

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

MINNESOTA CENTER FOR)
ENVIRONMENTAL ADVOCACY,)
CENTER FOR BIOLOGICAL DIVERSITY,)
and the W.J. MCCABE CHAPTER OF THE)
IZAAK WALTON LEAGUE OF AMERICA,)

Plaintiffs,)

v.)

THOMAS L. TIDWELL, in his official)
capacity as Chief of the U.S. Forest Service,)
U.S. FOREST SERVICE, MICHAEL YOUNG,))
in his official capacity as)
Acting Secretary of Agriculture,)
CONSTANCE CUMMINS, in her official)
capacity as Supervisor of the)
Superior National Forest, and)
POLYMET MINING, INC.)

Defendants.)
_____)

Civil No.:

COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF

COMPLAINT

Plaintiffs Minnesota Center for Environmental Advocacy, the Center for Biological
Diversity and the W.J. McCabe Chapter of the Izaak Walton League of America
(collectively “Plaintiffs”), by and through counsel, state and allege the following:

INTRODUCTION

1. Plaintiffs file this civil action pursuant to the Administrative Procedure Act
 (“APA”), 5 U.S.C. § 702, to seek review of United States Forest Service’s (“Forest
Service”) January 9, 2017 Final Record of Decision on the NorthMet Project Land

Exchange. The proposed land exchange would convey 6,650 acres of federal land in the Superior National Forest to PolyMet Mining Inc. (“PolyMet”) in exchange for the acquisition of 6,690 acres of non-federal lands to be integrated into the Superior National Forest. The federal lands to be conveyed are underlain by a mineral ore body of copper-nickel-platinum group elements, the mineral rights to which are controlled by PolyMet. The purpose of the exchange is to eliminate the conflict between PolyMet’s intention to mine those minerals by open-pit mining techniques and federal ownership of the surface rights, which the federal government believes to be incompatible with open-pit mining. The land exchange would unify the surface and subsurface rights under PolyMet’s control, thereby eliminating that conflict. Plaintiffs believe that the exchange has not yet been consummated and that the federal government retains title to the affected public lands at this time. Plaintiffs ask this Court to grant injunctive and declaratory relief setting aside the approval of the land exchange because it does not assure that the lands exchanged are of equal value, contrary to the requirements of the Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et seq.* (“FLPMA”). Plaintiffs allege that that the Forest Service erred in appraising the federal lands for their timber value rather than for mining, the lands’ intended use. Specifically, Plaintiffs seek: (1) a declaration that Forest Service has violated its statutory and regulatory responsibilities; (2) an order setting aside Forest Service’s approval of the land exchange and remanding the case to the agency for further proceedings consistent with FLPMA; and (3) an award of costs and expenses, including reasonable attorney’s fees.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331 (federal question), 43 U.S.C. § 1701(a)(6) (judicial review of public land adjudication decisions), 5 U.S.C. § 702 (right of judicial review), 5 U.S.C. § 704 (judicial review of final agency action under APA) and 5 U.S.C. § 706, because this action involves the United States as a defendant and arises under the laws of the United States.

3. The requested relief is proper under 28 U.S.C. §§ 2201 and 2202, and 5 U.S.C. §§ 705 and 706.

4. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(1) and (e)(1), as this is a civil action naming a federal agency and Defendants have offices within the district.

5. Venue is also proper in this Court pursuant to 28 U.S.C. § 1391(b)(2) and (e)(1) because a substantial part of the events giving rise to the claim occurred in this District and a substantial part of property that is the subject of the action is situated in this District. Namely, Forest Service has approved a land exchange that would take place within the Superior National Forest in northern Minnesota.

6. This petition is timely filed within six years of the issuance of the Forest Service Final Record of Decision, as required by 28 U.S.C. § 2401(a).

7. The Forest Service Final Record of Decision constitutes a final agency action because Forest Service has completed its review, has made its final decision on the land exchange and no further administrative review is available or required. The pre-

decisional objection and administrative review process under 36 C.F.R. Part 218, Subparts A and B was concluded with the issuance of an Objection Response Letter to the Draft Decision for the NorthMet Mining Project and Land Exchange on July 11, 2016, which states that “[t]his written response concludes the 36 CFR Part 218 administrative review process for the NorthMet Land Exchange decision by the Forest Service. In accordance with 36 CFR § 218.11(b)(2), this written response is not subject to further review from any other Forest Service or USDA official.”

PARTIES

8. MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY

(“MCEA”) is a Minnesota nonprofit public interest organization whose mission is to use law, science, and research to protect and enhance Minnesota’s natural resources, wildlife and the health of its people. MCEA is organized under the laws of the State of Minnesota and has its principal place of business at 26 East Exchange Street, Suite 206, Saint Paul, MN 55101. MCEA has over 3,000 members.

9. MCEA is a person as defined by the APA at 5 U.S.C. § 551(2).

10. MCEA has program areas in Mining and Natural Resources, and has participated in administrative decisionmaking for the Superior National Forest for many decades. MCEA’s members and staff are dedicated to management of public lands in a manner that preserves clean water, wildlife, and healthy ecosystems.

11. A number of MCEA’s members live and recreate on or near the lands to be conveyed by the Forest Service, as well as the lands being acquired in the exchange.

MCEA's members use and enjoy these lands for recreation, spiritual, cultural, economic and aesthetic enjoyment. Forest Service's Final Record of Decision and approval of the land exchange will adversely affect MCEA's members' and staff's use and enjoyment of these lands and the surrounding area. The interests of MCEA's members and staff would also be adversely affected by decisions of the Forest Service that converted public lands to private lands for less than fair value.

12. CENTER FOR BIOLOGICAL DIVERSITY ("the Center") is a national, nonprofit conservation organization with more than 52,000 members throughout the United States and the world. The Center works through science, law, and policy to secure a future for all species, great or small, hovering on the brink of extinction. The Center has an office in Duluth, Minnesota, and has many members who reside within and/or regularly use, enjoy, and recreate on public lands and waters in northeastern Minnesota, including on the Superior National Forest. The Center, its staff, and its members and the interests of its staff and members, would be significantly harmed and injured if the proposed land exchange is allowed to be implemented.

13. The Center is a person as defined by the APA at 5 U.S.C. § 551(2).

14. The W.J. MCCABE CHAPTER OF THE IZAAK WALTON LEAGUE OF AMERICA (the "McCabe Chapter") is a grassroots environmental organization that has worked for decades to protect the natural resources of Duluth and greater Minnesota. The McCabe Chapter takes a common-sense approach towards protecting our country's natural heritage and works to improve outdoor recreation opportunities for all. The

McCabe Chapter is located in Duluth, Minnesota and has hundreds of members who regularly use, enjoy and recreate on public lands in northeastern Minnesota, including the Superior National Forest. The McCabe Chapter dedicates significant resources to the protection of the St. Louis River at the headwaters of Lake Superior, downstream of the proposed NorthMet mine. The McCabe Chapter and its members, and the interests of the Chapter and its members, would be significantly harmed and injured if the proposed land exchange is implemented.

15. The McCabe Chapter is a person as defined by the APA at 5 U.S.C. § 551(2).

16. Plaintiffs bring this action on behalf of themselves and their members, who regularly use and enjoy federal lands throughout northeastern Minnesota, including the particular public lands that would be unlawfully conveyed in the contested land exchange, and lands and waters that would be adversely affected by the land exchange and related mine. Future use and enjoyment of these lands by Plaintiffs and their members will be effectively prohibited by the lands' passage into private hands. Plaintiffs and their members would also be significantly harmed by the reduction in the number of acres available for public use if the exchanged federal lands are undervalued. Proper valuation of the federal lands to be exchanged would result in a greater acreage becoming integrated into the Superior National Forest. As organizations with members keenly concerned with access to public lands, Plaintiffs are injured by the unlawfully forsaken opportunity to expand the Superior National Forest by properly valuing the lands to be

exchanged. Plaintiffs also bring this action on behalf of members who have experienced a diminution in the value of their property as a result of the land exchange, and who will experience a further diminution in the value of their property as a result of the unlawfully low valuation of the federal lands to be exchanged.

17. Many of Plaintiffs' staff and members use and recreate in and near the St. Louis River, and intend to continue to use and recreate in and near the St. Louis River, for the purpose of hiking, canoeing, fishing, photography, birdwatching, hunting and for simply enjoying the scenic qualities of the area. The federal lands to be exchanged lie at the apex of the St. Louis River watershed, and they were acquired under the authority of the Weeks Act, 16 U.S.C. §§ 515-521, for the purpose of protecting the headwaters of the St. Louis River. Being administered and regulated as part of the Superior National Forest, those lands enjoyed numerous protections that maximized their value in protecting the water quality of the St. Louis headwaters. Those protections include, but are not limited to, the Forest Service's prohibition on open-pit mining within the Superior National Forest. They also include the many protections afforded by the Superior National Forest Land and Resource Management Plan, the purpose of which is to "provide management direction to ensure that ecosystems are capable of providing a sustainable flow of beneficial goods and services to the public." *See* USDA Forest Service, *Land and Resource Management Plan – Superior National Forest, Eastern Region*, July 2004, at 1-2. Ninety-five percent of the non-federal lands that will be acquired by the Forest Service are outside of the St. Louis River watershed. Based on the unlawfully and artificially low

valuation of the federal lands, the proposed land exchange will reduce federal oversight and management of the St. Louis River headwaters area by over 6,300 acres.

18. The land exchange would allow the NorthMet mine to proceed, which would impair Plaintiffs' staff and members' use and enjoyment of the public lands at the mine site, as well as adjacent public lands and downstream waters. The mine would destroy critical habitat for imperiled species such as wolves and lynx, and risk long term pollution of downstream waters and streams.

19. The loss of the protections afforded by administration of the federal lands as part of the Superior National Forest, as well as the property losses incurred as a result of the unlawfully low valuation of the federal lands and the diminution in the acreage of the Superior National Forest as compared to an exchange based on a lawful valuation, will irreparably injure the health, aesthetic, recreational, scientific, educational, religious and procedural interests of Plaintiffs, their staff, and members. Plaintiffs' and their members' injuries will be redressed by the relief sought.

20. Defendant U.S. FOREST SERVICE ("Forest Service") is an agency within the United States Department of Agriculture charged with the responsibility of managing natural resources within the national forests throughout the United States.

21. Defendant MICHAEL YOUNG is named in his official capacity as Acting Secretary of Agriculture. Acting Secretary Young is the highest-ranking official within the U.S. Department of Agriculture, and in that capacity, has ultimate responsibility for the administration and implementation of the Federal Land Policy and Management Act

with regard to land exchanges. The Acting Secretary of Agriculture establishes property valuations for lands to be exchanged pursuant to 43 U.S.C. § 1716(d)(1) and (2), and 36 C.F.R. § 254.3(c). Acting Secretary Young is sued in his official capacity.

22. Defendant THOMAS L. TIDWELL is named in his official capacity as Chief of the United States Forest Service. Mr. Tidwell is the highest level official responsible for management actions carried out by the Forest Service, including the land exchange process at issue in this action.

23. Defendant CONSTANCE CUMMINS, is named in her capacity as Supervisor of the Superior National Forest. Ms. Cummins is the Deciding Officer signing the Final Record of Decision approving the land exchange. Ms. Cummins' decision to approve the land exchange constituted the final agency action on the matter.

24. POLYMET MINING, INC. ("PolyMet") is named as a required party under Fed. R. Civ. P. 19(a). PolyMet controls the mineral rights to the NorthMet ore body and has applied for federal and state permits to build an open-pit mine to recover the copper-nickel-platinum group metals of the NorthMet deposit. Under the terms of the Final Record of Decision, PolyMet is the grantee receiving legal title to the surface rights at issue in the land exchange. The Forest Service's instructions for the appraisal of the federal lands to be conveyed indicate that Forest Service is the appraiser's client, and PolyMet is acting as an agent contracting with the appraiser to complete the appraisal report.

STATUTORY AND REGULATORY BACKGROUND

Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1787

25. FLPMA declares that it is national policy that “the public lands be retained in Federal ownership unless, as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest.” 43 U.S.C. § 1701(a)(1).

26. To implement this policy, the Act permits exchanges of public lands within the National Forest system only if: (1) the public interest will be well served by the exchange, 43 U.S.C. § 1716(a); and (2) the value of the public lands to be exchanged is equal to the value of the private lands to be acquired, 43 U.S.C. § 1716(b). If not equal, the exchange must be equalized by a cash payment not to exceed 25% of the value of the federal lands to be conveyed. 43 U.S.C. § 1716(b).

27. FLPMA ensures equality of value by requiring a valuation of the lands involved in a proposed land exchange. 43 U.S.C. § 1716(d)(1). FLPMA authorizes four methods of valuation: (1) appraisals, (2) arbitration based on appraisals, (3) a process of bargaining, or (4) “some other process to determine the values of the properties involved in the exchange.” 43 U.S.C. § 1716(d).

28. FLPMA directs the Forest Service to promulgate rules and regulations governing the appraisal of lands to be exchanged under the Act. 43 U.S.C. § 1716(f)(1). Regulations governing appraisals “shall reflect nationally recognized appraisal standards, including, to the extent appropriate, the Uniform Appraisal Standards for Federal Land

Acquisitions” (“UASFLA”) 43 U.S.C. § 1716(f)(2). Forest Service’s implementing regulations correspondingly require compliance with UASFLA standards. 36 C.F.R. § 254.9.

29. Forest Service regulations implementing the requirements of FLPMA are found in relevant part at Title 36, Part 254 of the Code of Federal Regulations. Those regulations state that:

[L]ands or interests to be exchanged must be of equal value or equalized in accordance with the methods set forth in 254.12 of this subpart. An exchange of lands or interests shall be based on market value as determined by the Secretary through appraisal(s), through bargaining based on appraisal(s), through other acceptable and commonly recognized methods of determining market value, or through arbitration.

36 C.F.R. § 254.3(c).

30. In this case, the Forest Service valued the federal lands to be exchanged based on an appraisal. The results of that appraisal and the valuation of the exchanged lands were approved by the Final Record of Decision for the NorthMet land exchange. *See* Ex. 1.

31. The appraisal regulations require the appraiser to estimate the market value of the lands to be exchanged by, in part, determining the “highest and best use” of the lands to be exchanged. 36 C.F.R. § 254.9(b)(1)(i). According to the UASFLA, the highest and best use determination is “one of the most important elements of the entire appraisal process.” *See* Interagency Land Acquisition Conference, *Uniform Appraisal Standards for Federal Land Acquisitions 2016*, available at

<https://www.justice.gov/file/408306/download>, at 22. Due to the critical nature of this

determination, “the appraiser must apply their skill with great care and provide market support for the highest and best use conclusion(s) developed in the appraisal.” *Id.*

Administrative Procedure Act, 5 U.S.C. §§ 701-706

32. The APA, 5 U.S.C. §§ 701-706, provides for judicial review of agency action, such as the Forest Service’s Final Record of Decision on the NorthMet Land Exchange. A reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, in excess of statutory jurisdiction, authority or limitations, or otherwise not in accordance with law. 5 U.S.C. §§ 706(2)(A), 706(2)(C).

FACTS

The NorthMet Land Exchange

33. The sole purpose of the NorthMet land exchange is to resolve a conflict between the Forest Service and PolyMet concerning PolyMet’s right to conduct open-pit mining on lands for which it controls the subsurface mineral rights. Surface rights to those lands were purchased by the Forest Service beginning in 1935, and are currently National Forest System lands administered as part of the Superior National Forest. *See* Ex. 1, Final Record of Decision at 1. The Forest Service has taken the position that the mineral rights that were reserved when the lands were purchased do not include the right to surface mine as proposed by PolyMet. PolyMet has taken the position that the mineral rights it controls provide for access to those minerals by any mining method, including the open pit mining proposed in its Permit to Mine Application submitted to the

Minnesota Department of Natural Resources in November 2016.

34. As noted by the Final Record of Decision, “a land exchange would eliminate this fundamental conflict.” Ex. 1 at 1. The Final Record of Decision on the land exchange states the purpose and need for the land exchange as “to eliminate the conflict between PolyMet’s desire to surface mine and the Forest Service ownership and management of NFS lands, by exchanging federal lands for non-federal lands that have equal or greater value.” Ex. 1 at 2.

35. The Record of Decision authorizes the conveyance of 6,650.2 acres of federal land located in St. Louis County, Minnesota to PolyMet, in exchange for the acquisition of 6,690.4 acres of non-federal lands in four tracts. Ex. 1 at 9, Table 1.

36. The value of the federal land, according to the Final Record of Decision, is \$3,658,000, and the value of the non-federal lands is \$4,083,000. Ex. 1 at 8. Forest Service will equalize the transaction with a cash payment of \$425,000. *Id.*

37. The federal lands proposed for exchange are underlain by the NorthMet copper-nickel-platinum group metals (PGM) deposit, the mineral rights to which are controlled by PolyMet. PolyMet has applied to the State of Minnesota for permits to conduct an open pit mining operation to recover the economically important metals of the NorthMet deposit. As noted above, the land exchange is fundamentally premised on the fact that copper-nickel mining will occur on the lands to be conveyed to PolyMet. The Record of Decision repeatedly acknowledges these intended mining operations, noting on the document’s very first page that PolyMet “proposes to build an open-pit mine to

recover these minerals.” Ex. 1 at 1. The exchange would “give PolyMet the property rights it needs to pursue its surface mining proposal.” Ex. 1 at 2.

Appraisal of the Lands to Be Conveyed

38. Plaintiffs MCEA and the Center for Biological Diversity submitted a joint objection to the Draft Record of Decision for the land exchange, noting that it did not demonstrate that the lands to be conveyed were of equal value:

Even though an appraisal has apparently been completed for the proposed land exchange, the Forest Service has not disclosed the appraisal to the concerned public with the Final EIS, the Draft Record of Decision, or even through the Freedom of Information Act. The appraisal must be disclosed to allow the public to determine whether the Forest Service is meeting its land exchange requirements; the agency’s failure to provide this fundamental and directly relevant information in the EIS violates NEPA. The Forest Service’s refusal and failure to provide the appraisal in the Draft Record of Decision and during the objection process further violates FLPMA and the Forest Service’s regulations, as the Forest Service is unable to demonstrate that the federal and non-federal lands are in fact of equal value. The public is unable to effectively object to whether or not the Forest Service has complied with the relevant factors in preparing the appraisal, as provided by the Forest Service’s regulations, when the appraisal is undisclosed.

39. Forest Service regulations require that the “findings and supporting rationale” for a proposed land exchange be documented and included in the administrative record for the agency’s decision. 36 C.F.R. § 254.3(b)(3).

40. Forest Service responded to objections to the Draft Record of Decision on July 11, 2016, with a letter captioned “Objection Response Letter to the Draft Decision for the NorthMet Mining Project and Land Exchange.” Ex. 2. The objection response

letter states that the proposed exchange “meets the value requirements of 36 C.F.R. § 254.3” because the value of the non-federal lands is within 25% of the value of the federal land. The letter adopted and approved the appraised value of the federal lands as \$3,658,000. Ex. 2.

41. In response to objections arguing that the land exchange should be postponed until PolyMet’s proposed mining operation is permitted by federal and state authorities, Forest Service responded that “the land situation would still remain a split estate (different surface and subsurface owners) and given the knowledge that the mineral estate contains valuable minerals, a similar mining proposal could be initiated in the future.” Ex. 2 at 5.

42. Subsequent to the Objection Response Letter of July 11, 2016, which concluded the administrative review process for the land exchange, the Forest Service released the appraisal report for the federal lands at issue, in response to a Freedom of Information Act (“FOIA”) request.

43. The Appraisal Report for the NorthMet land exchange is premised on an “extraordinary assumption” that the party owning the mineral rights and seeking the exchange – here, PolyMet – would not have the right to access the minerals via surface mining. In other words, the “extraordinary assumption” instructs the appraiser to value the surface land without regard to its potential mineral development. Ex. 3, Appraisal Report at 2.

44. The “extraordinary assumption” was a direct instruction from the Forest

Service to the appraiser. The May 18, 2015 appraisal instructions from Forest Service to William Steigerwaldt and Compass Land Consultants describe the estate to be appraised, stating that “[o]utstanding 3rd parties have reserved all minerals except for those identified above to be reserved by the Forest Service.” Ex. 4, Forest Service Instructions at 319. The instructions further specify that “[t]he appraisal must not include any extraordinary assumptions not approved in writing in advance by the reviewer,” and direct the appraiser to include the following “extraordinary assumption”:

There are outstanding mineral rights in favor of a 3rd party. Based upon legal instruction from the USDA Office of General Counsel, the owner of the outstanding mineral rights does not have the right to surface mine, and the property owner is entitled to subjacent support.

Ex. 4 at 320.

45. The appraisal instructions also direct the appraiser to adopt the following “hypothetical condition,” which was accordingly used in the resulting appraisal report:

In accordance with 36 C.F.R. 254.9, the subject property should be appraised based on the Hypothetical Condition that it is in private ownership, available for sale in the open market, and zoned consistent with similar non-Federal property.

Ex. 4 at 320.

46. Despite the admonition of 36 C.F.R. § 254.9(b)(1)(iv) that the appraiser shall “consider the contributory value of any interest in land such as . . . minerals,” the Forest Service did not instruct the appraiser to consider the fact that PolyMet controls the mineral rights underlying the subject estate.

47. The methodology for conducting appraisals of lands to be conveyed in land

exchanges is provided by the Uniform Appraisal Standards for Federal Land Acquisitions (“UASFLA”), published by a collaboration between the Interagency Land Acquisition Conference, the Appraisal Institute, and the U.S. Department of Justice. *See Interagency Land Acquisition Conference, Uniform Appraisal Standards for Federal Land Acquisitions 2016, supra.*

48. The UASFLA’s instructions on “extraordinary assumptions” used in appraisals states that they may be used only if:

- It is required to properly develop credible opinions and conclusions;
- The appraiser has a reasonable basis for the extraordinary assumption;
- Use of the extraordinary assumption results in a credible analysis; and
- The appraiser complies with the disclosure requirements set forth in USPAP [Uniform Standards of Professional Appraisal Practice] for extraordinary assumptions.

Id. at 13.

49. The appraiser analyzed the highest and best use of the federal lands under a four factor analysis that looks at uses of the land that are: (1) legally permissible; (2) physically possible; (3) financially feasible; and (4) maximally productive. Based on this analysis and the extraordinary assumption that a third party would be unable to mine the lands being valued, the appraiser concluded that the highest and best use of the land was for timber. Ex. 3 at 2, 19-20. The appraiser noted that the Forest Service’s interpretation of the reservation of mineral rights in the original deeds of conveyance “indicates that surface mining is not allowed,” and that therefore a mining use “does not appear feasible.” *Id.* at 20. According to the appraisal report, the only way that a mining use

would be feasible is if a third party controlled both the surface and mineral estate. *Id.*

50. If the proposed land exchange is implemented, PolyMet will control both the surface and mineral estates on the federal lands valued by the appraisal report.

Unification of these estates is the sole purpose of the land exchange.

51. The appraisal report acknowledges that the report is intended for use in “a proposed multi-parcel land exchange between PolyMet Mining, Inc. and the Superior National Forest.” Ex. 3 at 5.

52. The appraisal report notes that the subject property is zoned “Mining and Minerals” by the City of Babbitt. Ex. 3 at 19. It also states that “[t]here is local mining activity, and new mine proposals and permits are in progress in this vicinity.” *Id.* at 20.

53. Having concluded that mining “does not appear feasible” on the lands to be exchanged, the appraisal report does not provide any estimates of value for lands on which the highest and best use is mining.

54. The Forest Service relied solely on the appraisal report’s estimate of timber value to satisfy its obligations under the equal value requirement of 43 U.S.C. § 1716(b). *See* Ex. 1 at 8.

55. The United States General Accounting Office (“GAO”) has studied valuations in land exchanges, and concluded that the Forest Service typically has “given more than fair market value for nonfederal land [it] acquired and accepted less than fair market value for federal land [it] conveyed.” U.S. GAO, Report to the Ranking Minority Member, Committee on Resources, House of Representatives, *BLM and the Forest*

Service: Land Exchanges Need to Reflect Appropriate Value and Serve the Public Interest, June 2000, at 4, available at <http://www.gao.gov/new.items/rc00073.pdf>.

Despite being admonished for this repeated pattern almost twenty years ago, Forest Service in this matter repeated this error by ordering an appraisal based on a counterfactual that ignored a significant component of value.

Plaintiffs' Attempts to Correct the Valuation Error

56. Although interested parties requested copies of the appraisal report for the NorthMet Land Exchange, the Forest Service did not release the report until early October, 2016.

57. Although the appraisal report was reviewed and approved prior to the release of the Draft Record of Decision on the land exchange in November, 2015, it was not released to interested parties until after the objection period on the Draft Record of Decision had closed, thereby foreclosing the opportunity to offer comment on the contents of the appraisal report itself. Plaintiffs were therefore unable to determine whether the proposed exchange complied with the equal value requirements of FLPMA.

58. Plaintiffs learned of the appraisal report's release in October 2016, and were able to secure a copy of the report in December 2016. Plaintiffs submitted a letter to the Forest Service on December 14, 2016, requesting the opportunity to offer comment on the appraisal report, arguing that it was new information that justified comment outside the objection period. Ex. 5.

59. Upon discovering the FLPMA violation in their review of the appraisal

report, Plaintiffs submitted a second letter to the Forest Service on December 30, 2016 communicating their concerns. The letter highlights the appraisal report's conclusion that mining is not feasible on the subject lands, and notes that "[i]t is not only feasible for mining to occur on the exchanged lands, it is highly likely. PolyMet has invested hundreds of millions of dollars in developing the mine project on the very lands for which the Forest Service's valuation concludes that mining is not feasible." That conclusion, we noted, "defies reason" and violates FLPMA's equal value requirement. Ex. 6.

60. A more accurate valuation of the federal lands that did not ignore their potential use for mining would have produced a much higher valuation. Comparable sales demonstrate that properties sold to facilitate mining are sold for amounts much higher than the \$550/acre used by the Forest Service in the present land exchange.

CLAIM FOR RELIEF

(VIOLATION OF FLPMA)

FAILURE TO COMPLY WITH THE EQUAL VALUE REQUIREMENT

61. Plaintiffs reallege and incorporate by reference the allegations contained above as though fully set forth herein.

62. In determining that the requirements of FLPMA Section 206, 43 U.S.C. § 1716, were met for the proposed land exchange, defendants have acted arbitrarily, capriciously, abused their discretion, contravened applicable law, and exceeded their statutory authority. Pursuant to the APA, 5 U.S.C. § 706(2), this Court may hold unlawful

and set aside any such action.

63. Because the Forest Service relied on an appraisal report that was fundamentally premised on an assumption that is untrue, the NorthMet land exchange is unlawful under the equal value requirements of FLPMA, 43 U.S.C. § 1716(b).

64. Forest Service has significantly undervalued the federal lands to be exchanged by relying on an appraisal that does not reflect the value created by the unification of the previously separate surface and mineral estates.

65. Forest Service has acted arbitrarily and capriciously in instructing the appraiser that the appraisal must be based on the assumption that a “3rd party” controls the subsurface rights and is unable to surface mine, when the “3rd party” is in fact the *agent* on the appraisal, PolyMet Mining Inc, who intends to mine the surface of the exchanged property.

66. By failing to adequately determine the actual value of the lands to be exchanged, based on the fact that nonferrous mining on those lands is not only feasible but highly likely, defendants violated Section 206(b) of FLPMA, 43 U.S.C. § 1716(b).

67. Because equal value of the exchange has not been established, approval of the land exchange would reduce the Superior National Forest by over 6,000 acres, in exchange for lands worth a small fraction of the lands conveyed to PolyMet.

68. Plaintiffs have objected to the proposed land exchange and demanded that defendants comply with their legal obligations. Defendants refuse to do so.

69. Defendants’ approval of the Final Record of Decision for the NorthMet

Mining Project and Land Exchange was arbitrary, capricious, an abuse of discretion, and not in accordance with FLPMA. 5 U.S.C. § 706(2)(A). The Court should therefore hold unlawful and set aside the Final Record of Decision. *Id.*

REQUEST FOR JUDGMENT

70. Plaintiffs request that the Court enter judgment against each of the defendants as follows:

- A. Declare unlawful and set aside the NorthMet Land Exchange Record of Decision as contrary to the requirements of FLPMA;
- B. Enjoin any implementation of the proposed land exchange, pending compliance with the equal value requirement of FLPMA;
- C. Award plaintiffs their costs of litigation, including attorneys' fees and expert witness fees;
- D. Grant such other or further relief as the Court deems proper.

Dated: March 27, 2017

/s/ Kevin P. Lee
Kevin P. Lee
(MN License No. 0395933)
Minnesota Center for Environmental Advocacy
26 East Exchange Street, Suite 206
St. Paul, MN 55101
Phone: (651) 223-5969
Fax: (651) 223-5967
klee@mncenter.org

/s/ Marc D. Fink
(MN License No. 0343407)
Center for Biological Diversity
209 East 7th Street

Duluth, MN 55805

Phone: (218) 464-0539

mfink@biologicaldiversity.org

*Attorneys for MCEA, Center for Biological Diversity,
and the W.J. McCabe Chapter of the Izaak Walton
League of America*