, the "motivation & use" was solely for timber investment. *Id*. The appraisal further

reduced its valuation of the federal lands by applying an income stream approach considering only timber harvest income. *Id.* at 40-41, pp. 37-38.

After receiving the CLC appraisal from the Forest Service in October 2016, plaintiff consulted with a Minnesota highest and best use expert, Jason L. Messner, AIA, to understand the basis of the valuation of the federal lands. Maccabee Aff., Dkt. 1-5 at 4, ¶8. Mr. Messner's Review of an Appraisal Report: Superior National Forest/PolyMet Mining, Inc. ("Messner Appraisal Review") is filed with the Complaint as Plaintiff's Exhibit 4, Dkt. 1-4, and Mr. Messner's affidavit, Dkt. 1-6, provides foundation for this Review.

The Messner Appraisal Review analyzed three groups of recent Northeastern Minnesota land sales by private parties to mining companies. Group 2 of these sales included the mining company land purchases listed in the CLC appraisal. Appraisal, Pl. Ex. 2, Dkt.1-2 at 24, p. 21. In these sales, mining companies paid mean prices 85% above the assessed values of the properties. Messner Appraisal Review, Pl. Ex. 4, Dkt. 1-4 at 6.

The Messner Appraisal Review also analyzed properties purchased by U.S. Steel in the Northeastern Minnesota community of Pineville from 2009 to 2016 for expansion of existing mining uses. In the case of raw land, U.S. Steel paid over a 500% premium above the assessed value, as compared to 22% above the assessed value for a private non-mining purchase. *Id*. Land purchases in Aitkin County by the Kennecott Exploration Company from 2012 to 2016 for *potential* copper mining also demonstrated a premium paid by mining companies. On average, Kennecott paid $3,885 per acre compared to

$1,149 per acre for land purchased by private non-mining buyers, suggesting a premium of over 200% for properties in this area with future mining potential. *Id*.

Mr. Messner cited the Uniform Appraisal Standards for Federal Land Acquisitions ("UASFLA") so-called Unit Rule, which requires that property be valued as a whole, even when ownership of the surface estate and mineral rights is divided. Messner Appraisal Review, Pl. Ex. 4, Dkt. 1-4 at 5. He opined, "There is clear evidence in the marketplace that mining companies are willing to pay a premium for certain properties proximate to their existing operations, or to control land to accommodate further expansion of mining-related activities in northeastern Minnesota." *Id*.

Mr. Messner found that the appraisal upon which the Forest Service relied failed to consider the subject's unique or specific location for mining uses or data from sales to mining companies in Northeastern Minnesota. *Id.* at 6. Thus, its conclusion of highest and best use "is not reasonable or supported by the market, and not in conformity with the UASFLA." *Id*. The Messner Appraisal Review determined,

> As a result the subsequent valuation of the subject property utilizing the sales comparison approach and income approach, based solely on its value for forestry and timber production is not reasonable and results in an opinion of value that is not credible. *Id*.

FLPMA requires that the value of federal and non-federal lands involved in an exchange be of equal market value. The difference in value between federal and non-federal lands cannot exceed 25 percent. 43 U.S.C. §1716(b); *see also* 36 C.F.R. §§ 254.3(c); 254.12(b).

FLPMA mandates that the appraisal standards used by the agencies for land exchanges "reflect nationally recognized appraisal standards, including to the extent appropriate, the Uniform Appraisal Standards for Federal Land Acquisitions." 43 U.S.C. §1716(f)(2). Federal regulations also require that equal value in exchange transactions be developed following the UASFLA. 36 C.F.R. § 254.42(b). An appraiser, in estimating market value, must determine the "highest and best use of the property to be appraised" and "estimate the value of the lands and interests as if in private ownership and available for sale in the open market." 36 C.F.R. § 254.9(b)(i) and (ii). An appraiser must also "Consider the contributory value of any interest in land such as water rights, minerals, or timber, to the extent they are consistent with the highest and best use of the property." 36 C.F.R. § 254.9(b)(iv).

The UASFLA require that lands must be valued at a property's "highest and best use," defined as "The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future." UASFLA, Pl. Ex. 6, §1.4.4, p. 22; §4.2.1.4, p. 96; §4.3, pp. 101-102; § 4.3.1, p. 102; foundation provided in Maccabee Aff. in Support of Motion at 3, ¶ 5. Because most property is adaptable to several uses, the UASFLA clarify "the highest and best use is the physically possible, legally permissible, and financially feasible use that results in the highest value." UASFLA, Pl. Ex. 6, § 4.3.2, p. 113.

The UASFLA Unit Rule requires valuation of the property as a whole, even when the physical components of the property, such as surface estate and mineral rights, are under different ownership. *Id.*, §1.2.7.3.2, p. 16. When land is underlaid with marketable

minerals, the existence of those minerals must be considered in determining the market value of the property. *Id.*, §4.8.1, pp. 178-179.

The UASFLA also specify that an appraisal's opinion of value shall be supported by confirmed sales of comparable or nearly comparable lands having "like optimum uses." *Id.*, § 1.5.1.1, p. 25. In selecting the comparable sales to be used in valuing a given property, "it is fundamental that all sales have the same economic highest and best use as the subject property and that the greatest weight be given to the properties most comparable to the subject property." *Id.*, § 1.5.2.2, p. 26.

In addition to FLPMA and federal regulations, Forest Service directives require that land exchange appraisals conform to the UASFLA and consider all economic uses of the property. Forest Service Manual ("FSM") 5410.3(1)(a), 5410.5; Forest Service Handbook ("FSH") 5409.12, ch. 60 §65.1. The Forest Service Appraisal Handbook states that the "highest and best use" is that reasonable and probable legal use which is most likely to produce the greatest net return. FSH 5409.12, ch. 10 §12.1 ¶ 4. The Handbook directs, "In determining highest and best use, consider highly probable changes in use or demand based on analysis of the market." *Id*.

The Handbook includes anticipation of future uses in valuation: "Value is created by anticipated benefits to be derived in the future. Purchasers who pay speculative prices apply this principle." *Id.*, at ¶6. Further, "In determining the highest and best use the appraiser must consider the uses of similar properties being purchased in the market area." FSH 5409.12, ch. 10 §13.34.

The Handbook also recognizes that "Premiums may be paid for land based on the mere speculation or assumptions of the presence of valuable minerals." FSH 5409.12, ch. 10, §12.22(11). "Any property from which one or more minerals (including oil, gas, and geothermal) could be economically produced may be a mineral property." FSH 5409.12, ch. 20 §23. In addition, "Market value may be recognized based on demonstrated anticipation of new uses, technical mining changes, or perceived potential for the occurrence of a valuable mineral deposit on the property." *Id*.

The Handbook also gives direction on the use of sales comparisons in valuation. "Nearby arm's length transactions, comparable to the land under appraisement, and reasonably current, are the best evidence of market value." Following federal court cases, the sales comparison approach is "normally the best evidence of market value." FSH 5409.12, ch. 60, § 66, Exhibit 03, C-2.2 (b)(3), Part III.

These directives and the UASFLA are consistent with well-settled condemnation case law. Market value of land depends on "just consideration of all the uses for which it is suitable" including the "highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future." *Olson v. United States*, 292 U.S. 246, 255, 54 S. Ct. 704, 78 L. Ed. 1236 (1934). A reasonable buyer will purchase land "with an eye to not only its existing use but to other potential uses as well" so fair value is "not limited to the value of the property as presently used, but includes any additional market value it may command because of the prospects for developing it to the 'highest and best use' for which it is suitable." *United States v. 320.0 Acres of Land*, 605 F.2d 762, 781(5th Cir. 1979). Finally, "the more comparable a sale is,

the more probative it will be of the fair market value." *United States v. 480.00 Acres of Land*, 557 F.3d 1297, 1307 (11th Cir. 2009).

Plaintiff has met its burden to show a fair chance of prevailing on claims that the Forest Service valuation of the subject federal lands purely for timber investment was arbitrary and capricious. A decision is arbitrary or capricious under the APA if

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983).

Under the APA, courts are not obliged to rubberstamp administrative decisions that are inconsistent with statutory language or underlying policy. *Friends of the Boundary Waters Wilderness v. Bosworth,* 437 F. 3d 815, 821 (8th Cir. 2006); *citing NLRB v. Brown*, 380 U.S. 278, 291, 85 S. Ct. 980, 13 L. Ed. 839 (1965). FLPMA unambiguously requires that a federal land exchange must be an equal exchange supported by an appraisal performed in conformity with the UASFLA, 43 U.S.C. §1716(b), (f)(2). The Forest Service was required under FLPMA, federal regulations and Forest Service directives to consider the mineral interests in the property, whether or not under separate ownership, the intended and highest and most profitable use of the property for mining purposes, and the sales of the most comparable properties in the open market, namely recent sales of Northeastern Minnesota surface lands to mining companies for existing and proposed mining uses.

The Forest Service's valuation of the federal lands at $550 per acre solely for "timber investment" runs contrary to the Forest Service's stated public "purpose and need" for the exchange to enable PolyMet to construct an open-pit copper-nickel mine, the known presence of significant copper, nickel and platinum group metals on the property, the zoning of the property for mining related uses, and the proximity to other mining uses.

Perhaps most striking, the Forest Service decision and the appraisal on which it relied failed to consider the actual private market data from Northeastern Minnesota, where lands have been sold to mining companies at a premium, including sales of nine properties with an average price of $1,645 per acre that were listed in the appraisal but not used for valuation. As the Messner Appraisal Review highlighted, "Reaching a proper conclusion of highest and best used is the cornerstone of the valuation process." Messner Appraisal Review, Pl. Ex. 4, Dkt. 1-4 at 5.

Neither the Forest Service nor its appraiser provided anything approaching a satisfactory explanation for the failure to value the federal lands at their highest and best use for mining related purposes.

> Even where an agency is accorded deference, the "agency must provide a satisfactory explanation for its actions based on relevant data." *Niobrara River Ranch, L.L.C. v. Huber*, 373 F.3d 881, 884 (8th Cir. 2004). This requires an analysis of whether the decision was "based upon consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971).

Friends of the Boundary Waters Wilderness v. Bosworth, supra, 437 F. 3d at 822. *See also Columbus Community Hospital, Inc. v. Califano,* 614 F. 2d 181, 185 (8th Cir. 1980)

(Agency interpretation that is plainly erroneous or inconsistent with regulation must be reversed, requiring remand to determine hospital value).

Mr. Messner criticized William Steigerwaldt, the Forest Service's appraiser, for failing to provide a satisfactory explanation for excluding private sales of land in northeast Minnesota to mining companies when determining the value of PMLE federal lands. Citing the nine sales to mining companies in northeast Minnesota listed on page 21 of Mr. Steigerwaldt's report, Mr. Messner opined,

> While the intent of these purchases ranges from providing buffer land, to providing for wetland mitigation, to allowing for future exchanges, Mr. Steigerwaldt simply concludes that the buyers were highly motivated, the sales were speculative in nature, and dismisses them out of hand. . .
>
> In fact, a further examination of these sales and the subject property's physical attributes, including its location and mineral reserves, would support a conclusion that the highest and best use of the subject property is not for timber and forestry production, but rather for future mining or related activities. Messner Appraisal Review, Pl. Ex. 4, Dkt. 1-4 at 5.

Market data from comparable Northeastern Minnesota sales to mining companies that should have been used to determine PMLE land value demonstrates that "there is a significant chance that but for the errors the agency might have reached a different result." *Friends of the Boundary Waters Wilderness v. Bosworth, supra,* 437 F. 3d at 822, *quoting Cent. S.D. Co-op. Grazing Dist. v. Sec'y of the United States Dep't of Ag.,* 266 F.3d 889, 899 (8th Cir. 2001).

The nine recent private market sales of Northeastern Minnesota lands to mining companies listed in the Forest Service appraisal had an average price of $1,645 per acre, approximately three times the $550 per acre price proposed for the subject federal lands.

Appraisal, Pl. Ex. 2, Dkt. 1-2 at 24, 41, pp. 21, 38. Northeastern Minnesota private market data cited in the Messner Appraisal Review suggested that mining companies paid a premium of as much as 500% for raw land to expand existing uses and over 200% for land for *potential* mining uses. Lands recently sold to the Kennecott Mining Company in Aitkin Minnesota for future potential copper mining uses averaged $3,885 per acre, more than 700% of the price at which the Forest Service valued the federal lands. *See* Messner Appraisal Review, Pl. Ex. 4, Dkt. 1-4 at 6.

A new appraisal of the federal lands according to their highest and best use for mining related purposes, using comparable Minnesota sales, is needed to determine the reasonable price per acre for the PolyMet land exchange federal lands. It is highly likely that such an appraisal would require PolyMet to identify additional private lands for exchange in order to secure the 6,650 acres of Superior National Forest land sought for its open-pit copper-nickel mine. The Forest Service has no authority under FLPMA or its implementing regulations to proceed with an unequal exchange. 43 U.S.C. §1716(b); *see also* 36 C.F.R. §§ 254.3(c); 254.12(b).

Federal precedent applying FLPMA supports plaintiff's claims on the merits. The leading case of *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172 (9th Cir. 2000), blocked a Bureau of Land Management ("BLM") land exchange due to failure to consider the highest and best use of the federal property. The *Desert Citizens* case proposed a land exchange to use BLM lands for a landfill. The Court reversed the district court and held that the BLM's reliance on an appraisal that failed to consider the expected use of the property and the private market for landfill development was

unreasonable and conflicted with the Uniform Appraisal Standards for Federal Land Acquisition (abbreviated by the Court as "UAS"). *Id*., at 1181-82.

Specifically, the Court in *Desert Citizens* found "the conclusory nature of the report's treatment of highest and best use fails to provide the level of detail required by the UAS." *Id*. at 1182. "The appraisal report also fails to meet the UAS requirement that supply, demand, and vicinity trends be considered." *Id*. The proposed use of the federal parcel must also be considered in determining land value. *Id*. at 1183. The Court chided,

> In general, if a proposed use is reasonable and not merely speculative or conjectural, an element of risk is an insufficient basis upon which to exclude that use from consideration . . . Here, the use of the land as a landfill was not only reasonable, it was the specific intent of the exchange that it be used for that purpose. There is no principled reason why the BLM, or any federal agency, should remain willfully blind to the value of federal lands by acting contrary to the most elementary principles of real estate transactions.

Id. at 1184, *citing McCandless v. United States*, 298 U.S. 342, 56 S. Ct. 764, 80 L. Ed. 1205 (1936) (Where cattle ranch lands could be converted to a more profitable use as a sugar plantation, that use should be considered in valuation).

Desert Citizens found the actions of the BLM to be arbitrary and capricious and set aside the federal land exchange due to the failure to consider the landfill use as a possible highest and best use of the property. *Id*. at 1186-87. "The government must not wear blinders when it participates in a real estate transaction, particularly if the result, as here, is the transfer of a flagrantly undervalued parcel of federal land to a private party." *Id.* at 1187.

National Parks & Conservation Ass'n v. Bureau of Land Management, 606 F.3d 1058 (9th Cir. 2010), involved another land exchange proposed by the BLM to allow

construction of a landfill on a former mining site near Joshua Tree National Park. The Court of Appeals followed *Desert Citizens* on the merits, granting summary judgment that the BLM valuation was deficient and failed to comply with FLPMA. The Court stated that the BLM's argument that its own market analysis had found no evidence of market demand "distorts the facts of *Desert Citizens* and misses the point entirely." *Id*. at 1068. The Court explained that holdings in *Desert Citizens* and the subsequent *National Parks* case were not based on looking to the BLM market analysis, but rather to the "obvious and well-known presence" of landfill proposals, finding that "the appraiser's willful ignorance of facts of 'general notoriety' 'particularly troubling.'" *Id., citing Desert Citizens, supra*, 231 F.3d at 1182, 1185.

IRREPARABLE HARM TO PLAINTIFF

In addition to a strong case on the merits, plaintiff can demonstrate that irreparable harm is likely. "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.,* irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co. v. Village of Gambell, AK,* 480 U.S. 531, 545, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987); *W. Land Exch. Project v United States BLM*, 315 F Supp. 2d 1068, 1097 (D. Nev. 2004); *S. Appalachian Mt. Stewards v. A & G Coal Corp.,* 2013 U.S. Dist. LEXIS 131464, *6, 2013 WL 5149792 (W.D. Va., Sept. 13, 2013).

Forest Service documents demonstrate the significant environmental consequences of the proposed PolyMet land exchange. The PMLE would convey 6,650 acres of Superior National Forest land to PolyMet. Forest Service ROD, Pl. Ex. 1, Dkt. 1-1 at 10. According to the Forest Service Biological Assessment for the Proposed NorthMet Project and Land Exchange, "This land exchange would be the largest land exchange conducted by the Forest Service." *See* Maccabee Aff. in Support of Motion, at 2, ¶3.

The PolyMet land exchange would result in a 6,025.8 acre net decrease in Minnesota Biological Survey ("MBS") High Biodiversity sites. Forest Service ROD, Pl. Ex. 1., Dkt. 1-1 at 54. The PMLE would decrease forested habitat, mature mixed forest types that provide thermal cover for moose, and jack pine-black spruce in the federal estate. *Id.* The PMLE would decrease denning habitat for lynx and impact two wildlife corridors. *Id*. The PMLE would "result in the loss of subsistence resources and opportunities on the federal lands" and "result in a loss of some of the ecosystem functions provided by the forest, wetland, and other natural habitats on the federal lands, particularly the portions of the federal lands (i.e., the Mine Site) where habitat would be replaced by mine facilities." *Id*. at 56. Photographs included in the appraisal for the PMLE show forests on the federal lands. Appraisal Photos, Pl. Ex. 3, Dkt. 1-3 at 1-4, foundation provided in Maccabee Aff., Dkt. 1-5 at 2, ¶ 4.

If the land exchange is implemented before the Court can address the plaintiff's claims, the *status quo* will change and title of these federal lands will pass to PolyMet. Even before decisions are made on permits required for a mine, the transfer of federal lands to PolyMet would allow significant changes to the land, such as clear-cutting of

forests, grading of surface lands and construction of roads and utilities that fragment habitats. With an agreement for a land exchange in place, defendants may allow PolyMet to begin these construction or pre-construction activities or may change the management of the lands anticipating the transfer to PolyMet. Even if the PolyMet open-pit mine failed to secure financing or permits, thousands of acres of ecologically valuable Superior National Forest habitats would be irreparably degraded.

Whether or not there is some ecological value to the non-federal lands proposed for exchange, plaintiff and its members would suffer environmental injury specific to the site proposed for the PolyMet land exchange. The affidavits of Robert Tammen and Rory Scoles provide examples harms that plaintiff's members would experience to aesthetic, recreational, subsistence, economic and other interests.

If the PolyMet copper-nickel mine were to be constructed, noise from blasting could be heard where plaintiff's members, including Mr. Tammen, recreate, disturbing their quiet enjoyment, and water pollution would affect their experience canoeing and fishing in waters downstream of the proposed mine. Tammen Aff. at 3, ¶ 9. Mr. Tammen has taken family and visitors in a float plane to view landscapes near his home in Northeastern Minnesota: "From the air, the federal lands proposed for the PolyMet land exchange are aesthetically pleasing national forest lands, with woods, swamps, a winding headwaters stream, and an occasional logging trail." *Id.* at 2, ¶7. These views, which would be impaired by the PMLE, are shown in photographs taken for the Forest Service appraisal and the NorthMet Cultural Landscape Study Final Report. Appraisal Photos, Pl. Ex. 3, Dkt. 1-3 at 3; Cultural Landscape Photos & Map, Pl. Ex. 5 at 2-3.

Even if the PolyMet mine is later rejected for financial reasons or fails to obtain permits, the transfer of federal lands to PolyMet would allow destruction of forests, construction and pre-construction activities and fragmentation of habitats near property owned by Mr. Tammen and his wife, Pat, "harming our ability to enjoy the aesthetics of the lands and reducing the likelihood that my wife and I would enjoy seeing birds and wildlife from our property or other nearby locations in the Superior National Forest." *Id.*, at 3, ¶10.

Mr. Scoles would also suffer direct harm. If the PolyMet copper-nickel mine were built, Mr. Scoles' experience canoeing, kayaking, fishing and gathering wild rice could be affected by pollution downstream of the site. Scoles Aff. at 3, ¶7. Even if the PolyMet mine was never built, Mr. Scoles has explained "the land exchange alone could result in destruction of Superior National Forest trees, habitats and wildlife breeding areas, directly affecting my ability to canoe, explore, hunt food for myself and my family and to maintain my work and enjoyment guiding back-country hiking, camping, skiing and snowshoeing trips in the Superior National Forest." *Id*.

Although fences or access restrictions placed by PolyMet on what are now 6,650 acres of Superior National Forest lands proposed for the PMLE could be removed once plaintiff prevailed on the merits and the land exchange was unwound and set aside, changes resulting from habitat destruction, impairment of High Biodiversity ecosystems, clear-cutting of mature forests, building roads and utilities, grading and other pre-construction or construction activities would create irreparable harm to plaintiff and its members. An injunction is needed to preserve the *status quo* of Forest Service ownership and management of the subject federal lands pending litigation.

BALANCE OF HARMS

In many cases where an injunction is sought – and granted – an interested party has begun construction activities and will incur some measure of costs, which have to be balanced against the irreparable harm to the movant. In *Richland/Wilkin Joint Powers Auth. v. United States Corps of Eng'rs*, *supra*, for example, a preliminary injunction was issued and upheld despite the fact that construction had commenced on the diversion project under review. The Court acknowledged that delay could result in higher construction costs and a continued risk of flooding in certain communities, but found these concerns outweighed by the risk of irreparable harm to plaintiffs. *Id*., 826 F. 3d at 1039.

In this matter, preserving the *status quo* would result in no harm to the defendants. The Superior National Forest lands proposed for exchange would continue to be managed according to the National Forest Land and Resources Management Plan currently applicable. In addition, since the PMLE would require payment of $425,000 by the Forest Service to PolyMet, Forest Service ROD, Pl. Ex. 1, Dkt. 1-1 at 11, enjoining the exchange pending litigation would avoid the need for a federal appropriation and costs to the public.

Although PolyMet may prefer proceeding with a land exchange immediately, there is no evidence that preserving the *status quo* pending litigation would result in any costs to PolyMet. The Forest Service ROD recognizes that there are a number of "unknowns" regarding the PolyMet copper-nickel mine, including "financial assurance specifications for mining activities on the land to be conveyed" and a

"myriad" of permits yet to be issued for the mining project. Forest Service ROD, Pl. Ex. 1, Dkt. 1-1 at 13. PolyMet's website acknowledges that it is seeking "more than 20 permits that will be required to build and operate the mine" and that its current operations consist of "permitting and securing construction financing." Maccabee Aff. in Support of Motion at 3, ¶ 7.

Restricting defendants from proceeding with the PolyMet land exchange or altering the management of the subject Superior National Forest lands would impose no costs on defendants and would potentially save the government $425,000. Since PolyMet has yet to meet financial assurance requirements or secure any of the more then 20 permits required to build and operate its proposed open-pit copper-nickel mine, there would be no cognizable harms to PolyMet from a prudent delay in the land exchange.

PUBLIC INTEREST

The public interest is best served by preserving the *status quo* pending litigation. The Forest Service has acknowledged, "For this project the No Action Alternative is the environmentally preferred alternative . . .Under the No Action Alternative, no lands would be exchanged and the NorthMet Mining Project Proposed Action would not proceed." Forest Service ROD, Pl. Ex. 1, Dkt. 1-1 at 28. The Forest Service rejected the No Action alternative to avoid the risk that PolyMet would initiate litigation against the United States to assert its claimed entitlement to build an open-pit copper-nickel mine on National Forest System land. *Id.*

The Federal Land Policy and Management Act does not include avoidance of a risk of litigation among the "public purposes" for an exchange of National Forest Land. *See* 43 U.S.C. § 1716(a). Any public benefits from potential economic benefits from the proposed mine are not imminent and would not be affected by preserving the *status quo* pending litigation. It is uncertain whether PolyMet will secure additional non-federal land to meet FLPMA equal exchange requirements or meet financial assurance and permit specifications. Should 6,650 acres of federal lands be transferred to PolyMet before the question of equal valuation is adjudicated, plaintiff would suffer irreparable environmental harm from an exchange that may never benefit the public.

The need for scrutiny to ensure that the PolyMet land exchange serves the public interest is highlighted by a June 2000 Government Accounting Office report, *BLM and the Forest Service: Land Exchanges Need to Reflect Appropriate Value and Service the Public Interest*, which found that the BLM and the Forest Service had sometimes engaged in land exchanges "without due regard for key statutory requirements governing land exchanges." GAO Report, Pl. Ex. 7, p. 32, foundation provided in Maccabee Aff. in Support of Motion at 3, ¶6. The GAO concluded,

> Specifically, the agencies have given more than fair market value for nonfederal land they acquired, accepted less than fair market value for federal land they conveyed, and have not demonstrated that the public benefits of acquiring the nonfederal land matched or exceeded the public benefits of retaining the federal land — thereby raising doubts about whether these exchanges served the public interest. GAO Report, Pl. Ex. 7, p. 32.

The public interest in ensuring compliance with the equal exchange requirements of FLPMA and the balance of harms support an injunction to maintain the

status quo pending resolution of plaintiff's claims that the Forest Service has arbitrarily and capriciously undervalued federal lands for the PolyMet land exchange.

REMEDY

Plaintiff's motion to restrain defendants from signing an exchange agreement with PolyMet or taking other action to transfer the subject federal lands to PolyMet would provide timely and necessary relief.

The final ROD approving the PolyMet land exchange will only become legally binding on the parties if and when an exchange agreement is signed by the Forest Service and PolyMet. 36 C.F.R. §254.14(b), (d). If an exchange agreement is signed, in the event of a failure to comply with the land exchange a noncomplying agency is liable for all costs borne by the other party as a result of the exchange. 36 C.F.R. §254.14(c). Counsel for the defendants recently confirmed to plaintiff's counsel that the exchange agreement with PolyMet had yet to be executed and that neither title work nor the appropriation process for the $425,000 that the Forest Service proposes to pay PolyMet in the exchange have been completed. Maccabee Aff. in Support of Motion, at 3-4, ¶ 8.

Current Forest Service expenditures are funded by the Further Continuing and Security Assistance Appropriations Act signed by the President on December 10, 2016. This Continuing Resolution provides funding through April 28, 2017, after which a new appropriations bill would need to be enacted by Congress. H.R. 2028 (Pub. L. 114-254). The Anti-Deficiency Act precludes authorizing an expenditure or involving the government in any obligation to pay money before funds have been appropriated for that purpose. 31 U.S.C. §1341(a)(1)(A), (B). Restraining defendants from executing an

exchange agreement with PolyMet pending the outcome of this litigation would ensure that the United States does not prematurely assume obligations to PolyMet.

Restraining the defendants from actions that would change the character or management of the subject Superior National Forest lands would ensure that the defendants don't act or allow PolyMet to act in anticipation of the PolyMet land exchange to degrade the ecological value of the federal lands. This restraint would remove the threat of irreparable harm to plaintiff and to Superior National Forest lands while this Court determines whether the Forest Service arbitrarily and capriciously disregarded the intended and highest and most profitable use of federal lands and undervalued them to approve an unequal land exchange in violation of FLPMA and the APA.

CONCLUSION

Plaintiff has standing and its Motion for Preliminary Injunction is properly before this Court. Plaintiff has demonstrated the probability of prevailing on its claims that the Forest Service undervalued the subject 6,650 acres of federal land for the PolyMet land exchange in violation of FLPMA equal exchange requirements and the APA. Plaintiff would suffer irreparable harm absent the requested relief, and the balance of harms and the public interest support issuance of the injunction requested by plaintiff. The time is fitting and critical to avoid obligating the United States government to a land exchange that fails to meet the requirements of federal law.

On the basis of plaintiff's Complaint, and affidavits and exhibits filed therewith; plaintiff's Motion for Preliminary Injunction and the Memorandum, affidavits, exhibits

and proposed order filed in support of the Motion; along with the authorities cited herein, plaintiff respectfully moves the Court for an order restraining the defendants from executing an exchange agreement for the PolyMet land exchange and restraining the defendants from changing the management or character of the subject federal lands in ways that might degrade their environmental value pending resolution of this litigation.

Dated this 23rd day of February 2017.

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