UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Case No. 17-CV-00276 (JNE/LIB)

WATER LEGACY,

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,

and

POLY MET MINING, INC.,

Intervenor-Defendant.

PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiff WaterLegacy has requested a preliminary injunction to prevent irreparable injury to Plaintiff's environmental interests pending this Court's determination of whether the undervaluation of 6,650 acres of Superior National Forest lands to the PolyMet Mining, Inc. ("PolyMet") and the approval of an unequal exchange violate the Federal Land Policy and Management Act ("FLPMA"), its implementing regulations, and the Administrative Procedures Act ("APA").

Plaintiff asks that the federal lands proposed for the PolyMet land exchange be valued fairly, as they would be in the private market in an arms length transaction

between a willing, prudent and knowledgeable buyer and seller. The price in such the private market would include consideration of the intended and highest and best use of surface lands for mining and mining-related uses.

If a private entity owned the surface estate, rather than the Forest Service, a company seeking to build an open-pit mine would also need to secure surface rights. The private seller would perform an independent appraisal to determine the value of its land given the presence of the minerals, local zoning, proximity to other mining uses, and sales of other property in the area to mining companies. A private seller would not settle for a price of $550 per acre based only on timber use without a thorough assessment of the higher and more profitable use for mining and mining-related uses.

The federal government, before disposing of a large tract of public land with high value natural resources, was obligated to exercise the same prudence as a private seller to ensure that lands were not arbitrarily and capriciously undervalued, in violation of FLPMA and the APA, as well as in breach of common sense.

The United States Department of Agriculture Forest Service ("Forest Service") was not entitled to subsidize the proposed PolyMet open-pit mine by ignoring or disregarding analysis of the intended and probable highest and best use of the federal lands for mining-related uses in an area zoned for mining and a market including mining companies and uses, where all parties acknowledge the presence of high value minerals on the property. Whether to promote other policy interests or under the threat of

litigation,[1] the Forest Service had no discretion under FLPMA to undervalue federal lands proposed for exchange.

As demonstrated in Plaintiff's Complaint, Memorandum in Support of Motion for Preliminary Injunction ("PI Memo"), Memorandum in Opposition to Intervenor-Defendant PolyMet's Motion to Dismiss for Lack of Standing ("Standing Memo") and the affidavits and exhibits filed with these documents, Plaintiff has standing, this Court's jurisdiction is well-founded, and Plaintiff has met its burden to demonstrate a fair likelihood of prevailing on the merits of its claims. The explanatory affidavit and appraisal review filed by Plaintiff are appropriately before this Court. Arguments made by the Federal Defendants and PolyMet to rationalize the appraisal of federal lands solely for timber uses are inconsistent with applicable standards and law.

Although Plaintiff believes that the proposed PolyMet open-pit copper nickel mine would result in additional far-reaching environmental harms, Plaintiff's Motion for Preliminary Injunction is focused on the PolyMet land exchange. Plaintiff has demonstrated that irreparable environmental harm would result from transfer to PolyMet of 6,650 acres of Superior National Forest forests, wetlands and habitats in the headwaters of the St. Louis River, the United States' largest tributary to Lake Superior. Absent a preliminary injunction, the exchange would result in imminent and irreparable harm from loss of natural resources to the federal estate and loss of National Forest Service management of forests, habitats and watersheds.

[1] Federal Defendants' Response to Plaintiff's Motion for Preliminary Injunction ("Fed. Def. Memo"), Dkt. 51, pp. 11-12.

Neither the Federal Defendants nor PolyMet have identified any harms to their interests or to the public interest that would result from an order by this Court preserving the *status quo* and federal title to 6,650 acres of public lands until the questions of undervaluation and unequal exchange raised by the Plaintiff can be resolved on their merits.

DISCUSSION

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).

1. A preliminary injunction is warranted based on the merits of Plaintiff's claims that the Forest Service undervalued the federal lands proposed for the PolyMet land exchange and approved an unequal change in violation of FLPMA and the APA.

Plaintiff's PI Memo demonstrated that Plaintiff has a fair chance of prevailing on its claims that the Forest Service appraisal and 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). This discussion summarizes central issues and responds to arguments raised by Defendants.

A. Standards for preliminary injunction and APA review support the merits of Plaintiff's claims.

To enjoin an agency administrative decision, Plaintiff need only show a "fair chance of prevailing" on the merits. *Richland/Wilkin, supra,* 826 F. 3d at 1040; *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732-733, 733 fn. 6 (8th Cir. 2008). In this context, a fair chance of prevailing means "something less than fifty percent." *Id.* at 730. Plaintiff has more than met this burden.

Analysis under the APA supports Plaintiff's motion for a preliminary injunction. 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). A decision is arbitrary or capricious if the agency has "entirely failed to consider an important aspect of the problem." *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); *Friends of the Boundary Waters Wilderness v. Bosworth*, *supra*, 437 F. 3d at 822.

Although an agency's decision is entitled to a presumption of regularity under the APA, "that presumption is not to shield his action from a thorough, probing, in-depth review." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). An agency must "present an adequate basis and explanation for its decision" and "must cogently explain" any exercise of its discretion. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins*., *supra*, 463 U.S. at 48.

Methodology used by an agency is entitled to deference only "where the methodology is not arbitrary, without foundation, or 'so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Friends of the Boundary Waters Wilderness v. Bosworth*, *supra*, 437 F. 3d at 824. In *Bosworth*, the Court found that methods used by the Forest Service to set motorboat quotas were "so unreliable or inadequately explained as to make reliance on them arbitrary and capricious." *Id*.

Where a case turns on whether the agency acted in compliance with a federal statute, the agency's interpretations are reviewed *de novo* by the courts. *Dakota Nat'l Bank & Trust Co. v. First Nat'l Bank & Trust Co*., 554 F.2d 345, 350-351 (8th Cir. 1977). In *Friends of the Boundary Waters Wilderness v. Dombeck,* 164 F.3d 1115 (8th Cir. 1999) the Court overturned the Forest Service's interpretation of statutes pertaining to motorized use of the Boundary Waters and granted plaintiff's motion for summary judgment on that issue. *Id.* at 1124-1125.

In a federal land exchange case, even if there is agency discretion in evaluating public interest factors, FLPMA also dictates a substantive result: any land exchange must reflect equal value and a cash equalization payment cannot exceed 25 percent of the total price. 43 U.S.C. §1716(b). FLPMA further specifies the methods that must be used in an exchange, including an appraisal, compliance with federal regulations and the Uniform Appraisal Standards for Federal Land Acquisitions ("UASFLA"), and consideration of the highest and best use of federal lands for appraisal and exchange purposes. 43 U.S.C. §1716(d),(f).

Although some cases cited by Defendants have allowed federal agencies broad discretion in environmental review,[2] other cases limit discretion where agencies fail to adequately explain decisions or fail to comply with federal policy. *See Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520, 536 (8th Cir. 2003) ("Even though NEPA's requirements are predominantly procedural, they do require that SEA 'explain fully its course of inquiry, analysis and reasoning'"); *Ctr. for Biological Diversity v. United States Forest Service*, 349 F. 3d 1157 (9th Cir. 2003); *Ky. Riverkeeper, Inc. v. Rowlette*, 714 F. 3d 402 (6th Cir. 2013); *Dubois v. U. S. Dept. of Agr.,* 102 F.3d 1273, (1st Cir. 1996). Defendants cite no precedent according "great deference" to a federal agency failing to consider the highest and best use of lands proposed for exchange.[3]

In this case, the Forest Service entirely failed to consider an important aspect of the problem, namely the highest and best use of the federal lands for mining-related purposes. Such consideration was required under FLPMA, its implementing rules and the UASFLA. Neither the appraiser nor the Forest Service presented an adequate explanation for the decision to exclude the intended highest and best use of the federal lands for mining-related uses.

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[2] *Hells Canyon Alliance v. U.S. Forest Service*, 227 F.3d 1170, (9th Cir. 2000) and *Kleppe v. Sierra Club, 427 U.S. 390 (1976).*

[3] In *Nat'l Coal Ass'n v. Hodel,* 675 F. Supp. 1231, 1245 (D. Mont. 1987), the highest and best use of the lands for coal mining was undisputed. Equal valuation claims were not addressed in *Northern Plains Research Council v. Lujan*, 874 F. 2d 661,668 (9th Cir. 1989), since taxpayer status did not confer standing; and were not discussed in *Nat'l Coal Ass'n v. Hodel*, 825 F.2d 523 (D.C. Cir. 1987).

B. The affidavit and Appraisal Review of Jason Messner are properly before this Court.

Although judicial review under the APA is generally limited to the administrative record that was before the agency when its made its decision, the affidavit and Appraisal Review prepared by Jason Messner are properly before this Court to assist the Court to "engage in a substantial inquiry" of whether the Forest Service "acted within the scope of [its] authority" and "considered the relevant factors" in valuation and approval of the PolyMet land exchange. *Citizens to Preserve Overton Park, Inc. v. Volpe*, *supra*, 401 U.S. at 415. In *Overton Park*, the Supreme Court remanded a case so the court could consider evidence providing some explanation beyond the "bare record" to review agency action. *Id.* at 420.

The Eighth Circuit's rule allowing extra-record explanatory and supplementary evidence applies to the Messner affidavit and Appraisal Review. In *Arkla Exploration Co. v. Texas Oil & Gas Corp*., 734 F.2d 347 (8th Cir. 1984), *cert. denied*, 469 U.S. 1158, 105 S. Ct. 905, 83 L. Ed. 2d 920 (1985), the Court upheld a decision that mineral leases were improperly issued in violation of the APA based, in part, on extra-record supplemental and explanatory evidence. Expert evidence was needed to cure "factual deficiencies" in the administrative record. *Id*. at 352; to allow review of the agency decision in "more than a perfunctory, rubber-stamp way," *Id* at 357; and to help the court understand the "kinds of scientific, technical, and economic data" that were relevant to a legally correct agency decision. *Id*. Without such supplementary evidence, "the court hardly could be expected intelligently to determine whether the Secretary adequately

considered all the factors" that go into a proper determination. *Id*.

The exception defined in *Arkla* was applied to vacate an order denying a preliminary injunction in *Sierra Club v. United States Army Corps of Engineers*, 771 F. 2d 409 (8th Cir. 1985). Quoting *Arkla*, the Court directed that, on remand, "The existing administrative record may be 'supplemented, if necessary, by affidavits, depositions of other proof of an explanatory nature.'" *Id*. at 413. The *Arkla* extra-record rule was also applied *in City of Kennett v. United States Envtl. Prot. Agency,* 2015 U.S. Dist. LEXIS 133775, 2015 WL 5785831, *8 (E.D. Mo., Oct. 1, 2015)("[T]he Eighth Circuit has made clear that admission of explanatory expert evidence . . is proper to 'educate the court and to illuminate the administrative record' so long as it does not 'substitute the court's judgment for the' agency's."); and in *United States v. Means*, 627 F. Supp. 247, 265 (D. S. Dak. 1985)("[U]nder the arbitrary and capricious standard, this Court may admit and use supplementary evidence to explain the record and to determine whether the process employed by the agency in reaching its decision took into consideration all the relevant factors.").

Other circuits have also recognized that consideration of extra-record materials is appropriate "where the agency ignored relevant factors it should have considered or considered factors left out of the formal record." *Lee v. United States Air Force*, 354 F.3d 1229, 1242 (2004). "By its very nature, evidence which the agency fails to consider is frequently not in the record. Accordingly, in order to allow for meaningful, in-depth, probing review, such extra-record evidence is often properly included in the Administrative Record." *Ctr. for Native Ecosystems v. Salazar*, 711 F. Supp. 2d. 1267,

1280 (D. Colo. 2010).

The Messner affidavit and Appraisal Review are necessary to explain technical issues related to the Forest Service appraisal and highest and best use analysis and to allow the court to review an important aspect of the problem excluded from consideration in the PolyMet land exchange process. As detailed in the next section of this Discussion, neither the appraisal nor the Forest Service Appraisal Review Report[4] provide an adequate explanation for valuation of the PolyMet land exchange property solely for timber use and failure to consider the highest and best use of the federal lands for mining-related uses.

In addition, but for the Federal Defendants' refusal to release the appraisal until October 2016, the Messner affidavit and Appraisal Review submitted by Plaintiff would have been part of the PolyMet land exchange administrative record. For years, Plaintiff made every effort under the Freedom of Information Act ("FOIA") to obtain the appraisal so Plaintiff could consult with experts to assess if its methodology was defensible. Maccabee Aff., Dkt. 1-5, ¶¶ 4-8.

The Forest Service had no sound legal basis to deny Plaintiff access to PolyMet land exchange appraisal information under the FOIA. Ironically, the case cited by Federal Defendants denying release of an appraisal under the deliberative process Exemption 5 to the FOIA, *Government Land Bank v. General Services Admin.*, 671 F.2d 663, 666 (1st Cir. 1982), denied an appraisal to an adverse party buying federal property in order to

[4] Plaintiff received the Agreement to Initiate ("ATI"), Dkt. 52-4; Revised Contract, Dkt. 52-5; Technical Appraisal Review Report, Dkt. 52-10 and Addendum to Review Report, Dkt. 52-11 for the PolyMet land exchange when they were filed on March 30, 2017.

provide government leverage in negotiating price. This precedent does not apply to PolyMet land exchange appraisals.

In *Dep't of Interior v. Klamath Water Users Protective Ass'n,* 532 U.S. 1, 121 S. Ct. 1060, 149 L. Ed. 2d 87 (2001), the Supreme Court held that FOIA Exemption 5 does not apply to communications between an agency and persons that have interests of their own distinct from the agency. The *Klamath* rationale was applied to requests made by a plaintiff for appraisal information related to a land exchange in *Pagosans for Public Lands v. United States Forest Serv*., 2007 U.S. Dist. LEXIS 96814; 2007 WL 5061698 (D. Colo., Aug. 22, 2007). The court held, and the Forest Service eventually conceded, that appraisal reports prepared for a third-party non-agency proponent of the land exchange could not be lawfully withheld from the Plaintiff under FOIA Exemption 5. *Id,.* at *7. The court further ruled that FOIA Exemption 5 did not apply to any information about appraisal review that was communicated by the Forest Service to the third-party non-agency proponent of the land exchange. *Id.,* at *12.

The initial 2013 appraisal requested by Plaintiff was paid for by PolyMet and performed by Compass Land Consultants ("CLC") under a contract with PolyMet, the third-party non-agency proponent of the land exchange. Appraisal, Dkt. 1-2 at 8, p. 5; ATI, Dkt. 52-4 at 27. The final July 2015 version of the appraisal was done under a revised contract signed by the Forest Service, but this contract identified PolyMet as an "Agent" of the Forest Service and an "Intended User" who would receive a copy of the appraisal once it had been approved. Appraisal, Dkt. 1-2 at 8, p. 5; Revised Contract, Dkt. 52-5 at 1. Since PolyMet, a third-party with independent interests in the value of the

federal lands, was engaged throughout the appraisal process, the FOIA required the release of both CLC appraisals.

Even had FOIA Exemption 5 applied to PolyMet land exchange appraisals, the Forest Service would have been required to release its final appraisal to Plaintiff on July 8, 2015, when the appraisal report was reviewed and approved. Forest Service Manual §5412.11.[5] At the very latest, the Forest Service was required to release the approved appraisal on November 5, 2015, when the final PolyMet NorthMet EIS based on the Forest Service final appraisal was released.[6]

If the Forest Service had supplied the appraisal as requested by Plaintiff in 2013, in July 2015 or even in November 2015, rather than making baseless objections and delaying any release until October 2016, Plaintiff would have filed materials such as the Messner affidavit and Appraisal Review with its objections to the PolyMet land exchange on January 4, 2016. Maccabee Aff., Dkt. 1-5 at ¶8. The interests of justice and the Court's review under FLPMA and the APA would be served by accepting and considering this extra-record explanatory material provided by Plaintiff.

C. The Forest Service was required to consider, not ignore, the highest and best use of the surface lands for mining-related uses, the intended use of the property and the effects of subsurface mineral rights on market value.

Facts pertaining to the PolyMet land exchange are not disputed. The PolyMet land

[5] *See* Appraisal, Dkt. 1-2 at 1 for approval date. The 2013 Supplemental Draft Environmental Impact Statement ("SDEIS") described the proposed exchange. Fed. Def. Ex. F, Comments of WaterLegacy PolyMet NorthMet Mining Project and Land Exchange SDEIS ("WL SDEIS Cmt."), Dkt. 52-7, at 24.

[6] *See* http://files.dnr.state.mn.us/input/environmentalreview/polymet/feis/cover_letter.pdf.

exchange proposes to exchange 6,650 contiguous acres of Superior National Forest for private lands on 10 non-contiguous parcels. ROD, Dkt. 1-1 at 10-11, 53. The land exchange is proposed because "PolyMet is planning to construct and operate an open pit mine to extract copper, nickel, and platinum group metals from beneath land currently managed as part of the Superior National Forest."[7] The "purpose and need for the land exchange is to eliminate the conflict between PolyMet's desire to surface mine" and National Forest Service ownership and management of federal lands under the Weeks Act. ROD, Dkt. 1-1 at 5.

The federal lands are zoned for Mining and Minerals, are on the edge of an active mining area where new mine proposals and permits are in progress, and have compelling mineral potential with a significant value for copper, nickel, platinum group and other minerals. Appraisal, Dkt. 1-2 at 18-19, 23; pp. 15-16, 20.

The appraisal valued the federal lands only for timber investment purposes, at $550 per acre. *Id*. at 5, 41, pp. 2, 38. The appraisal identified nine Northern Minnesota sales of land to mining companies by private parties from 2008 to 2012, with prices from $624 to $2,556 per acre and an average price of $1,645 per acre. *Id*. at 24, p. 21. However, the appraisal excluded analysis of these sales, assuming, "based on the prices paid, many (if not all) of the sales appear to be highly motivated and speculative." *Id.* The appraisal provided no evidence that the prices paid were anything other than a reflection of Minnesota's competitive private market for property with mining-related uses, did not

[7] Poly Met Mining, Inc.'s Memorandum of Law in Opposition to WaterLegacy's Motion for a Preliminary Injunction ("PLM Memo"), Dkt. 48 at 3.

consider these market sales or any other private sales of lands to mining companies in determining the highest and best use of the federal lands, and did not explain why the highest and best use of the subject federal lands for mining-related purposes was not considered in determining their value. *Id*. at 24-25, pp. 21-22.

The Forest Service Technical Appraisal Review Report stated, "the property is considered to have a potential for high value copper, nickel, platinum group metals and other minerals." Dkt. 52-10 at 5. However, its only "highest and best use" discussion was: "Forestry and timber production. The property is not considered to have recreation potential due to the proximity to mining." *Id*. at 6. The Forest Service Review did not explain why the federal lands were not appraised for their highest and best use for mining or why no lands purchased for mining-related uses were included in the sales comparison approach to value for the federal property; it also provided no explanation of the appraiser's failure to analyze the nine mining-related sales identified in the appraisal. *Id*.

Without asserting whether or how any specific transaction should be used as a comparable sale, Mr. Messner reviewed the nine sales to mining companies identified in the appraisal. In these private sales, the mining companies paid mean prices 85% above assessed property values. Messner Appraisal Review, Dkt. 1-4 at 6.

Mr. Messner also analyzed properties purchased by U.S. Steel in Pineville, Minnesota from 2009 to 2016 for expansion of existing mine uses. In the case of vacant land, U.S. Steel paid over a 500% premium above the assessed value, as compared to 22% above the assessed value for private non-mining purchases in the area. 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 did not render an opinion regarding the market price of federal lands valued at the highest and best use for mining related-purposes, which conclusion would be outside the scope of an appraisal review. *Id.* at 1. Mr. Messner found, "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*. at 5. He concluded that valuation of the federal land "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.* at 6.

Defendants don't deny that the PolyMet land exchange valuation failed to consider the highest and best use of property for mining related uses. Federal Defendants have argued that the value of the lands for their intended mining related use must be *ignored* and *disregarded*.[8] PolyMet has bluntly insisted "In effect, the property appraised has no mineral rights."[9] None of Defendants' rationales are consistent with the requirements of FLPMA, its implementing regulations, the UASFLA, or legal precedent.

PolyMet argues that value resulting from a non-federal party's planned use of the

[8] Fed. Def. Memo, Dkt. 51 at 9, p. 7, emphasis in original.
[9] PLM Memo, Dkt. 48 at 24; Robert Strachota Declaration, Dkt. 49, ¶17.

land cannot be considered in determining the price of the land.[10] This argument misquotes the UASFLA, Dkt. 12-2, §4.3.2.2, p. 104, and the cited case, *United States v. Cors,* 337 US 325, 333 (1949), both of which state that it "is not fair that the *government* be required to pay the enhanced price which its demand alone has created." (emphasis added). This issue was addressed in the leading equal valuation case under FLPMA, which stated that the BLM "improperly relies on a condemnation case to argue that the site's expected use as a landfill should not affect market value" and held that a private party's intended use is not so excluded. *Desert Citizens Against Pollution v. Bisson*, 231 F. 3d 1172, 1183 (9th Cir. 2000). No cases cited by Defendants hold that a government appraisal for a land exchange need not consider its value to the non-federal party.[11]

When FLPMA rules were adopted, the assertion by mining companies that appraisers should disregard value created by their mining use was explicitly rejected:

> A mining industry association suggested that this paragraph of the rule [36 C.F.R. §254.9(b)] include a statement that appraisers should disregard any increase in value to Federal lands resulting from a non-Federal party's particular need to acquire the land. It was the association's belief that appraisers overvalue Federal lands adjacent to operating mines. This suggestion was not adopted, since the appraiser must take into consideration all potential buyers and uses of the property, including possible purchase by adjacent property owners.

Land Exchanges, 59 Fed. Reg. 10854, 10863 (Mar. 8, 1994).

[10] PLM Memo, Dkt. 48 at 18-19.

[11] *United States v. 564.54 Acres of Land*, 441 U.S. 506, 99 S. Ct. 1854, 60 L. Ed. 435 (1979) held a condemnor should pay market value, not replacement cost; *Horne v. Dep't of Agriculture*, 135 S. Ct. 2419 (2015) held that taking personal property required compensation; *Bauman v. Ross*, 167 U.S. 548 (1897) set compensation for a highway taking.

Defendants' claims that the highest and best use of the federal lands for mining-related purposes can be ignored as outside the "competitive market" also misstate the UASFLA. PolyMet claims that §4.10 of the UASFLA should be interpreted to prevent consideration of the value created by PolyMet's desire for the federal lands,[12] but UASFLA's annotations preclude this interpretation. Under the UASFLA, lack of competitive demand is exemplified where the government seeks to build a missile range without "evidence that anyone other than the government could or would use the land" for that purpose. UASFLA, Dkt. 12-2, §4.10, p. 186 fn. 1039, *citing United States v. 46672.96 Acres of Land (Doña Ana)*, 521 F.2d 13, 16 (10th Cir. 1975). For competitive demand under the UASFLA, "[T]he use must be one which a *private* owner might reasonably develop or enjoy." UASFLA, *supra*, §4.10, p. 186, fn. 1039, *citing United States v. 320.0 Acres of Land,* 605 F.2d 762, 811 fn. 107 (5th Cir. 1979)(emphasis in original).

In contrast, the UASFLA highlights the land exchange cases relied on by Plaintiff as positive examples of a competitive demand for the non-federal party's proposed use in the private market. UASFLA, *supra*, §4.10, p. 186, fn. 1039, *citing National Parks & Conservation Ass'n v. Bureau of Land Management,* 606 F.3d 1058, 1067-1068 (9th Cir. 2010) (noting "obvious and well-known presence of competing . . proposals" for nonfederal party's proposed use) and *Desert Citizens, supra*, 231 F. 3d at 1185 (noting "regional market and the presence of competitors" pursuing similar projects to nonfederal party's proposed use).

[12] PLM Memo, Dkt. 48 at 18.

Federal Defendants' reference to the concept of "special adaptability" to rationalize disregarding the market value of mining-related uses similarly misinterprets the UASFLA.[13] Text and annotations in both the UASFLA (2000) and the updated UASFLA (2016) explain that exclusion of value of the "taker's purpose" applies only to a government condemnor's purpose in condemnation cases. UASFLA (2000), Dkt. 53, §B-2, p. 30; UASFLA (2016), Dkt. 12-2, §4.2.3, p. 100.

FLPMA policy contradicts the Defendants' interpretations. "[I]n preparing any estimate of value, an appraiser must take into consideration all probable uses of the property, including the proposed or intended use. . . To disregard an important element of information that may influence market value would be improper." Land Exchanges, *supra* 59 Fed. Reg. at 10859. The record suggests there is a robust private market in Minnesota where value of land is influenced by mining-related uses.

Federal Defendants next claim that the value of constituent legal interests in property should not be considered in valuation of the subject federal lands.[14] PolyMet similarly argues that an appraisal should not consider the contributory value of mineral rights it owns.[15] FLPMA and the UASFLA preclude this interpretation.

FLPMA regulations state, "In estimating market value, the appraiser shall . . Consider the contributory value of *any* interest in land such as water rights, minerals, or

[13] Fed. Def. Memo, Dkt. 51 at 10, p. 8, citing UASFLA (2000), Dkt. 53 at 30-31. Plaintiff cites the UASFLA (2016) applicable when the ROD was issued on January 9, 2017. Dkt-1-1 at 52. The Forest Service Addendum to Review Report approving the Appraisal for use through October 10, 2016, is dated July 26, 2016. Dkt. 52-11 at 1.
[14] Fed. Def. Memo, Dkt. 51 at 11, p. 9. The cited part of UASFLA(2000), Dkt. 53, D-7, p. 86 pertains to assembled land exchanges; it does not discuss subsurface mineral rights.
[15] PLM Memo, Dkt. 48 at 25.

timber, to the extent they are consistent with the highest and best use of the property." 36 C.F.R. §254.9(b)(iv) (emphasis added). The UASFLA requires valuing property as a whole, even "in circumstances where the physical components of the property are held under different ownership such as the surface estate, mineral rights, water rights, or timber." UASFLA, Dkt. 12-2, §1.2.7.3.2, p. 16. For land "that is underlaid with marketable minerals. . the existence of those minerals is a factor to be considered in determining the market value of the property." *Id*., §4.8.2, p. 179. Courts are accustomed to considering the contributory value of access to underlying minerals when government condemns a surface estate. *Mills v. United States*, 363 F.2d 78 (8th Cir. 1966).

PolyMet's argues its split mineral rights should be disregarded on the theory that there is no market value to anyone but PolyMet related to these underlying mineral rights.[16] Although *Desert Citizens* did not involve a split mineral estate, its holding rejecting defendant's argument that there was "no general market for use of the land as a landfill" is directly pertinent. *Desert Citizens, supra*, 231 F. 3d at 1180. The Court held that the intended use of the property, the fact its use was reasonably probable, and the existence of other landfill proposals in the region required that landfill use be considered as part of the highest and best use determination even though landfill developer, Gold Fields, owned the private land surrounding the subject federal lands, so that any other private party would have to purchase at least a portion of Gold Fields' property to successfully construct a landfill. *Id*.

[16] PLM Memo, Dkt. 48 at 25.

Theoretically, the value of surface lands could be unaffected by a split mineral estate if mineral reserves had no value or if underground mining were equally feasible and profitable. However, in this case the minerals are highly valuable, and Defendants assert that an underground mine is not economically feasible. ROD, Dkt. 1-1 at 31.

Moreover, PolyMet has provided evidence that, long before mineral extraction, the federal surface lands will provide economic benefits beyond their value for timber use. "Unified control over both the surface and mineral rights at the mine site substantially increases the value of PolyMet's real estate holdings." Kevin Pylka Declaration, Dkt. 50, ¶ 9. PolyMet also "expects the acquisition of title to the surface rights through the land exchange to make PolyMet Mining Corp. more attractive to potential investors." *Id*., ¶15. Whether PolyMet retains these benefits or sells them, proceeds with mining operations or markets its interests to the highest bidder, the PolyMet land exchange would confer marketable economic value above and beyond the transfer of acreage for timber uses.

2. A preliminary injunction to prevent changes in the status quo is warranted because Plaintiff has shown sufficient likelihood of imminent and irreparable environmental harm.

An injunction is appropriate when monetary damages would not compensate for future harm.[17] Plaintiff has shown it is entitled to an injunction to prevent irreparable harm to the environmental interests of its members. "Environmental injury, by its nature,

[17] Cases are distinguishable where injuries are compensable with monetary damages, *Caballo Coal Co. v. Ind. Mich. Power Co.,* 305 F. 3d 796, 800 (8th Cir. 2002); or where the primary harm has already occurred, *Roudachevski v. All-American Care Ctrs., Inc.,* 648 F.3d 701, 706 (8th Cir. 2011); *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.,* 696 F.3d 771, 779 (8th Cir. 2012).

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,* 480 U.S. 531, 545, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987); *Sierra Club v. Army Corps*, *supra,* 645 F. 3d at 996.

In FLPMA, Congress declared the policy of the United States both to require payment of fair market value for public lands and to "protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values." 43 U.S.C. §1701(a)(8), (a)(9). If federal lands are undervalued and an unequal exchange approved, the government is subsidizing the destruction of environmental values on public lands, contrary to the policy articulated by Congress.

Irreparable harm is inherently measured in a "flexible" consideration of the likelihood of success on the merits, that "balances" harms to moving and non-moving parties and the public interest. *Dataphase Systems, Inc. v. C L Systems, Inc*., 640 F.2d 109, 113 (8th Cir. 1981); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, *supra*, 530 F.3d at 729 n.3. The fewer harms to non-moving parties from issuing an injunction, the lighter a burden faced by the plaintiff. In this case, Plaintiff has shown a likelihood of success on the merits and Defendants have alleged no cognizable injuries that would result from a preliminary injunction.

The alleged harm to a moving party "need not be occurring or be certain to occur before a court may grant relief." *Richland/Wilkin JPA v. Army Corps, supra,* 826 F.3d at 1037. The Court upheld the injunction in *Richland/Wilkin* even though the moving

party would not be harmed by the particular levee to be enjoined and harms from the overall levee project would not occur for at least seven years. *Id*. at 1038.

Plaintiff's claims in this case are far less attenuated. The PolyMet land exchange would result in environmental harm to Plaintiff due to imminent changes in ownership, access, management and land use of a 6,650-acre contiguous tract of forests, habitats and watersheds in the headwaters of the St. Louis River and the Lake Superior Basin.

Litigation under FLPMA over the Bureau of Land Management's proposal to lift protections from private exploitation of federal lands explained that, but for the injunction, "imminent actions" would trigger irreparable harm. *National Wildlife Federation v. Burford*, 835 F. 2d 305, 325 (D.C. Cir. 1987). The "imminent actions" highlighted by the court included "*transfers*, *sales*, and mineral and mining developments." *Id*. (emphasis added).

Defendants cannot dispute that the PolyMet land exchange agreement is imminent. Federal Defendants have acknowledged that the PolyMet land exchange agreement could be signed as soon as April 28, 2017, when the federal government's Continuing Resolution expires.[18] Oversight by Congress and the Secretary of Agriculture is ministerial. The land exchange agreement would become legally binding if no objections were raised by Congress or by the Secretary of Agriculture during a 30-day oversight period. *See* 36 C.F.R. §254.14(b)(5); 16 U.S.C. §521b; Forest Service Handbook §5409.13, 35.1 Transfer of title could occur any time after that brief period.

[18] Fed. Def. Memo, Dkt. 51 at 15, p. 13.

Irreparable environmental harm is not contingent on PolyMet's mine construction. Even if the PolyMet mine project doesn't proceed, the subject 6,650 acres of Superior National Forest lands in the St. Louis River headwaters will not be returned to public ownership or to National Forest Service management. Whether PolyMet, a successor in interest, or another private entity gains title to the federal lands, this huge tract of ecologically important land will remain under private control, governed only by zoning that allows forestry, mining and minerals and contains no requirements to preserve forests, watersheds or habitats.

The PolyMet land exchange would result in immediate *net* losses of natural resources to the public, the St. Louis River watershed and the Lake Superior Basin. The exchange would result in a 6,025.8 acre net decrease in Minnesota Biological Survey High Biodiversity sites within the federal estate; would decrease forested habitat, mature mixed forest types that provide thermal cover for moose, and jack pine-black spruce in the federal estate; and would decrease denning habitat for lynx and impact two wildlife corridors. Final ROD, Dkt. 1-1 at 54. The exchange would "result in the loss of subsistence resources and opportunities on the federal lands," *Id*. at 56, and "loss of some of the ecosystem functions provided by the forest, wetland, and other natural habitats on the federal lands," particularly, but not exclusively, where federal lands would be used for mine facilities. *Id*.

Reviewing the PolyMet NorthMet supplemental draft environmental impact statement ("SDEIS") prepared by the Forest Service and other agencies,[19] Plaintiff determined that the land exchange would result in a *net* loss of 2,030 acres of mature forest, decreasing upland conifer forest by 919.5 acres and Jack Pine-Black Spruce landscape ecosystem by 2,016.6 acres. WL SDEIS Cmt., Dkt. 52-7 at 29, p.111. According to the SDEIS, "The decrease of upland conifer forest is contrary to a goal of the 2004 Forest Plan. The Forest Plan calls for an increase in the acreage of red, white, and jack pine habitats (and a decrease in the acreage of aspen vegetation communities)." *Id*., *quoting* SDEIS at 5-609.

In addition, since the private lands proposed to be exchanged are in different watersheds, ROD, Dkt. 1-1, at 19, 53, the exchange would impact public water resources in the Lake Superior Basin. Plaintiff determined that the PolyMet land exchange would remove a *net* total of 1,584 linear feet of first order headwater streams and 21,120 linear feet of second order streams from the National Forest System. WL SDEIS Cmt., Dkt. 52-7 at 30, p. 112. The land exchange would also result in a *net* loss of 3,791 acres of federal wetlands within the Lake Superior Basin. *Id*.

Should PolyMet take title to the subject lands, the Superior National Forest Land and Resource Management Plan ("Forest Plan"), Dkt. 55-1, would no longer apply.[20] As detailed in Plaintiff's Standing Memo, Dkt. 54, the Forest Plan sets goals to support wildlife habitat for the "aesthetic, commercial, subsistence, recreational, cultural, wildlife

[19] Fed. Def. Ex. F, WL SDEIS Cmt., Dkt. 52-7, cites specific SDEIS pages.
[20] The Forest Service ROD applied the Forest Plan, Dkt. 1-1 at 5, 14, 15, *et seq*.

watching, hunting, fishing, trapping, and scientific uses and values of wildlife," Forest Plan, Dkt. 55-1 at 27, D-WL-2; and goals to conserve populations and habitats for native, desired, indicator, sensitive federally-listed, proposed or candidate threatened and endangered species. *Id.*, D-WL-3. The Forest Plan's desired conditions for vegetation "contribute to ecosystem sustainability and biological diversity" and address current and future generations' interests in the "many aesthetic, spiritual, consumptive, commodity, recreational, and scientific uses and values of forests." *Id*. at 22, D-VG-2.

The Forest Plan provides for an increase of old growth and mature forests, including jack pine and black spruce forests, like those on the federal lands. *Id*. at 23-24, O-VG-2, O-VG-9, O-VG-16. The Plan calls for a decrease in upland openings in the forest, *Id*. at 23, O-VG-5; and management to "maintain the characteristics of mature or older native upland forest vegetation communities." *Id*. at 24, O-VG-17.

The Forest Plan limits damage to wildlife and habitats from infrastructure. The Plan limits road and trail densities to maintain the competitive advantage of lynx, *Id*. at 30, G-WL-8; provides that dirt and gravel roads that traverse lynx habitat, such as the subject federal lands, "should generally not be paved or otherwise upgraded," *Id*. at 31, G-WL-9; and restricts motor vehicle traffic and closes roads and trails under certain non-frozen and thaw conditions, *Id*. at 49-50, S-TS-2, G-TS-11. Temporary roads must be located to minimize resource damage, *Id*. at 50, G-TS-13, and, whenever feasible, "utility lines will be buried within existing road rights-of-way." *Id*. at 53, G-SU-1.

The Forest Plan sets goals to protect water quality, *Id*. at 10, D-WS-4, D-WS-5; and to improve watershed conditions "to support ecological functions and intended

beneficial water uses; *Id.* at 12, O-WS-1. The Plan discourages new facilities, such as roads, within riparian or floodprone areas and requires that any such facilities be constructed to minimize adverse impacts on watershed ecology. *Id*. at 13, S-WS-5. In most cases, the Plan prevents wetland impacts and impairment of water quality within, upstream or downstream of a wetland, *Id.* at 15, G-WS-13, G-WS-15.

If PolyMet secured title to the 6,650 acres of Superior National Forest proposed for the PolyMet land exchange, the City of Babbitt's Mining and Minerals zoning would apply.[21] Babbitt's Mining and Minerals zoning district permits forestry, mineral mining and "all ancillary activities necessary for management, operation and uses involved in the mineral extraction, processing, transportation and disposal of waste." Mining Code, Dkt. 55-2, 6.11(b). It contains no requirements to protect watersheds, habitats or forest cover and no limits on construction of roads or utilities. In addition, although Minnesota's permit to mine laws govern mining operations, Minn. Stat. §93.481, Subd. 1 (2016); Minn. R. 6132.0300, Subp. 1 (2017), they do not preclude cutting timber, building roads or other alterations of natural landscapes and habitats.

Plaintiff's Standing Memo, Dkt. 54; the affidavits of Rory Scoles, Dkt.14 and Dkt. 56; and the affidavits of Robert Tammen, Dkt. 13 and Dkt. 57, illustrate direct injury to Plaintiff's members sufficient to establish Plaintiff's standing. The PolyMet land exchange would irreparably harm Mr. Scoles' interests in recreation, aesthetics and subsistence:

> My interests in the use of the Superior National Forest site proposed for the PolyMet land exchange for recreation, food and aesthetics would be directly and immediately injured if the land exchange were to proceed without a proper basis, changing my

[21] Applicable zoning referenced in Appraisal, Dkt. 1-2 at 19, p. 16.

> freedom to gain access to the land exchange site and changing its undeveloped and wild conditions that I find desirable. Scoles Supp. Aff., Dkt. 56 at ¶ 5.
>
> Whether or not the PolyMet open-pit copper-nickel mine is developed, the proposed land exchange and control of the site by PolyMet would result in cutting of mature forests, construction of roads, and other private actions that would degrade its Superior National Forest habitats and wildlife breeding areas, directly injuring my ability to canoe, explore, view birds and wildlife, hunt food for myself and my family on and near the site and to maintain my work and enjoyment guiding back-country hiking, camping, skiing and snowshoeing trips in nearby areas of the Superior National Forest. *Id*. at ¶ 6.

The PolyMet land exchange would also irreparably harm the environmental interests of Robert Tammen, a nearby property owner:

> Changes that would result from the PolyMet land exchange - such as cutting forests, building roads and utilities, construction and pre-construction work - would directly impair my interests in aesthetic enjoyment of the Superior National Forest lands proposed for the PolyMet land exchange. Tammen Supp. Aff., Dkt. 57 at ¶ 5.
>
> Changes that would result from the PolyMet land exchange proceeding without a proper basis, such as cutting mature trees, pre-construction activities for an open-pit mine and fragmentation of corridors and habitats for wildlife, are highly likely to directly impair my interests in watching birds and wildlife and my recreation and enjoyment on my property and in other areas of the Superior National Forest that I visit on an ongoing basis near the proposed PolyMet land exchange site. *Id*. at ¶3.

Plaintiff WaterLegacy represents the interests of thousands of additional members and supporters committed 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. Maccabee Aff., Dkt. 1-5, ¶1. The mission for which WaterLegacy was founded will be adversely impacted and other individual members will be directly affected if the PolyMet land exchange is allowed to proceed. Complaint, Dkt. 1 at 4, ¶10.

The Federal Defendants' have acknowledged there is no assurance that ground-disturbing activities won't take place once title has transferred to PolyMet.[22] PolyMet has provided no declaration that it won't cut mature trees, build infrastructure or otherwise degrade forests, habitats and aesthetics once it gains title to the federal lands. Even if PolyMet had made such a statement, without more, it would be insufficient to ensure protection from the conduct that Plaintiff seeks to enjoin. *See Red Wolf Coalition v. United States Fish & Wildlife Serv.,* 2016 U.S. Dist. LEXIS 134020, 46 ELR 20157, *21(E. D. N. Car., Sept. 29, 2016) A preliminary injunction is needed to prevent irreparable harm to Plaintiff until its claims can be determined on their merits.

3. Defendants have shown no cognizable harms from issuance of the preliminary injunction sought by Plaintiff.

An injunction may issue even if the non-moving party would experience significant harm. An injunction against continued levee construction was approved even though costs of loss of a single construction season were estimated at $1.17 million. *Richland/Wilkin, supra*, 826 F. 3d at 1035. In *Sierra Club v. Army Corps*, *supra*, an injunction was approved even though costs for construction delays could cost as much as $11 million per month. 645 F. 3d at 996.

In this case, Federal Defendants have submitted no affidavits or evidence of harm that would result from preservation of the *status quo* pending a ruling on the merits. The speculative and unsupported allegation of counsel that an injunction on the exchange of title will "harm the United States by delaying its ability to realize the many public

[22] Fed. Def. Memo, Dkt. 51 at 30, p. 28.

benefits of the exchange"[23] carries no weight. *See Bloom v. Metro Heart Group*, 440 F. 3d 1025, 1028 (8th Cir. 2006); *Moody v. St. Charles County*, 23 F. 3d 1410, 1412 (8th Cir. 1994).

Although PolyMet has asserted that owning the surface rights at the mine site "has tremendous intrinsic value to PolyMet as a company,"[24] the only alleged harm from the preliminary injunction requested by Plaintiff is that PolyMet "considers it likely" that an injunction "would have a negative impact" on PolyMet's public market value, e.g. its stock price.[25] PolyMet cites no precedent stating that a party's speculation as to the impact of a court's decision on stock price can be weighed against issuance of an injunction.[26]

There are no harms to non-moving parties to be weighed against the irreparable harm to Plaintiff that would result from changes to the *status quo* pending litigation.

4. The public interest weighs in favor of an injunction.

Defendants have cited the Final ROD to assert public benefits from the PolyMet land exchange and mine project.[27] Plaintiff believes, based on the far more detailed record of environmental review, that public harms of the PolyMet land exchange and NorthMet mine far outweigh their benefits. That question is not before the Court.

Defendants' perceptions of the public interest in the PolyMet project do not vitiate

[23] Fed. Def. Memo, Dkt. 51 at 35, p. 33.
[24] PLM Memo, Dkt. 48 at 26.
[25] PLM Memo, Dkt. 48 at 27; Pylka Declaration, Dkt. 50 at ¶13.
[26] *General Motors Corp. v. Harry Brown's LLC*, 563 F. 3d 312, 319-320 (8th Cir. 2009) weighed business closure against issuance of an injunction.
[27] Fed. Def. Memo, Dkt. 51 at 36-40, pp. 34-38, PLM Memo, Dkt. 48 at 28-29.

the need to comply with FLPMA's requirement of "equal value exchanges on a monetary basis." Land Exchange, *supra*, 59 Fed. Reg. at 10857. Defendants have asserted no public benefits in proceeding with a land exchange that undervalues Superior National Forest lands.

Generally, when a binding exchange agreement is signed, parties are no longer "subject to the loss of their investments if any party decides the exchange is no longer feasible;" the signing "commits the parties to continue until the transaction is completed." Land Exchanges, *supra*, 59 Fed. Reg. at 10864. However, the court may unwind a land exchange executed in violation of FLPMA, particularly if Plaintiff has moved for a preliminary injunction. *Desert Citizens v. Bisson, supra*, 231 F. 3d at 1187.

In *Sierra Club v. Army Corps*, *supra,* the Court weighed the public interest in agency compliance with federal law to support issuing an injunction:

> The district court found that an injunction was in the public interest because it would convey to the public the importance of having its government agencies fulfill "their obligations and comply [] with the laws that bind them." . . The district court's analysis on this element is sound.

645 F. 3d at 997. Similar reasoning applies here.

CONCLUSION

Plaintiff's Motion for Preliminary Injunction is properly before this Court. Plaintiff has demonstrated the probability of prevailing on its claims that the Forest Service ignored the intended and highest and best use of Superior National Forest lands proposed for the PolyMet land exchange for mining and mining-related uses and approved an unequal exchange in violation of FLPMA and the APA. Plaintiff would

suffer irreparable harm, and the balance of harms weighs heavily in favor of issuing an injunction to preserve the *status quo* and protect 6,650 acres of high environmental value public lands pending this Court's decision on the merits of Plaintiff's claims.

On the basis of Plaintiff's Complaint, Motion for Preliminary Injunction, PI Memo, Standing Memo and this Reply Memorandum, along with the authorities cited therein and the affidavits and exhibits filed in this matter, 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, land use or condition of the subject federal lands and degrading their environmental value pending resolution of Plaintiff's claims under FLPMA and the APA.

Dated this 13th day of April 2017.

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