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11
12 **IN THE UNITED STATES DISTRICT COURT**
13 **FOR THE DISTRICT OF MINNESOTA**

14 CENTER FOR BIOLOGICAL DIVERSITY;) Case No.
15 SAVE LAKE SUPERIOR ASSOCIATION;)
16 SAVE OUR SKY BLUE WATERS;) **COMPLAINT FOR DECLARATORY**
17 FRIENDS OF THE CLOQUET VALLEY) **AND INJUNCTIVE RELIEF**
18 STATE FOREST; and DULUTH FOR)
CLEAN WATER;)

19 Plaintiffs,)

20 v.)

21 DEB HAALAND, SECRETARY OF THE)
22 INTERIOR; UNITED STATES FISH AND)
23 WILDLIFE SERVICE; UNITED STATES)
FOREST SERVICE; and UNITED STATES)
ARMY CORPS OF ENGINEERS,)

24 Defendants.)
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INTRODUCTION

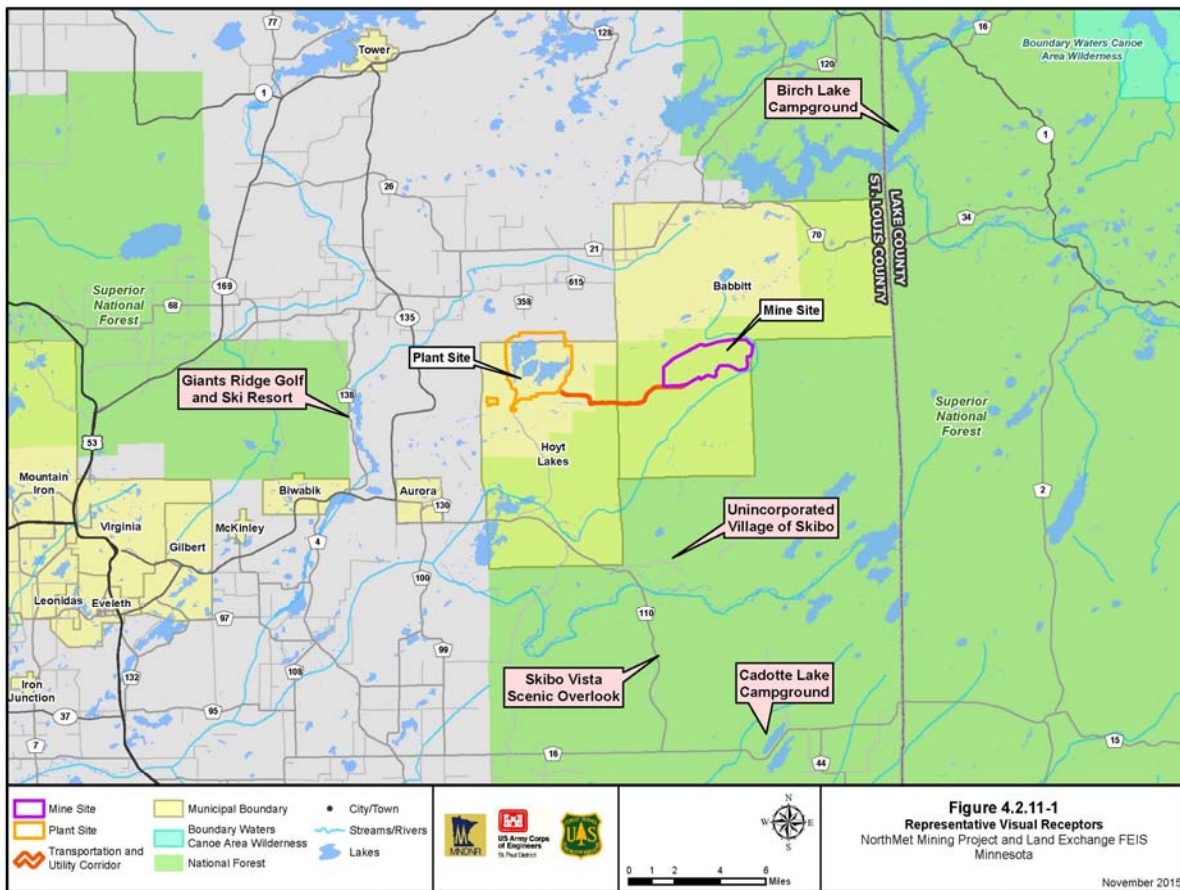
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1. Plaintiffs Center for Biological Diversity, Save Lake Superior Association, Save Our Sky Blue Waters, Friends of the Cloquet Valley State Forest, and Duluth for Clean Water challenge the failure of Defendants Deb Haaland, the United States Secretary of the Interior; the United States Fish and Wildlife Service (“FWS”); the United States Forest Service (“Forest Service”); and the United States Army Corps of Engineers (“Corps”) to comply with the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 *et seq.*, and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551 *et seq.*, for the proposed NorthMet Mine Project and Land Exchange in northeastern Minnesota.

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2. Plaintiffs challenge (1) FWS’s February 5, 2016 Biological Opinion for the NorthMet Mine Project and Land Exchange; (2) the Forest Service’s reliance on the 2016 Biological Opinion when it approved the January 9, 2017 Record of Decision for the NorthMet Land Exchange; (3) the Corps’ reliance on the 2016 Biological Opinion when it approved the March 21, 2019 Record of Decision for the Clean Water Act Section 404 Permit for the NorthMet Mine Project; and (4) the ongoing failure of FWS and the Corps to reinitiate and complete ESA consultation for the NorthMet Mine Project despite significant new information and substantial changes to the Project revealing that the Project may affect threatened species and critical habitat in a manner and to an extent not previously considered.

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3. Plaintiffs seek (1) declaratory relief that FWS violated Section 7 of the ESA in preparing and approving the 2016 Biological Opinion for the NorthMet Mine Project and Land Exchange; (2) declaratory relief that the Forest Service and the Corps each violated Section 7 of the ESA in relying on the unlawful 2016 Biological Opinion in issuing their Record of Decisions and related decisions; (3) declaratory relief that the June 28, 2018 land exchange between the

1 Forest Service and PolyMet is void; (4) declaratory relief that FWS and the Corps are in ongoing
 2 violation of the ESA by failing to reinitiate and complete ESA consultation for the NorthMet
 3 Mine Project; (5) an order vacating the 2016 Biological Opinion, the Forest Service’s 2017
 4 Record of Decision for the Land Exchange, and the Corps’ 2019 Record of Decision and Clean
 5 Water Act Section 404 Permit; (6) an order requiring FWS and the Corps to reinitiate and
 6 complete ESA consultation for the NorthMet Mine Project; and (7) injunctive relief to enjoin any
 7 implementation of the NorthMet Mine Project pending full compliance with the ESA.
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 10 4. The following map shows the location of the Plant Site, Mine Site, and
 11 Transportation/Utility Corridor for the proposed NorthMet Mine Project:
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1 5. The following is an aerial view of the Partridge River in northeastern Minnesota,
2 near the proposed NorthMet Mine Site (photo by Rob Levine).
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17 **JURISDICTION**

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19 6. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331; 28 U.S.C. §
20 1346; 5 U.S.C. §§ 551 *et seq.*; and 16 U.S.C. § 1540(g) because this action involves the United
21 States as a defendant and arises under the laws of the United States, including the ESA, 16
22 U.S.C. §§ 1531 *et seq.*, and the APA, 5 U.S.C. §§ 551 *et seq.* On November 10, 2021, Plaintiffs
23 provided Defendants with notice of Plaintiffs’ intent to file suit pursuant to the ESA citizen suit
24 provision. 16 U.S.C. § 1540(g)(2). An actual justiciable controversy exists between Plaintiffs
25 and Defendants. The requested relief is proper under 28 U.S.C. §§ 2201 & 2202; 5 U.S.C. §§
26 705 & 706; and 16 U.S.C. § 1540(g). The challenged agency actions are final and subject to this
27 Court’s review under 5 U.S.C. §§ 702, 704, and 706.
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1 **VENUE**

2 7. Venue is proper pursuant to 28 U.S.C. § 1391(e) and 16 U.S.C. § 1540(g)(3)(A),
3 because a substantial part of the events giving rise to Plaintiffs’ claims occurred in the District,
4 Defendants have offices in the District, Plaintiff Center for Biological Diversity has an office in
5 the District, and Plaintiffs Save Lake Superior Association, Save Our Sky Blue Waters, Friends
6 of the Cloquet Valley State Forest, and Duluth for Clean Water reside in the District.
7

8 **PARTIES**

9 8. Plaintiff Center for Biological Diversity (“the Center”) is a nonprofit corporation
10 headquartered in Tucson, Arizona, with offices in a number of states and Mexico. The Center
11 has an office in Duluth, Minnesota. The Center works through science, law, and policy to secure
12 a future for all species, great or small, hovering on the brink of extinction. The Center is actively
13 involved in protecting threatened and endangered species, and their habitat, nationwide and in
14 Mexico. The Center has over 89,000 members throughout the United States and the world.
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16 9. Plaintiff Save Lake Superior Association is a nonprofit organization based in Two
17 Harbors, Minnesota. The Association, which originated in 1969, is the oldest citizen group
18 working exclusively to preserve and protect Lake Superior. It was organized to help stop the
19 dumping of taconite tailings into Lake Superior by Reserve Mining, whose tailings were
20 threatening human health and contaminating the water and aquatic life.
21

22 10. Plaintiff Save Our Sky Blue Waters is a nonprofit public interest corporation
23 based in Duluth, Minnesota. Save Our Sky Blue Waters is a grassroots organization that seeks to
24 protect the ecological integrity of Minnesota’s Arrowhead Region. From Lake Superior to the
25 Boundary Waters, the Arrowhead Region is one of the most magnificent areas of the country, for
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1 its boreal forests, wildlife, wetlands, and waters. The protection of these valuable resources is
2 Save Our Sky Blue Water's core mission.

3
4 11. Plaintiff Friends of the Cloquet Valley State Forest is dedicated to the protection
5 and preservation of the natural and cultural resources of the Cloquet Valley State Forest in
6 northeastern Minnesota. The lands, lakes, rivers, and streams of northern Minnesota, which lay
7 north of Duluth in the Cloquet Valley State Forest and in the Arrowhead, are home to many
8 people, plants, and animals, and serve the world in many ways. Friends of the Cloquet Valley
9 State Forest works to promote the responsible enjoyment of this unique treasure.

10
11 12. Duluth for Clean Water is an all-volunteer nonprofit organization based in Duluth,
12 Minnesota that seeks a healthy future for the St. Louis River and Lake Superior watershed.
13 Duluth for Clean Water works through advocacy, education, and the political process to protect
14 the health and safety of downstream communities from proposed upstream metal sulfide-ore
15 mining, and to preserve northern Minnesota's greatest assets, its boreal forests, bogs and
16 peatlands, and its fresh water.

17
18 13. Plaintiffs bring this action on their own behalf, and on behalf of their members
19 who derive recreational, inspirational, religious, spiritual, scientific, educational, and aesthetic
20 benefits from Canada lynx, northern long-eared bats, and these wildlife species' habitats,
21 including within northeastern Minnesota, on the Superior National Forest, and near the proposed
22 NorthMet mine site.

23
24 14. Plaintiffs' members regularly use and enjoy the Superior National Forest, and
25 other lands near the proposed NorthMet Mine Project, for a variety of purposes, including
26 hiking, canoeing, fishing, gathering wild rice, camping, photographing scenery and wildlife, and
27 engaging in other vocational, scientific, and recreational activities. Plaintiffs' members derive
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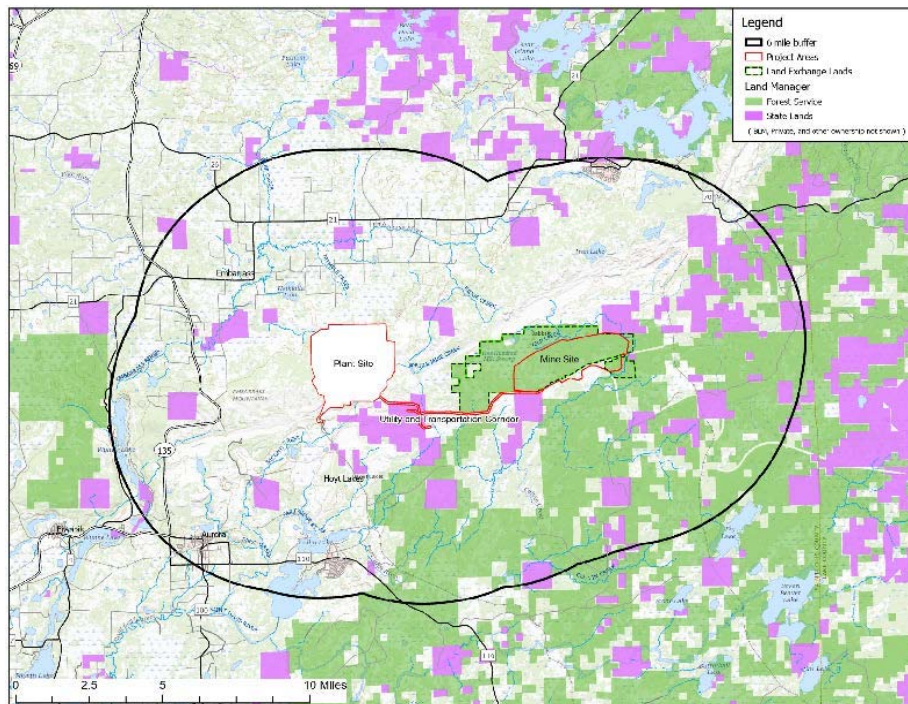
1 health, recreational, inspirational, religious, spiritual, scientific, educational, and aesthetic
2 benefits from these activities.

3
4 15. The areas of the Superior National Forest, and the other lands near the proposed
5 NorthMet Mine Project, which Plaintiffs' members regularly use and enjoy, include the
6 headwaters of the Lake Superior watershed, including the Partridge River watershed. Plaintiffs'
7 members use and enjoyment of these areas is significantly enhanced by the knowledge that
8 imperiled wildlife species including the Canada lynx and northern long-eared bat have been
9 identified in these areas, and that these areas are within the designated critical habitat for the
10 Canada lynx.
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12 16. The NorthMet land exchange between the Forest Service and PolyMet has been
13 executed, and therefore the proposed NorthMet mine site is now private land and Plaintiffs'
14 members are now prohibited from accessing, using, and enjoying the exact mine site. While the
15 mining company and the Forest Service previously made it difficult for the public to access the
16 proposed mine site, it is now no longer possible for Plaintiffs' members or the public to access,
17 use, and enjoy the mine site as some members of the Plaintiffs were able to do prior to the land
18 exchange. Because this land is now private, and no longer part of the Superior National Forest,
19 prior public notice and public involvement requirements no longer apply for proposed activities
20 on this land, and a number of substantive environmental protections have been eliminated.
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23 17. During the ESA consultation for the proposed NorthMet Mine Project, FWS, the
24 Forest Service, and the Corps recognized that the negative impacts to Canada lynx, gray wolves,
25 and the northern long-eared bat and their habitat resulting from the Project would not be limited
26 to only the proposed plant site and proposed mine site, but rather that surrounding areas and
27 wildlife corridors would also be affected. The agencies determined that the area that may be
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1 adversely affected by the NorthMet Mine Project includes those areas within six miles of the
 2 Project, or approximately 250 mi² plus the area that extends to wildlife corridor number 18.¹ The
 3 map below identifies this six-mile buffer.
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17 18. The areas of the Superior National Forest and other areas nearby the proposed
 18 NorthMet Mine Project that Plaintiffs’ members regularly use and enjoy include specific areas
 19 within the six-mile radius that was determined by FWS, the Forest Service, and the Corps to be
 20 the area within which wildlife may be directly and indirectly affected by the proposed project.
 21

22 19. Plaintiffs’ members’ use and enjoyment of specific areas within this six-mile
 23 radius is significantly enhanced by the knowledge that imperiled wildlife species, including the
 24 Canada lynx and northern long-eared bat, have been identified in these areas, and that these areas
 25 are within the designated critical habitat for the Canada lynx.
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 27

28 ¹ See 2016 Biological Opinion, p. 43; 2015 Biological Assessment, p. 6-1, 6-2.

1 20. One example of Plaintiffs' members who use and enjoy areas near the proposed
2 NorthMet Mine Project, and within the six-mile buffer, is Lori Andresen, who is a long-time
3 member of several Plaintiff organizations. Ms. Andresen is a resident of Duluth, and her family
4 owns a cabin that is located on an in-holding in the heart of the Superior National Forest, near
5 the town of Isabella, Minnesota. Ms. Andresen enjoys canoeing, wild ricing, and fishing on the
6 Embarrass and Partridge Rivers within the six-mile buffer of the project area, as well as hiking,
7 photography, and other recreational activities within this area. Ms. Andresen has made a number
8 of trips to this area within the past few years, including multiple trips to the headwaters of the
9 Lake Superior watershed in 2017, near the Partridge River and Stubble Creek, to hike, fish, take
10 photographs, and look for wildlife and signs of wildlife; multiple trips to the Partridge River and
11 Stubble Creek in 2018 to hike, take photographs, observe wildlife, and pick berries; multiple
12 trips to the Partridge River and Embarrass River in 2019 to hike and fish; and another trip to the
13 St. Louis and Partridge Rivers in 2021.

14 21. Another example of Plaintiffs' members who use and enjoy areas near the
15 proposed NorthMet Mine Project is Jacqueline Christenson, who is a member of Duluth for
16 Clean Water and Center for Biological Diversity. Ms. Christenson has been visiting the Superior
17 National Forest all her life, and more specifically, recreated near the proposed NorthMet Mine
18 Project in 2018 and 2019. Ms. Christenson paddled the Partridge River in 2018, and paddled
19 Colvin Creek to the Partridge River in 2019, just downstream from the proposed mine site.

20 22. Plaintiffs' members intend to continue to regularly use and enjoy the Superior
21 National Forest and other areas nearby the proposed NorthMet Mine Project, including areas
22 within the six-mile radius of the mine site. This includes specific and concrete plans to use and
23

1 enjoy areas nearby the proposed NorthMet Mine Project, including areas within the six-mile
2 buffer, this coming spring and summer, 2022.

3
4 23. One example of Plaintiffs' members who has plans to return and again enjoy
5 specific areas near the proposed NorthMet Mine Project is Lori Andresen. In June 2022, Ms.
6 Andresen has plans to visit the Partridge River just south of the proposed mine site, as well as
7 Colvin Creek and the South Branch of the Partridge River, to hike, fish, and take photographs.

8
9 24. Another example of Plaintiffs' members who has plans to return and again enjoy
10 specific areas near the proposed NorthMet Mine Project is Jacqueline Christenson, who has
11 planned a multi-day canoe trip for July 2022, for the Partridge River and Colvin Creek.

12 25. The health, recreational, inspirational, religious, spiritual, scientific, educational,
13 and aesthetic interests of Plaintiffs and their members have been and will continue to be
14 adversely affected and irreparably injured if Defendants' ongoing violations of the ESA and
15 APA identified herein continue. These are actual, concrete injuries caused by the Defendants'
16 violations of the ESA and APA. If the proposed NorthMet Mine Project is allowed to proceed
17 without full compliance with the ESA, including updated and legally sufficient Section 7
18 consultation, Plaintiffs and their members will be harmed by the adverse, long-term, and
19 permanent impacts to Canada lynx, northern long-eared bats, and critical habitat for the lynx.
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21
22 26. Plaintiffs' and their members' injuries will be redressed by the relief sought. If
23 the 2016 Biological Opinion and other related decisions are vacated, as requested, and/or the
24 agencies are ordered to reinitiate consultation based on new information and changes to the
25 proposal, the agencies will be required to undertake additional ESA consultation and analysis
26 prior to determining whether or not the proposed action can proceed as proposed without
27 jeopardizing the Canada lynx or northern long-eared bat, or adversely modifying or destroying
28

1 designated critical habitat for the Canada lynx. As a result of the additional ESA consultation
2 and analysis, the agencies may choose to make changes to the proposed project in a way that
3 would benefit the Canada lynx or northern long-eared bat, or their habitat, or the agencies may
4 choose to not authorize the mine to move forward as proposed.
5

6 27. Defendant Deb Haaland, U.S. Secretary of the Interior, is the highest-ranking
7 official within the U.S. Department of the Interior, and in that capacity, has ultimate
8 responsibility for the administration and implementation of the ESA regarding terrestrial
9 endangered and threatened species, including the northern long-eared bat and Canada lynx.
10 Secretary Haaland is sued in her official capacity.
11

12 28. Defendant U.S. Fish and Wildlife Service (“FWS”) is an agency within the U.S.
13 Department of the Interior. It and its officers are responsible for administering the ESA,
14 particularly regarding potential impacts to terrestrial wildlife species that have been listed as
15 threatened or endangered with extinction pursuant to the ESA, including the northern long-eared
16 bat and Canada lynx.
17

18 29. Defendant U.S. Forest Service (“Forest Service”) is an agency within the U.S.
19 Department of Agriculture. It and its officers are responsible for the lawful management of the
20 National Forest System, including the Superior National Forest.
21

22 30. Defendant U.S. Army Corps of Engineers (“Corps”) is an agency of the U.S.
23 Department of Defense. The Corps is responsible for reviewing and issuing Section 404 permits
24 under the Clean Water Act, as it did here.
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STATUTORY AND REGULATORY BACKGROUND

I. The Endangered Species Act

31. Congress enacted the ESA in 1973 to provide “a program for the conservation of . . . endangered species and threatened species.” 16 U.S.C. § 1531(b). Section 2(c) of the ESA establishes that it is the policy of Congress that all federal agencies shall seek to conserve threatened and endangered species, and shall utilize their authorities in furtherance of the purposes of this Act. 16 U.S.C. § 1531(c)(1).

32. The ESA defines “conservation” to mean “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.” 16 U.S.C. § 1532(3).

33. Section 4 of the ESA directs the Secretary of the Interior to list species that are threatened or endangered with extinction, and to designate “critical habitat” for such species. 16 U.S.C. § 1533(a). “Critical habitat” is the area that contains the physical or biological features essential to the “conservation” of the species and which may require special protection or management considerations. 16 U.S.C. § 1532(5)(A).

34. Section 4 of the ESA also requires the Secretary to develop and implement recovery plans for threatened and endangered species, unless the Secretary finds that such a plan will not promote the conservation of the species. 16 U.S.C. § 1533(f).

35. The ESA defines “endangered species” as “any species which is in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6). The ESA defines “threatened species” as “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20).

1 36. The ESA requires the action agency, in consultation with FWS, to “insure that
2 any action authorized, funded, or carried out by” the agency “is not likely to jeopardize the
3 continued existence of any endangered species or threatened species or result in the destruction
4 or adverse modification” of the critical habitat of such species. 16 U.S.C. § 1536(a)(2). FWS
5 and the action agency must use the best scientific data available during consultation. *Id.*

7 37. “Action” is broadly defined under the ESA to include all activities or programs of
8 any kind authorized, funded, or carried out by federal agencies, including actions directly or
9 indirectly causing modifications to the land, water, or air; actions intended to conserve listed
10 species or their habitat; and the promulgation of regulations. 50 C.F.R. § 402.02.²

12 38. For each proposed action, the action agency must request from FWS whether any
13 listed or proposed species may be present in the area of the proposed agency action. 16 U.S.C. §
14 1536(c)(1); 50 C.F.R. § 402.12. If listed or proposed species may be present, the action agency
15 must prepare a “biological assessment” to determine whether the listed species is likely to be
16 adversely affected by the proposed action. *Id.*

18 39. If the action agency determines that a proposed action may affect any listed
19 species or critical habitat, the agency must engage in formal consultation with FWS, unless the
20 biological assessment concludes that the action is not likely to adversely affect any listed species
21 or critical habitat, and FWS concurs with that finding. 50 C.F.R. § 402.14.

24
25 ² FWS issued amended ESA regulations in 2019 and has proposed additional revisions. The
26 citations to the ESA regulations herein are to the version of the regulations that were in effect at
27 the time of the challenged 2016 Biological Opinion, except for the regulation governing the
28 reinitiation of consultation, for which we cite to the regulation currently in effect.

1 40. To complete formal consultation, FWS must provide the action agency with a
2 “biological opinion,” explaining how the proposed action will affect the listed species or habitat.
3
4 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14.

5 41. If FWS concludes that the proposed action “will jeopardize the continued
6 existence” of a listed species or result in the destruction or adverse modification of critical
7 habitat, the biological opinion must outline “reasonable and prudent alternatives.” 16 U.S.C. §
8 1536(b)(3)(A).

9
10 42. If the biological opinion concludes that the action is not likely to jeopardize the
11 continued existence of a listed species, and is not likely to result in the destruction or adverse
12 modification of critical habitat, FWS must provide an “incidental take statement,” specifying the
13 amount or extent of incidental taking on such listed species and any “reasonable and prudent
14 measures” that FWS considers necessary or appropriate to minimize such impact, and setting
15 forth the “terms and conditions” that must be complied with by the action agency to implement
16 those measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

17
18 43. In order to monitor the impacts of incidental take, the action agency must monitor
19 and report the impact of its action on the listed species to FWS as specified in the incidental take
20 statement. 16 U.S.C. § 1536(b)(4); 50 C.F.R. §§ 402.14(i)(1)(iv), 402.14(i)(3). If during the
21 course of the action, the amount or extent of incidental taking is exceeded, the action agency
22 must reinitiate consultation with FWS immediately. 50 C.F.R. § 402.14(i)(4).

23
24 44. The reinitiation of formal consultation is required and must be requested by the
25 action agency or FWS where discretionary federal involvement or control over the action has
26 been retained or is authorized by law, and if (1) the amount or extent of taking specified in the
27 incidental take statement is exceeded; (2) new information reveals effects of the action that may
28

1 affect listed species or critical habitat in a manner or to an extent not previously considered; (3)
2 the action is modified in a manner that causes an effect to the listed species or critical habitat that
3 was not considered in the biological opinion; or (4) a new species is listed or critical habitat
4 designated that may be affected by the identified action. 50 C.F.R. § 402.16(a).
5

6 45. After the initiation or reinitiation of consultation, the action agency is prohibited
7 from making any irreversible or irretrievable commitment of resources with respect to the
8 agency action which may foreclose the formulation or implementation of any reasonable and
9 prudent alternative measures. 16 U.S.C. § 1536(d).
10

11 46. Section 9 of the ESA and its implementing regulations prohibit the unauthorized
12 “take” of listed species. 16 U.S.C. § 1538(a)(1); 16 U.S.C. § 1533(d); 50 C.F.R. § 17.31. “Take”
13 is defined broadly to include harming, harassing, trapping, capturing, wounding, or killing a
14 protected species either directly or by degrading its habitat. 16 U.S.C. § 1532(19); 50 C.F.R. §
15 17.3 (defining harm to include “significant habitat modification or degradation where it actually
16 kills or injures wildlife by significantly impairing essential behavioral patterns, including
17 breeding, feeding, or sheltering”).
18

19 47. Taking that is in compliance with the terms and conditions specified in the
20 incidental take statement of a biological opinion is not considered a prohibited taking under
21 Section 9 of the ESA. 16 U.S.C. § 1536(o)(2).
22

23 **II. The Administrative Procedure Act**

24 48. Pursuant to the Administrative Procedure Act (“APA”), a person suffering legal
25 wrong because of agency action, or adversely affected or aggrieved by agency action within the
26 meaning of a relevant statute, is entitled to judicial review thereof. 5 U.S.C. § 702. Agency
27
28

1 action made reviewable by statute and final agency actions for which there is no adequate
 2 remedy in court are subject to judicial review. 5 U.S.C. § 704.

3
 4 49. The APA directs a court to compel agency action unlawfully withheld or
 5 unreasonably delayed; and to hold unlawful and set aside agency action found to be arbitrary,
 6 capricious, an abuse of discretion, or otherwise not in accordance with the law, or agency action
 7 that is undertaken without observance of procedure required by law. 5 U.S.C. § 706.

8 **FACTUAL ALLEGATIONS**

9
 10 **I. The Wildlife Species on the Superior National Forest Threatened with Extinction**

11 **A. *The Canada Lynx***

12 50. The Canada lynx is a medium-sized cat with long legs and unusually large paws
 13 that make it highly adapted for hunting in deep snow. A mid-size carnivore, the Canada lynx
 14 plays an important ecological role in targeting smaller prey species that reproduce relatively
 15 quickly. In 2000, FWS designated the Canada lynx as a threatened species under the ESA.
 16



24 51. The majority of recorded lynx occurrences in Minnesota are from the northeastern
 25 portion of the state, where the Superior National Forest is located.

26
 27 52. A number of land management activities on the Superior National Forest may
 28 affect Canada lynx and lynx habitat, including mining exploration and other mining activities.

1 Land exchanges concerning proposed mining sites on the Superior National Forest may also
2 result in a loss of lynx habitat, lynx prey habitat, and connectivity.

3
4 53. Minerals management and mine development have the potential to adversely
5 affect lynx and lynx critical habitat by reducing habitat quality for denning, foraging, and
6 dispersal; disrupting travel, resting, and foraging patterns; and disturbing denning females and
7 reducing habitat quality for lynx prey species.

8
9 54. Direct lynx mortality on the Superior National Forest may result from trapping,
10 shooting, predator control, and vehicle collisions. Other large-scale risk factors to lynx and lynx
11 critical habitat include the fragmentation and degradation of lynx habitat.

12
13 55. Common causes of mortality for lynx include starvation of kittens and human
14 caused mortality, including trapping. Lynx in Minnesota have been killed by vehicle and train
15 collisions.

16
17 56. At the time of the 2016 Biological Opinion, there had been 63 lynx mortalities
18 recorded in Minnesota since 2000. Of these 63 mortalities, 29 died after being trapped, 16 died
19 from unknown causes, 9 died from vehicle collisions, 7 died from being shot, and 2 died after
20 collisions with trains.

21
22 57. In 2005, FWS completed a “Recovery Outline” for Canada lynx. The Canada
23 lynx Recovery Outline serves as an interim strategy to guide recovery efforts and inform the
24 critical habitat designation process for lynx until a draft recovery plan has been completed.
25 Under the Recovery Outline, the lynx habitat on the Superior National Forest is identified as one
26 of six “core areas” within the contiguous United States.

27
28 58. The goal of the Recovery Outline is to address the threats to lynx so that its
protection under the ESA is no longer required, and delisting is warranted. Objectives include

1 ensuring that sufficient habitat is available to accommodate the long-term persistence of
2 immigration and emigration between each core area and adjacent populations in Canada or
3 secondary areas in the United States.
4

5 59. On February 25, 2009, FWS issued a final rule revising the critical habitat
6 designation for Canada lynx. 74 Fed. Reg. 8616 (Feb. 25, 2009). By definition, the critical
7 habitat designation includes the specific areas within the geographic area that is occupied by lynx
8 and on which are found the physical and biological features that are essential to the conservation
9 of the species. 16 U.S.C. § 1533(5)(A)(i).
10

11 60. Within Minnesota, FWS designated critical habitat for Canada lynx in portions of
12 Cook, Koochiching, Lake, and St. Louis Counties. The majority of the Superior National Forest
13 is within designated lynx critical habitat.
14

15 61. The designated critical habitat for Canada lynx within Minnesota is considered
16 essential because it is the only area in the Great Lakes Region for which there is evidence of
17 recent lynx reproduction. Moreover, it likely acts as a source for, or provides connectivity to,
18 more peripheral portions of the lynx's range in the region.
19

20 62. For the portion of the critical habitat designation within St. Louis County of
21 Minnesota, FWS carved out the "mining district" and excluded it from the critical habitat
22 designation. 74 Fed. Reg. at 8643, 8670. According to FWS, in much of this mining district,
23 mining has removed all vegetation. Moreover, areas that are still vegetated are extensively
24 fragmented by the mined areas and haul roads.
25
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27
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1 **B. *The Northern Long-Eared Bat***

2 63. The northern long-eared bat was listed by FWS as a threatened species under the
3 ESA in 2015. In April 2016, FWS issued a final rule finding that designating critical habitat for
4 the northern long-eared bat was “not prudent.”

5 64. Known for their long ears and secretive roosting and hibernating strategies, the
6 northern long-eared bat is a temperate, insectivorous, migratory bat that hibernates in mines and
7 caves in the winter and spends summers in wooded areas. The bat generally hibernates from
8 mid-fall through mid-spring each year. The bats play an essential ecological role in keeping
9 insect populations in check.
10



19 65. Suitable summer habitat for the northern long-eared bat consists of a wide variety
20 of forested habitats where they roost and forage. Upon their emergence from the hibernacula
21 (locations chosen by a species for hibernation) in the spring, female bats seek suitable habitat for
22 maternity colonies. Females give birth to a single offspring, typically in mid-May to early June
23 each year.
24

25 66. The main threat to the northern long-eared bat is an invasive and often deadly
26 fungal bat disease commonly referred to as white-nose syndrome, which has rampantly spread in
27 bat populations from the Northeast to the Midwest and Southeast of the United States.
28

1 Population numbers of the northern long-eared bat have declined by 99 percent in the Northeast.
2 Due to white-nose syndrome, northern long-eared bats are also increasingly vulnerable to other
3 stressors, such as habitat degradation and fragmentation, that further imperil the bat's population.
4

5 67. In Minnesota, northern long-eared bat populations are known from 15
6 hibernacula. At the time of the 2016 Biological Opinion, it was estimated that 3,000 northern
7 long-eared bats hibernated in the largest known hibernaculum in Minnesota, the Soudan Mine in
8 St. Louis County.

9
10 68. At the time of the 2016 Biological Opinion, white-nose syndrome had not been
11 detected in Minnesota. The fungus that causes white-nose syndrome was detected within
12 Minnesota in 2011-2012, but the fungus had not caused white-nose syndrome in bats within the
13 state at the time of the 2016 Biological Opinion.

14
15 69. In November 2015, FWS completed a biological opinion for activities affecting
16 the northern long-eared bat within the Eastern Region of the National Forest System, which
17 includes the Superior National Forest. FWS concluded that these activities are not likely to
18 jeopardize the continued existence of the northern long-eared bat.

19
20 70. On January 14, 2016, FWS published a final "4(d) Rule" for the northern long-
21 eared bat, pursuant to Section 4(d) of the ESA. 16 U.S.C. § 1533(d). The 4(d) rule only
22 prohibits the "incidental take" of northern long-eared bats within areas impacted by white-nose
23 syndrome if the take occurs within known hibernaculum; results from tree removal activities that
24 are within 0.25 mile of a known hibernaculum; or the implicated activities cut or destroy a
25 known, occupied maternity roost tree or others trees within a 150-foot radius from the known,
26 occupied maternity roost tree during the pup season from June 1 through July 31. The rule also
27 prohibits the purposeful take of the northern long-eared bat, except in limited circumstances.
28

1 **C. *The Gray Wolf***

2 71. Gray wolves are the largest wild members of the dog family, with adults weighing
3 up to 175 pounds. Gray wolves play a critical ecological role as a top predator and keystone
4 species. In response to their vastly declining numbers, FWS designated the gray wolf as an
5 endangered species under the ESA in 1974. The Minnesota population of gray wolves was
6 reclassified as a threatened species in 1978. FWS designated critical habitat for the gray wolf in
7 Minnesota and Michigan in 1978. FWS designated critical habitat for the gray wolf in
8 Minnesota and Michigan in 1978. All of the Superior National Forest was designated as critical
9 habitat for the gray wolf.
10



18 72. At the time of the 2016 Biological Opinion, the gray wolves in Minnesota
19 remained listed as a threatened species under the ESA. FWS estimated that the population of
20 wolves in Minnesota at that time was approximately 2,220, with an estimated 484 wolves on the
21 Superior National Forest.
22

23 73. In 2020, FWS delisted almost all gray wolves in the lower-48 United States from
24 the list of threatened and endangered species, including wolves in Minnesota. 85 Fed. Reg.
25 69,778 (Nov. 3, 2020).
26
27
28

1 74. The Center for Biological Diversity and other organizations have challenged the
2 gray wolves “delisting rule” in federal court. *Defenders of Wildlife, et al. v. U.S. Fish and*
3 *Wildlife Service, et al.*, 21-cv-344 (N.D. Cal.).
4

5 **II. The NorthMet Mine Project and Land Exchange**

6 75. PolyMet Mining Inc. (“PolyMet”) proposes to construct an open pit mine in
7 northeastern Minnesota to extract low- to medium-quality copper-nickel-PGE minerals. The
8 project, called the NorthMet Mine Project, is located in St. Louis County, about 60 miles north of
9 Duluth, and 6 miles south of Babbitt. The NorthMet Mine Project areas include the Mine Site
10 (3,015 acres), the Plant Site (4,515 acres), and the Transportation and Utility Corridor that
11 connects the Mine Site to the Plant Site (120 acres).
12

13 76. The NorthMet Mine Project was proposed on the Superior National Forest, on
14 lands where an open-pit mine was prohibited. The Forest Service therefore proposed a land
15 exchange between the Forest Service and PolyMet in order to eliminate the conflict between
16 PolyMet’s desire to surface mine and the United States’ surface rights. Because the NorthMet
17 Mine Project is dependent on the land exchange, the land exchange is considered a connected
18 action and interrelated activity, and both the NorthMet Mine Project and Land Exchange were
19 considered together in the environmental analysis and documents.
20

21 77. Three federal agencies have been involved in the environmental analysis and
22 review for the NorthMet Mine Project and Land Exchange. The Forest Service is an action
23 agency due to the proposed Land Exchange between the Forest Service and PolyMet. The Corps
24 is also an action agency due to PolyMet’s need for a Section 404 Permit under the Clean Water
25 Act for the proposed Project. And the Forest Service and the Corps were required to consult
26
27
28

1 with FWS under Section 7 of the ESA on the NorthMet Mine Project and Land Exchange due to
2 the Project's impacts on Canada lynx, gray wolves, northern long-eared bats, and their habitat.

3
4 78. The Minnesota Department of Natural Resources and the Minnesota Pollution
5 Control Agency have also been extensively involved in the environmental review process for the
6 NorthMet Mine Project due to a number of state permits that PolyMet was required to obtain.

7 **A. *The 2015 Biological Assessment***

8
9 79. In April 2015, the Forest Service and the Corps completed the "Biological
10 Assessment for the Proposed NorthMet Project and Land Exchange," as required under Section 7
11 of the ESA.

12 80. The Forest Service and the Corps determined that the Mine Site is used by the
13 Canada lynx, gray wolf, and northern long-eared bat, and that the northern long-eared bat utilizes
14 the Plant Site and Transportation/Utility Corridor.

15
16 81. The Forest Service and the Corps concluded that the NorthMet Mine Project is
17 "likely to adversely affect" Canada lynx, Canada lynx critical habitat, gray wolves, gray wolf
18 critical habitat, and the northern long-eared bat.

19
20 82. More specifically, the Forest Service and the Corps found that the NorthMet Mine
21 Project would directly affect about 1,719 acres of lynx and wolf critical habitat within the Mine
22 Site, and would result in the potential loss of available summer roost habitat at the Mine Site for
23 the northern long-eared bat.

24
25 83. The Forest Service and the Corps determined that the primary effects to lynx and
26 wolves would be from the loss and fragmentation of habitat, the loss of habitat connectivity, and
27 from fatalities associated with vehicle and rail traffic on the Mine Site, the Transportation and
28 Utility Corridor, the Plant Site, and access roads and railroads to the Project area. The agencies

1 determined that the primary effect to the northern long-eared bat would be loss of habitat. In
2 addition, noise and other disturbances could disrupt lynx and wolf use of travel corridors near the
3 Project area.
4

5 84. For purposes of preparing the Biological Assessment, the Forest Service and the
6 Corps determined that the “action area for direct and indirect effects” included those areas within
7 six miles of the Project. According to the Biological Assessment, this area was determined by
8 the FWS as the minimum area that needed to be assessed to identify Canada lynx that could be
9 impacted by the Project.
10

11 **B. *The 2016 Biological Opinion***

12 85. On February 5, 2016, FWS completed the Biological Opinion for the NorthMet
13 Mine Project and Land Exchange (“Biological Opinion”).
14

15 86. The NorthMet Mine Project would directly disturb at least 3,918 acres, including
16 at least 1,719 acres at the Mine Site and 2,189 acres at the Plant Site. The direct disturbance at
17 the Mine Site includes 528 acres of open mine pits, up to 794 acres of overburden and waste rock
18 stockpiles, and 397 acres of infrastructure.
19

20 87. Ore would be excavated using drilling and blasting methods at the Mine Site, and
21 then loaded and hauled by railroad approximately 8 miles west to the Plant Site for processing.
22 At the Plant Site, the tailings waste from the ore processing would be placed in a tailings basin
23 that would be built on an existing taconite tailings basin.
24

25 88. FWS explained in the Biological Opinion that “action area” is defined by the ESA
26 regulations to include all areas directly or indirectly affected by the federal action, and not
27 merely the immediate area involved in the action. For the action area of the Mine Site, Plant
28 Site, and Transportation and Utility Corridor, FWS included an approximate 6-mile buffer for

1 the effects analysis, and a wildlife movement corridor that was outside of the 6-mile buffer. The
2 6-mile buffer was identified by FWS as the minimum area that could be impacted by the
3 NorthMet Mine Project.
4

5 89. FWS concluded in its effects analysis that the land exchange will lead to the
6 subsequent development of the newly private lands, which would be an indirect effect of and
7 caused by the land exchange, thereby resulting in significant adverse effects and the potential
8 take of lynx, wolf, and northern long-eared bat.
9

10 90. More specifically, FWS determined that species habitat effectiveness, including
11 both quality and quantity, and use of the Mine and Plant Sites and surrounding area would be
12 reduced due to vegetation removal and subsequent habitat fragmentation, and the increasing
13 human presence, noise, traffic, and other factors as mining activities progress.
14

15 91. The destruction of habitat at the Mine Site would include 1,333 acres of lynx
16 denning, wolf cover, and northern long-eared bat roosting habitat. The loss of lynx, wolf, and
17 bat habitat will be permanent, except where the reclamation of forested habitat can occur, which
18 will take at least several decades.

19 92. The Mine Site and the eastern portion of the Transportation and Utility Corridor
20 are within Lynx Analysis Unit (“LAU”) #12 on the Superior National Forest. The NorthMet
21 Mine Project will result in the loss of at least 1,719 acres of lynx habitat in LAU #12.
22

23 93. New roads will be constructed for the NorthMet Mine Project, mostly within the
24 Mine Site. These roads will be well-traveled and there will be noise and activity associated with
25 construction and operations, 24 hours per day and year-around for up to 20 years. In addition,
26 there will be approximately 22 round trips daily of ore trains consisting of 16-20 ore cars.
27
28

1 94. There will be an increase of approximately 346 vehicle trips per day and 45 train
2 trips per day, totaling 391 per day in the action area above existing traffic levels. The total miles
3 of vehicle and train travel per day in the action area is estimated to be 3,608 vehicle miles and
4 423 train miles, for a total of 4,031 miles per day.
5

6 95. Increased traffic volume will increase the probability for lynx and wolf mortality
7 by vehicle and train collisions.
8

9 96. Wildlife movement in the region of the proposed NorthMet Mine Project is
10 already significantly restricted as result of extensive landscape changes, including past and
11 current iron ore and taconite mining. The NorthMet Mine Project would further adversely affect
12 remaining wildlife travel corridors near the Mine Site. More specifically, wildlife travel
13 corridors #16 and #17 would be directly affected by mining-related activities. Reduced or
14 restricted access to travel corridors #16 and #17 may further adversely affect other adjacent
15 travel corridors due to increased use from displaced lynx, wolves, and their prey.
16

17 97. The Plant Site of the NorthMet Mine Project proposal is within the “mining
18 district” that is excluded from the lynx critical habitat designation, while the Mine Site is located
19 within the currently designated critical habitat.
20

21 98. The NorthMet Mine Project would result in the long-term, and in most areas,
22 permanent loss of lynx habitat at the Mine Site and contribute to habitat fragmentation. Of the
23 1,719 acres of lynx critical habitat that would be destroyed at the Mine Site, only 202 acres have
24 the potential to be eventually reclaimed with woody vegetation growth, although this may take
25 many decades to be suitable as lynx habitat. And even these 202 acres may never be conducive
26 to use by lynx. The remaining 1,519 acres will be permanently lost to lynx habitat, and further
27 fragment the remaining habitat in the area.
28

1 99. The NorthMet Mine Project would cause the permanent loss of at least 1,500
2 acres of lynx critical habitat to mining at the Mine Site, adjacent to the “mining district” that is
3 already excluded from the lynx critical habitat designation. This includes the loss of 1,333 acres
4 of potential lynx denning habitat.
5

6 100. The Biological Opinion does not address or consider the impacts of the NorthMet
7 Mine Project on the recovery of Canada lynx. The Biological Opinion does not address or
8 consider the 2005 Canada Lynx Recovery Outline.
9

10 101. The habitat loss caused by the NorthMet Mine Project may result in lynx, wolves,
11 and northern long-eared bats abandoning the area temporarily or permanently, including portions
12 of existing home ranges, territories, or roosting sites, to find suitable habitat. Similarly, the
13 harassment of lynx, wolves, and northern long-eared bats, through noise, motorized vehicles, and
14 human presence, may result in their abandonment of habitat and leaving the general area.
15

16 102. The loss of suitable habitat would not only further fragment the remaining habitat
17 of lynx, wolves, and northern long-eared bats in the general vicinity, but likely also affect
18 adjacent suitable habitats due to increased use, and other factors.

19 103. Noise and other mining-related effects may diminish the habitat quality of
20 adjacent habitats and travel corridors, contribute to fragmentation effects from the loss of habitat,
21 and force lynx, wolves, and northern long-eared bats to travel farther to find available suitable
22 habitat and prey resources.
23

24 104. FWS determined in the Biological Opinion that the NorthMet Mine Project will
25 result in significant adverse effects to the northern long-eared bat, gray wolf, and Canada lynx,
26 including take. Despite this determination, FWS concluded that the NorthMet Mine Project is
27 not likely to jeopardize the continued existence of the northern long-eared bat, gray wolf, or
28

1 Canada lynx, and is also not likely to destroy or adversely modify critical habitat for the gray
2 wolf or Canada lynx.

3
4 105. The Biological Opinion included an “Incidental Take Statement.” FWS
5 anticipated “incidental take” in terms of one lynx and one wolf killed by a vehicle or train every
6 20 years in the action area.

7 106. FWS described additional incidental take through a surrogate of acres of habitat
8 for the lynx, wolf, and northern long-eared bat primarily due to vegetation and overburden
9 removal at the Mine and Plant Sites, and along the Transportation and Utility Corridor.
10 According to FWS, vegetation removal on all these sites will total no more than 3,918 acres,
11 including 1,719 acres at the Mine Site, less than 10 acres along the Transportation and Utility
12 Corridor, and 2,189 acres at the Plant Site.

13
14 107. FWS found in the Biological Opinion that direct incidental take of the northern
15 long-eared bat may occur, but is not prohibited provided specific actions are implemented under
16 the January 2016 final 4(d) rule for the bat.

17
18 108. FWS concluded in the Biological Opinion that the anticipated incidental take will
19 not jeopardize the continued existence of Canada lynx, gray wolf, or northern long-eared bat.
20 FWS also concluded that “while there may be adverse effects to critical habitat for both lynx and
21 wolf, it will not be adversely modified.”

22
23 109. FWS included two “reasonable and prudent measures” within the Incidental Take
24 Statement, which it stated are necessary and appropriate to minimize take of Canada lynx, gray
25 wolf, and northern long-eared bat.
26
27
28

1 110. The first reasonable and prudent measure concerned the incidental take of lynx
2 and wolves caused by vehicle collisions: “Implement proposed action Conservation Measures to
3 reduce likelihood of vehicle collisions with lynx and wolf.”
4

5 111. The second reasonable and prudent measure concerned the incidental take of
6 northern long-eared bats: “Implement measures to reduce the likelihood of injuring or killing any
7 northern long-eared bats during vegetation removal, other mining-related activities, and forest
8 management.”
9

10 112. FWS included two “terms and conditions” within the Incidental Take Statement.
11 The first term and condition concerned the incidental take of the northern long-eared bat, and
12 provided that PolyMet will not conduct any activities that disturb or disrupt hibernating bats if
13 any hibernacula are found in the Project area.
14

15 113. The second term and condition set forth “reporting requirements,” including the
16 requirement to report any vehicle collisions with lynx or wolves within 72 hours; the requirement
17 to report any sick, injured, or dead bats; and the requirement for PolyMet to provide FWS with
18 an annual report by January 31 of the following calendar year.
19

20 114. FWS concluded in the Biological Opinion that no more than one Canada lynx and
21 one gray wolf will be incidentally taken, and up to 3,918 acres of habitat for lynx, wolf, and
22 northern long-eared bat will be removed, as a result of the proposed action during the 20-year
23 duration of this biological opinion. FWS stated in the Biological Opinion that if, during the
24 course of action, this level of incidental take is exceeded, such incidental take represents new
25 information requiring the reinitiation of consultation.
26
27
28

1 **C. *The 2017 Forest Service Record of Decision for the NorthMet Project Land***
2 ***Exchange, and the 2018 Completion of the Land Exchange***

3 115. In January 2017, the Forest Service issued its Record of Decision for the
4 NorthMet Project Land Exchange. The Record of Decision approved and authorized the Land
5 Exchange between the Forest Service and PolyMet.
6

7 116. The Forest Service in the 2017 Record of Decision relied on the 2016 Biological
8 Opinion for its compliance with Section 7 of the ESA.

9 117. On June 28, 2018, the NorthMet Land Exchange between the U.S. Forest Service
10 and PolyMet Mining Company closed, with titles transferred.³

11 **D. *The 2018 State Permits***

12 118. On November 1, 2018, the Minnesota Department of Natural Resources issued
13 the following permits for PolyMet's NorthMet Mine Project: (1) permit to mine; (2) two dam
14 safety permits; (3) water appropriation permits; (4) an endangered and threatened species takings
15 permit pursuant to Minnesota's state endangered species law; and (5) a public waters work
16 permit.
17

18 119. On December 20, 2018, the Minnesota Pollution Control Agency issued the
19 following permits and certification for PolyMet's NorthMet Mine Project: (1) air emission
20 permit; (2) water quality permit; and (3) Clean Water Act Section 401 Certification.
21

22 **E. *The 2019 Corps Record of Decision and Clean Water Act Section 404 Permit***

23 120. In March 2019, the Corps issued its Record of Decision for the NorthMet Mine
24 Project. The Record of Decision describes the Corps' decision to authorize PolyMet's
25

26
27
28

³ See <https://polymetmining.com/wp-content/uploads/2021/11/SEDAR-MDA-Q3-F21.pdf>

1 discharges of dredge and fill material into waters of the United States, as part of the NorthMet
2 Mine Project, pursuant to Section 404 of the Clean Water Act.

3
4 121. In discussing the scope of analysis under the ESA, the Corps stated in the Record
5 of Decision that the Action Area was determined to include the Project Area as well as a six-mile
6 buffer, based on the extent to which the Project would cause indirect effects on the listed species.

7 122. The Corps in the 2019 Record of Decision relied on the 2016 Biological Opinion
8 for its compliance with Section 7 of the ESA.

9
10 **III. New information and modifications to the action reveal effects of the NorthMet**
11 **Mine Project and Land Exchange on threatened species and critical habitat in a**
12 **manner and to an extent that was not considered in the 2016 Biological Opinion**

13 123. Subsequent to the February 5, 2016 Biological Opinion, there has been significant
14 new information and modifications to the action that reveal potential effects of the proposed
15 NorthMet Mine Project and Land Exchange on threatened species and critical habitat in a
16 manner and to an extent not previously considered.

17 124. The northern long-eared bat population has plummeted on the Superior National
18 Forest, as white-nose syndrome is now present in Minnesota and has devastated bat populations.⁴
19 From 2015-2017, capture rates of the northern long-eared bat on the Superior National Forest
20 declined by 90 percent. And from 2017-2019, none were detected. At the Soudan Mine, where
21 the northern long-eared bat hibernates, there were historically 2,000 bats detected. By 2019, no
22 bats were detected at Soudan Mine, and the survey was cancelled in 2020.

23
24
25
26 ⁴ See “An Update on Northern Long-eared Bat Management and Monitoring on the Superior
27 National Forest,” July 21, 2020, available at: <https://sfec.cfans.umn.edu/2020-webinar-jul>; see
28 also “Northern Long-eared Bat Roost Tree Characteristics 2015-2017,” available at:
<https://conservancy.umn.edu/bitstream/handle/11299/204334/NRRI-TR-2018-41.pdf?sequence=1>; and “Bat Radiotelemetry in Forested Areas of Minnesota 2015-2017,”
available at: <https://conservancy.umn.edu/bitstream/handle/11299/204335/NRRI-TR-2018-42.pdf?sequence=1&isAllowed=y>.

1 125. According to a Forest Service biologist, researchers working on the annual bat
2 census for the Superior National Forest used to net an average of 8-10 northern long-eared bats
3 or little brown bats per night.⁵ By 2017, however, they averaged just two bats per night, and on
4 many nights came up empty. For the northern long-eared bat, they are not seeing any of them.

5
6 126. According to a 2019 newspaper report, researchers in Minnesota have given up on
7 their annual count of bats, deciding it is better to just leave any remaining bats alone.⁶ A
8 mammologist for the Minnesota Department of Natural Resources commented that it is best to
9 leave them alone, as “there’s just nothing left to find.”

10
11 127. The expected size and output of the NorthMet Mine Project has significantly
12 increased since the Project was analyzed by the Forest Service and the Corps in the 2015
13 Biological Assessment, and by FWS in the 2016 Biological Opinion. PolyMet is now analyzing
14 the development of substantially higher throughputs of 59,000 and 118,000-short ton per day at
15 the NorthMet Mine Site, compared to the 32,000-short ton per day that was analyzed in the 2005
16 Final Environmental Impact Statement for the proposed project, and assumed by the agencies in
17 preparing the 2015 Biological Assessment and 2016 Biological Opinion.⁷

18
19 128. According to a 2019 news release by PolyMet, “proven and probable reserves”
20 have increased by 14 percent to 290 million tons, and “measured and indicated reserves” have
21

22
23 ⁵ “*We knew this was coming*” – *Bat numbers plummeting in Arrowhead*, July 12, 2017, by
24 Marshall Helmberger in the Timberjay, available at: <http://timberjay.com/stories/we-knew-this-was-coming,13512>.

25 ⁶ “*Facing a bleak outlook, Minnesota bat researchers give up on annual count*,” December 8,
26 2019, by Greg Stanley in the Minneapolis StarTribune, available at:
27 <https://www.startribune.com/facing-a-bleak-outlook-minnesota-bat-researchers-try-a-new-tack/565934002/>.

28 ⁷ https://polymetmining.com/wp-content/uploads/2018/10/PN150163-PolyMet-NI-43-101-Technical-Report-2018_03_26_Rev0.pdf.

1 increased by 22 percent to 795 million tons, based on the results of the company's 2018-19
2 drilling program.⁸ And as further disclosed in a September, 2021 investor presentation, the
3 current mine plan that was assessed in the 2015 Biological Assessment and 2016 Biological
4 Opinion represents only one-third of the existing measured and indicated resource.⁹

5
6 129. In the 2015 Biological Assessment and 2016 Biological Opinion, the Forest
7 Service, the Corps, and FWS considered that PolyMet was planning to purchase 2,169 acres in
8 Aitkin County, Pine County, and south-central St. Louis County as mitigation for the anticipated
9 impacts to wetlands resulting from the project.¹⁰ On these wetland mitigation sites, 1,603 acres
10 were going to be restored or converted to wetlands. These "wetland mitigation sites" were part
11 of FWS' rationale in the Biological Opinion for why the project was not likely to jeopardize the
12 Canada lynx, gray wolf, or northern long-eared bat, or adversely modify the critical habitat for
13 lynx or the gray wolf.¹¹ However, in the Corps' 2019 Record of Decision for the NorthMet Mine
14 Project, it is disclosed that rather than purchasing these sites for wetland mitigation, PolyMet
15 instead purchased credits at a wetland mitigation bank.¹²

16
17
18 130. The extent and magnitude of additional planned and anticipated sulfide copper
19 mining in northeastern Minnesota has significantly increased since the 2015 Biological
20 Assessment and 2016 Biological Opinion. Teck American Incorporated has ramped up
21

22
23 ⁸ <https://polymetmining.com/investors/news/polymet-drilling-program-results-in-additions-to-northmet-mineral-resources-and-reserves/>

24
25 ⁹ <https://polymetmining.com/wp-content/uploads/2021/09/PLM-Investor-Presentation-Sept-2021.pdf>

26
27 ¹⁰ See Biological Opinion, p. 4.

28 ¹¹ Biological Opinion, p. 62.

¹² March 21, 2019 Record of Decision, p. 11.

1 exploration nearby the NorthMet site, in what would become a massive mine straddling both the
2 St. Louis and Rainy River watersheds.¹³ Encampment Minerals is also drilling exploratory
3 boring holes nearby, just south of Hoyt Lakes, within a high biological significance area by the
4 St. Louis River, and is also drilling near Birch Lake.¹⁴ And Twin Metals Minnesota has
5 submitted a mine plan of operations to the state and federal agencies for a massive underground
6 copper mine near Birch Lake.¹⁵

8
9 131. The continued exploration, development, and expansion of these mine proposals
10 will have significant impacts on Canada lynx, northern long-eared bats, and their habitat,
11 including continuing to further fragment lynx habitat and negatively impact its few remaining
12 travel corridors in the Mesabi Iron Range and Arrowhead Region of Minnesota.

13 132. The Forest Service has further developed the science and expert understanding of
14 the potential adverse impacts of a copper mine in this region, in response to the proposed Twin
15 Metals copper mine within the watershed of the Boundary Waters Canoe Area Wilderness
16 (“BWCAW”). This includes but is not limited to a December 14, 2016 letter from Chief Tidwell
17 of the Forest Service to the BLM. Based on its analysis, the Forest Service has found
18 “unacceptable the inherent potential risk that development of a regionally-untested copper-nickel
19
20
21
22

23
24 ¹³ <https://www.duluthnewstribune.com/business/energy-and-mining/4821744-Long-quiet-copper-nickel-project-asks-to-restart-exploratory-drilling>; [https://www.mesabtribune.com/teck-seeking-state-s-permission-to-explore-minerals-near-babbitt/article_4cd955f8-1d64-11ea-a717-4bbf07689793.html#//](https://www.mesabtribune.com/teck-seeking-state-s-permission-to-explore-minerals-near-babbitt/article_4cd955f8-1d64-11ea-a717-4bbf07689793.html#/).

26 ¹⁴ <https://www.duluthnewstribune.com/business/energy-and-mining/4870535-Encampment-asks-to-drill-for-minerals-near-Hoyt-Lakes>.

28 ¹⁵ <https://www.minnpost.com/environment/2019/12/what-you-need-to-know-about-the-twin-metals-mine-plan/>.

1 sulfide ore mine within the same watershed as the BWCAW might cause serious and
2 irreplaceable harm to this unique, iconic, and irreplaceable wilderness area.”¹⁶

3
4 133. The Forest Service’s determination of unacceptable risk is in part due to the
5 potential impacts to listed species including Canada lynx and the northern long-eared bat:

6 Crucially, the BWCAW and SNF are considered critical habitat for the threatened
7 Canada Lynx, which requires spruce-fir boreal forest with dense understory. Canada
8 Lynx cover large areas, traveling extensively throughout the year, meaning that
development and habitat fragmentation can affect the viability of lynx populations.

9 The threatened northern long-eared bat lives in both Lake and St. Louis County, where
10 [Twin Metals Minnesota’s] leases are located. The northern long-eared bat spends its
11 winter hibernating in caves. In summer it roosts in both live and dead trees, as well as
12 caves. Northern long-eared bat populations are under significant stress from White-nose
Syndrome, which has caused drastic declines in bat populations across the country.
Increased impacts to their habitat could exacerbate population decline.¹⁷

13 **IV. Plaintiffs’ ESA notice letter**

14 134. Plaintiffs sent a letter to Defendants on November 10, 2021, providing notice of
15 all allegations and claims included in this Complaint. Defendants received Plaintiffs’ notice
16 letter on or before November 16, 2021.

18 **V. The Status of the NorthMet Mine Project and Land Exchange**

19 135. According to PolyMet, the current status of the NorthMet Mine Project is that the
20 mining company has received “all major state and federal permits” for the Project, “including
21 Permit to Mine, air and water permits and federal wetlands (Section 404) permit.”¹⁸

22 136. PolyMet further summarizes the status of its permits as follows:

23
24 PolyMet received its Permit to Mine from the State of Minnesota on November 1, 2018, a
25 crucial permit for construction and operation of the Project. The Minnesota Department

26 ¹⁶ Dec. 14, 2016 letter from Forest Service Chief Tidwell to BLM Director Kornze, p. 1.

27 ¹⁷ *Id.*, p. 16.

28 ¹⁸ <https://polymetmining.com/operations/northmet-snapshot/>

1 of Natural Resources (“MDNR”) also issued all other permits for which the Company
2 applied including dam safety, water appropriations, endangered and threatened species
3 takings, and public waters work permits, along with Wetlands Conservation Act
4 approval. In addition, PolyMet received air and water permits from the Minnesota
5 Pollution Control Agency (“MPCA”) on December 18, 2018. Further, PolyMet received
6 the federal Record of Decision (“ROD”) and Section 404 Wetlands Permit from the U.S.
7 Army Corps of Engineers (“USACE”) on March 21, 2019, which was the last key permit
8 or approval needed to construct and operate the Project.¹⁹

9 137. As further noted by PolyMet, “[l]egal challenges contesting various aspects of the
10 MDNR, MPCA, and USACE decisions are ongoing and have led to court rulings that have
11 delayed the Project timeline.”²⁰

12 **CLAIMS FOR RELIEF**

13 **FIRST CLAIM FOR RELIEF**

14 **FWS’s 2016 Biological Opinion Violates the ESA and APA**

15 138. Plaintiffs hereby incorporate by reference all preceding paragraphs.

16 139. FWS’s 2016 Biological Opinion for the proposed NorthMet Mine Project and
17 Land Exchange is unlawful under the ESA, and arbitrary and capricious under the APA, for at
18 least the following reasons.

19 a) In determining that the NorthMet Mine Project is not likely to jeopardize
20 Canada lynx, and is not likely to adversely modify lynx critical habitat, FWS
21 failed to analyze or consider the effects of the Project on the recovery of the lynx.

22 b) FWS failed to make a finding or determination as to whether the NorthMet
23 Mine Project is likely to result in the destruction of designated critical habitat for
24 the Canada lynx and gray wolf.

25
26
27 ¹⁹ <https://polymetmining.com/wp-content/uploads/2021/11/SEDAR-MDA-Q3-F21.pdf>

28 ²⁰ *Id.*

1 c) In its final determination and conclusion, in considering the impacts of the
2 NorthMet Mine Project on Canada lynx, wolves, and the northern long-eared bat,
3 FWS improperly combined “survival and recovery” into one standard, rather than
4 considering each separately, thereby effectively reading “recovery” out of the
5 statute.
6

7 d) FWS failed to adequately explain why it was impracticable to express a
8 numerical population measure of the anticipated incidental take of lynx, wolves,
9 and northern long-eared bats caused by habitat destruction resulting from the
10 NorthMet Mine Project.
11

12 e) FWS failed to choose a proper surrogate instead of a numerical population
13 measure of the incidental take of lynx, wolves and northern long-eared bats
14 caused by habitat destruction, as the chosen surrogate fails to provide an adequate
15 trigger for the reinitiation of consultation.
16

17 f) FWS failed to provide reasonable and prudent measures, or terms and
18 conditions, to minimize the incidental take of lynx, wolves, and northern long-
19 eared bats caused by habitat destruction.
20

21 g) In finding that the NorthMet Mine Project will not result in jeopardy or
22 adverse modification of critical habitat, FWS improperly relied on conservation
23 and mitigation measures that are not reasonably specific, certain to occur, capable
24 of implementation, enforceable, or able to address the threats to the species.
25

26 h) FWS failed to include any terms and conditions to implement Reasonable
27 and Prudent Measure #1 concerning vehicle collisions.
28

1 i) FWS failed to consider or address that the NorthMet Mine Project's
2 permanent destruction of lynx critical habitat would revise FWS's critical habitat
3 designation for lynx by expanding the "mining district" in Minnesota that is
4 excluded from the designation.
5

6 j) FWS failed to use the best scientific data available in making its findings
7 and determinations.
8

9 k) FWS's determination that the NorthMet Mine Project is not likely to
10 jeopardize the Canada lynx, gray wolf, or northern long-eared bat, and is not
11 likely to adversely modify the designated critical habitat for the Canada lynx or
12 gray wolf, is unsupported, lacks any rational basis, is in disregard of the best
13 available science, is contrary to the evidence, and is arbitrary and capricious.
14

15 140. FWS violated the ESA in preparing and approving the 2016 Biological Opinion.
16 16 U.S.C. § 1536; 50 C.F.R. § 402.14. The 2016 Biological Opinion is arbitrary, capricious, an
17 abuse of discretion, and not in accordance with the ESA. 5 U.S.C. § 706(2)(A). The 2016
18 Biological Opinion should be held unlawful, set aside, and vacated. *Id.*

19 SECOND CLAIM FOR RELIEF

20 The Forest Service Violated the ESA in Relying on FWS's 2016 Biological Opinion

21 141. Plaintiffs hereby incorporate by reference all preceding paragraphs.
22

23 142. The 2016 Biological Opinion is unlawful, and thus the Forest Service's reliance
24 on the Biological Opinion in signing, authorizing, and approving the January 9, 2017, NorthMet
25 Project Land Exchange Record of Decision is arbitrary, capricious, and in violation of the ESA,
26 16 U.S.C. § 1536(a)(2).
27
28

1 143. Because the 2016 Biological Opinion is unlawful, the Forest Service is in ongoing
2 violation of its independent and substantive duty to ensure that the authorization and
3 implementation of the NorthMet Project Land Exchange is not likely to jeopardize the continued
4 existence of any listed species, or result in the destruction or adverse modification of designated
5 critical habitat, in violation of Section 7 of the ESA. 16 U.S.C. § 1536(a)(2). The Forest Service
6 cannot meet its ESA Section 7 obligations for the NorthMet Project Land Exchange by relying
7 on a Biological Opinion that is legally flawed. *Id.*
8

9 144. The Forest Service’s Record of Decision for the NorthMet Project Land Exchange
10 is arbitrary, capricious, an abuse of discretion, and contrary to the ESA. 5 U.S.C. § 706(2)(A).
11 The Record of Decision should be held unlawful, set aside, and vacated. *Id.*
12

13 **THIRD CLAIM FOR RELIEF**

14 **The Corps Violated the ESA in Relying on FWS’s 2016 Biological Opinion**

15 145. Plaintiffs hereby incorporate by reference all preceding paragraphs.
16

17 146. The 2016 Biological Opinion is unlawful, and thus the Corps’ reliance on the
18 Biological Opinion in signing, authorizing, and approving the agency’s 2019 Record of
19 Decision, and authorizing and issuing the Clean Water Act Section 404 Permit to PolyMet for
20 the NorthMet Mine Project, is arbitrary, capricious, and in violation of the ESA, 16 U.S.C. §
21 1536(a)(2).
22

23 147. Because the 2016 Biological Opinion is unlawful, the Corps is in ongoing
24 violation of its independent and substantive duty to ensure that the authorization and
25 implementation of the NorthMet Mine Project is not likely to jeopardize the continued existence
26 of any listed species, or result in the destruction or adverse modification of designated critical
27 habitat, in violation of Section 7 of the ESA. 16 U.S.C. § 1536(a)(2). The Corps cannot meet its
28

1 ESA Section 7 obligations for the NorthMet Mine Project by relying on a Biological Opinion
2 that is legally flawed. *Id.*

3
4 148. The Corps' 2019 Record of Decision, and the Clean Water Act Section 404
5 Permit for the NorthMet Mine Project, is arbitrary, capricious, an abuse of discretion, and
6 contrary to the ESA. 5 U.S.C. § 706(2)(A). The Record of Decision and Section 404 Permit
7 should be held unlawful, set aside, and vacated. *Id.*

8 **FOURTH CLAIM FOR RELIEF**

9 **FWS and the Corps are in Ongoing Violation of the ESA for Failing to Reinitiate and** 10 **Complete ESA Consultation on the NorthMet Mine Project and Land Exchange**

11 149. Plaintiffs incorporate by reference all preceding paragraphs.

12
13 150. Section 7 of the ESA requires the Corps to consult with FWS to ensure that any
14 action authorized, funded, or carried out by the agencies are not likely to jeopardize the
15 continued existence of any threatened or endangered species, or result in the destruction or
16 adverse modification of the critical habitat of such species. 16 U.S.C. § 1536(a)(2).

17
18 151. The reinitiation of consultation is required and must be requested by FWS or the
19 Corps where discretionary federal involvement or control over the action has been retained or is
20 authorized by law, and if new information reveals effects of the action that may affect listed
21 species or critical habitat in a manner or to an extent not previously considered, the action is
22 modified in a manner that causes an effect to the listed species or critical habitat that was not
23 considered in the biological opinion, or a new species is listed or critical habitat designated that
24 may be affected by the identified action. 50 C.F.R. § 402.16(a).

25
26 152. FWS and the Corps have violated and remain in ongoing violation of the ESA by
27 failing to reinitiate and complete consultation on the impacts of the NorthMet Mine Project and
28 Land Exchange despite relevant new information and modifications to the action revealing that

1 the Project may adversely affect listed species and critical habitat in a manner and to an extent
2 not considered within the 2016 Biological Opinion. 16 U.S.C. § 1536(a)(2); 50 C.F.R. §
3 402.16(a).
4

5 153. The ongoing failure of FWS and the Corps to reinitiate and complete consultation
6 on the impacts of the NorthMet Mine Project and Land Exchange on threatened and endangered
7 species, and critical habitat, violates the ESA. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.16(a).
8

9 154. In the absence of the required reinitiated consultation, the Corps is in ongoing
10 violation of its obligation under Section 7 of the ESA to ensure that its actions are not likely to
11 jeopardize the continued existence of threatened and endangered species or result in the
12 destruction or adverse modification of designated critical habitat. 16 U.S.C. § 1536(a)(2).
13

14 **RELIEF REQUESTED**

15 WHEREFORE, the Plaintiffs respectfully request that this Court:

16 A. Declare that the February 5, 2016 Biological Opinion for the NorthMet Project
17 and Land Exchange is unlawful under the ESA and arbitrary and capricious under the APA;

18 B. Declare that the Forest Service's reliance on the unlawful 2016 Biological
19 Opinion in issuing the 2017 Record of Decision violates the ESA;

20 C. Declare that the June 28, 2018 land exchange between the Forest Service and
21 PolyMet is void;

22 D. Declare that the Corps' reliance on the unlawful 2016 Biological Opinion in
23 issuing the 2019 Record of Decision and Clean Water Act Section 404 Permit violates the ESA;

24 E. Declare that FWS and the Corps are in ongoing violation of the ESA by failing to
25 reinitiate and complete ESA consultation for the NorthMet Mine Project despite significant new
26
27
28

1 information and changes to the Project revealing that the Project may affect listed species and
2 critical habitat in a manner and to an extent not previously considered;

3
4 F. Set aside and vacate the 2016 Biological Opinion, the Forest Service's 2017
5 Record of Decision for the NorthMet Project Land Exchange, and the Corps' 2019 Record of
6 Decision and Clean Water Act Section 404 Permit;

7
8 G. Order FWS and the Corps to reinitiate and complete ESA consultation for the
9 NorthMet Mine Project and Land Exchange;

10 H. Enjoin any implementation of the NorthMet Mine Project pending completion of
11 a legally adequate Biological Opinion and full compliance with the ESA;

12 I. Award to Plaintiffs their costs, expenses, expert witness fees, and reasonable
13 attorney fees pursuant to applicable law including the Endangered Species Act, 16 U.S.C. §
14 1540(g); and the Equal Access to Justice Act, 28 U.S.C. § 2412; and
15

16 J. Grant the Plaintiffs such further relief as may be just, proper, and equitable.

17 Dated January 25, 2022.

Respectfully submitted,

18 /s/ Marc D. Fink

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