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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

CENTER FOR BIOLOGICAL DIVERSITY;)	
EARTHWORKS; and SAVE OUR SKY)	Civ. No. _____
BLUE WATERS,)	
)	
Plaintiffs,)	COMPLAINT FOR DECLARATORY
)	AND INJUNCTIVE RELIEF
v.)	
)	
RYAN ZINKE, in his official capacity as U.S.)	
Secretary of the Interior;)	
U.S. FISH AND WILDLIFE SERVICE;)	
THOMAS L. TIDWELL, in his official capacity))	
as Chief of the U.S. Forest Service; and)	
U.S. FOREST SERVICE,)	
)	
Defendants.)	
_____)	

INTRODUCTION

1. Plaintiffs Center for Biological Diversity, Earthworks, and Save Our Sky Blue Waters (collectively, “Plaintiffs”) challenge the failure of Defendants Ryan Zinke and the U.S. Fish and Wildlife Service (collectively, “FWS”), and Thomas L. Tidwell and the United States Forest Service (collectively, “Forest Service”) 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 Mining Project and Land Exchange (“NorthMet Mine”) on the Superior National Forest in northeastern Minnesota.

2. Plaintiffs challenge (1) FWS’s February 5, 2016 Biological Opinion for the NorthMet Mine; (2) the Forest Service’s arbitrary and unlawful reliance on the 2016 Biological Opinion when it signed and authorized the NorthMet Project Land Exchange Final Record of Decision on January 9, 2017; and (3) the Forest Service’s ongoing failure to insure that implementation of the NorthMet Mine is not likely to jeopardize the Canada lynx, northern long-eared bat, or gray wolf, or result in the adverse modification or destruction of critical habitat for the Canada lynx or gray wolf.

3. Plaintiffs seek (1) declaratory relief that FWS violated the ESA in preparing the 2016 Biological Opinion for the NorthMet Mine; (2) declaratory relief that the Forest Service violated the ESA in relying on the unlawful 2016 Biological Opinion; and (3) injunctive relief to enjoin any implementation of the NorthMet Mine project pending completion of a legally adequate Biological Opinion.

JURISDICTION

4. Jurisdiction is proper in this Court under 28 U.S.C. § 1331; 28 U.S.C. § 1346; 5 U.S.C. §§ 551 *et seq.*, and 16 U.S.C. § 1540(g) because this action involves the United States as a defendant and arises under the laws of the United States, including the ESA, 16 U.S.C. §§ 1531 *et seq.*, and the APA, 5 U.S.C. §§ 551 *et seq.* On January 10, 2017, Plaintiffs Center for Biological Diversity and Earthworks provided Defendants with notice of Plaintiffs’ intent to file suit pursuant to the ESA citizen suit provision. 16 U.S.C. § 1540(g)(2). An actual justiciable controversy exists between Plaintiffs and Defendants. The requested relief is proper under 28

U.S.C. §§ 2201 & 2202; 5 U.S.C. §§ 705 & 706; and 16 U.S.C. § 1540(g). The challenged agency actions are final and subject to this Court's review under 5 U.S.C. §§ 702, 704, and 706.

VENUE

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) and 16 U.S.C. § 1540(g)(3)(A), as a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in the District, Defendants have offices within the District, Plaintiff Center for Biological Diversity has an office in the District, and Plaintiff Save Our Sky Blue Waters resides in the District.

PARTIES

6. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY ("the Center") is a non-profit corporation headquartered in Tucson, Arizona, with offices in a number of states and Mexico. The Center has an office in Duluth, Minnesota. 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 is actively involved in protecting threatened and endangered species, and their habitat, nationwide and in Mexico. The Center has more than 52,000 members throughout the United States and the world.

7. Plaintiff EARTHWORKS is a non-profit corporation headquartered in Washington DC. Earthworks is dedicated to protecting communities and the environment from the adverse impacts of mineral and energy development while promoting sustainable solutions. Earthworks stands for clean air, water and land, healthy communities, and corporate accountability. Earthworks works for solutions that protect both the Earth's resources and our communities, and has more than 65,000 members throughout the United States and the world.

8. Plaintiff SAVE OUR SKY BLUE WATERS is a non-profit public interest corporation based in Duluth, Minnesota. Save Our Sky Blue Waters is a grassroots organization that seeks to protect the ecological integrity of Minnesota's Arrowhead Region. From Lake Superior to the Boundary Waters, the Arrowhead Region is one of the most magnificent areas of the country, for its boreal forests, wildlife, wetlands, and waters. The protection of these valuable resources is Save Our Sky Blue Water's core mission.

9. Plaintiffs bring this action on their own behalf, and on behalf of their members who derive scientific, aesthetic, recreational, and spiritual benefits from northern long-eared bats, gray wolves, Canada lynx, and these species' habitats on the Superior National Forest.

10. Plaintiffs' members use and enjoy the Superior National Forest for a variety of purposes, including hiking, fishing, camping, photographing scenery and wildlife, and engaging in other vocational, scientific, and recreational activities. Plaintiffs' members use and enjoyment of the Superior National Forest is enhanced by the knowledge that imperiled species including the northern long-eared bat, gray wolf, and Canada lynx are still found on the national forest. The specific areas of the Superior National Forest that Plaintiffs' members use and enjoy include areas within, nearby, and downstream of the proposed site of the NorthMet mine, and areas where northern long-eared bats, gray wolves and Canada lynx may be found.

11. Plaintiffs' members derive health, recreational, inspirational, religious, scientific, educational, and aesthetic benefits from their activities within the Superior National Forest. Plaintiffs' members intend to continue to use and enjoy the Superior National Forest frequently and on an ongoing basis in the future, including this spring and summer. The areas of the Superior National Forest that Plaintiffs' members intend to continue to use and enjoy include

areas within, nearby, and downstream of the proposed NorthMet Mine, and areas where the northern long-eared bat, gray wolf, and Canada lynx may be found.

12. The health, aesthetic, recreational, scientific, educational, religious, and procedural interests of Plaintiffs and their members have been and will continue to be adversely affected and irreparably injured if Defendants' ongoing violations of the ESA and APA continue. These are actual, concrete injuries caused by the Defendants' violations of the ESA and APA. Plaintiffs' and their members' injuries will be redressed by the relief sought.

13. Defendant RYAN ZINKE, U.S. Secretary of the Interior, is the highest-ranking official within the U.S. Department of the Interior, and in that capacity, has ultimate responsibility for the administration and implementation of the ESA with regard to terrestrial endangered and threatened species, including the northern long-eared bat, gray wolf and Canada lynx. Secretary Zinke is sued in his official capacity.

14. Defendant U.S. FISH AND WILDLIFE SERVICE ("FWS") is an agency within the U.S. Department of the Interior. It and its officers are responsible for administering the ESA, particularly regarding potential impacts to terrestrial wildlife species that have been listed as threatened or endangered with extinction pursuant to the ESA, including the northern long-eared bat, gray wolf and Canada lynx.

15. Defendant THOMAS L. TIDWELL, Chief of the U.S. Forest Service, is the highest-ranking official within the U.S. Forest Service, and in that capacity, has ultimate responsibility for the lawful management of the National Forest System, including the Superior National Forest. Chief Tidwell is sued in his official capacity.

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

STATUTORY AND REGULATORY BACKGROUND

I. Endangered Species Act

17. The ESA requires all federal agencies to utilize their authorities to carry out programs for the conservation of threatened and endangered species. 16 U.S.C. § 1536(a)(1).

18. 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).

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

20. “Action” is broadly defined under the ESA to include all activities or programs of any kind authorized, funded, or carried out by federal agencies, including actions directly or indirectly causing modifications to the land, water, or air; actions intended to conserve listed species or their habitat; and the promulgation of regulations. 50 C.F.R. § 402.02.

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

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

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

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

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

26. In order to monitor the impacts of incidental take, the Forest Service must monitor and report the impact of its action on the listed species to FWS as specified in the incidental take statement. 16 U.S.C. § 1536(b)(4); 50 C.F.R. §§ 402.14(i)(1)(iv), 402.14(i)(3). If during the course of the action, the amount or extent of incidental taking is exceeded, the Forest Service must reinitiate consultation with FWS immediately. 50 C.F.R. § 401.14(i)(4).

27. The reinitiation of formal consultation is required and must be requested by the Forest Service or FWS where discretionary federal involvement or control over the action has been retained or is authorized by law, and if (1) the amount or extent of taking specified in the incidental take statement is exceeded; (2) new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (3) the action is modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or (4) a new species is listed or critical habitat designated that may be affected by the identified action. 50 C.F.R. § 402.16.

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

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

breeding, feeding, or sheltering”). Taking that is in compliance with the terms and conditions specified in the incidental take statement of a biological opinion is not considered a prohibited taking under Section 9 of the ESA. 16 U.S.C. § 1536(o)(2).

II. Administrative Procedure Act

30. Pursuant to the Administrative Procedure Act (“APA”), a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. 5 U.S.C. § 702. Agency action made reviewable by statute and final agency actions for which there is no adequate remedy in court are subject to judicial review. 5 U.S.C. § 704.

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

FACTUAL ALLEGATIONS

I. The Canada Lynx

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

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

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

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

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

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

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

38. Of the 63 lynx mortalities recorded in Minnesota since 2000, 29 died after being trapped, 16 died from unknown causes, 9 died from vehicle collisions, 7 died from being shot, and 2 died after collisions with trains. In the last 10 years, at least 15 lynx have been captured incidentally by trappers in Minnesota, with at least 8 of these lynx dying as a result.

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

40. 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

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

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

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

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

44. For the portion of the critical habitat designation within St. Louis County of Minnesota, FWS carved out the "mining district" and excluded it from the critical habitat designation. 74 Fed. Reg. at 8643, 8670. According to FWS, in much of this mining district, mining has removed all vegetation. Moreover, areas that are still vegetated are extensively fragmented by the mined areas and haul roads.

II. The Gray Wolf

45. Gray wolves are the largest wild members of the dog family, with adults weighing up to 175 pounds. Gray wolves play a critical ecological role as a top predator and keystone

species. In response to their vastly declining numbers, FWS designated the gray wolf as an endangered species under the ESA in 1974. The Minnesota population of gray wolves was reclassified as a threatened species in 1978.

46. In 1978, FWS designated critical habitat for the gray wolf in Minnesota and Michigan. All of the Superior National Forest is designated as critical habitat for the gray wolf.

47. FWS estimates that the population of wolves in Minnesota is approximately 2220. FWS has estimated that as of 2008, there were 484 wolves on the Superior National Forest.

48. A number of land management activities on the Superior National Forest may affect wolves and wolf habitat, including minerals exploration and mining projects. Land exchanges concerning proposed mining sites on the Superior National Forest may also result in a loss of wolf habitat, wolf prey habitat, and connectivity.

49. Road construction for mineral exploration projects may increase human-wolf conflicts due to increased human access during the time the roads are being used.

50. Direct wolf mortality on the Superior National Forest may result from shooting, trapping, predator control, and vehicle collisions. Large-scale risk factors for wolves on the Superior National Forest include disease, fragmentation and degradation of habitat, climate change, and illegal shooting.

51. “Low standard roads” provide the highest potential for den site disturbance, shooting, trapping, and vehicle collisions with wolves. The Superior National Forest has at least 1927 miles of low standard roads, and at least 158 additional miles of temporary roads.

52. The U.S. Department of Agriculture Wildlife Services captures and kills an average of 146 wolves per year in Minnesota on grounds of depredation control.

III. The Northern Long-Eared Bat

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

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

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

56. The main threat to the northern long-eared bat is an invasive and often deadly fungal bat disease commonly referred to as White-Nose Syndrome, which has rampantly spread in bat populations from the Northeast to the Midwest and Southeast of the United States. Population numbers of the northern long-eared bat have declined by 99 percent in the Northeast. Due to White-Nose Syndrome, northern long-eared bats are also increasingly vulnerable to other stressors, such as habitat degradation and fragmentation, that further imperil the bat’s population.

57. In Minnesota, northern long-eared bat populations are known from 15 hibernacula. An estimated 3,000 northern long-eared bats are thought to hibernate in the largest known hibernaculum in Minnesota, the Soudan Mine in St. Louis County.

58. White-Nose Syndrome was recently detected in bats within Minnesota for the first time, and has been confirmed in six Minnesota counties.

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

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

61. On May 3, 2016, the plaintiffs in *Center for Biological Diversity, et al. v. Ashe, et al.*, Civ. No. 1:15-cv-00477-EGS (D.D.C.), filed an amended complaint to include claims challenging as unlawful FWS’s “4(d) Rule” for the northern long-eared bat, and the related biological opinion, pursuant to the ESA, 16 U.S.C. § 1536(a)(2), and APA, 5 U.S.C. § 706(2).

IV. The NorthMet Mine Biological Opinion

62. On February 5, 2016, FWS completed the Biological Opinion for the NorthMet Mine (“Biological Opinion”). As explained in the Biological Opinion, PolyMet Mining Inc. (“PolyMet”) proposes the NorthMet Mine, an open-pit mine, on land in which the surface rights are owned by the United States, which would operate for 20 years.

63. The Forest Service has proposed a land exchange with PolyMet, and the development of the NorthMet Mine is dependent on the land exchange. The NorthMet Mine is an interrelated activity, and the effects of both the land exchange and the open-pit mine proposal on listed species and critical habitat are considered in the Biological Opinion.

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

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

66. The Mine Site is within Lynx Analysis Unit (“LAU”) #12 on the Superior National Forest. Neither the Forest Service nor FWS have surveyed LAU #12 on the ground to determine how much of the LAU currently comprises suitable lynx habitat. The NorthMet Mine will result in the loss of at least 1,719 acres of lynx habitat in LAU #12.

67. FWS concludes in the Biological Opinion that mining activities at the Mine Site are likely to adversely affect lynx, wolf, critical habitats for lynx and wolf, and the northern long-eared bat. These impacts include the loss of habitat, reduced habitat effectiveness, habitat fragmentation, increased human presence, noise, and transportation impacts.

68. New roads will be constructed for the NorthMet Mine, mostly within the Mine Site. These roads will be well-traveled and there will be noise and activity associated with construction and operations, 24 hours per day and year-around for up to 20 years. In addition,

there will be approximately 22 round-trips daily of ore trains.

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

70. Increased traffic volume will increase the probability for lynx and wolf mortality by vehicle and train collisions.

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

72. The Plant Site of the NorthMet Mine proposal is within the “mining district” that is excluded from the lynx critical habitat designation, while the Mine Site is located within the currently designated critical habitat.

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

remaining habitat in the area.

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

75. The Biological Opinion does not address or consider the impacts of the North Mine on the recovery of Canada lynx. The Biological Opinion does not address or consider the 2005 Canada Lynx Recovery Outline.

76. FWS determined in the Biological Opinion that the NorthMet Mine will result in significant adverse effects to the northern long-eared bat, gray wolf, and Canada lynx, including take. Despite this determination, FWS concluded that the NorthMet Mine is not likely to jeopardize the continued existence of the northern long-eared bat, gray wolf, or Canada lynx, and is also not likely to destroy or adversely modify critical habitat for the gray wolf or Canada lynx.

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

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

79. FWS found in the Biological Opinion that direct incidental take of the northern

long-eared bat may occur, but is not prohibited provided specific actions are implemented under the January 2016 final 4(d) rule for the bat.

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

81. FWS included two “reasonable and prudent measures” within the Incidental Take Statement, which it stated are necessary and appropriate to minimize take of Canada lynx, gray wolf, and northern long-eared bat.

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

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

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

85. The second term and condition sets forth “reporting requirements,” including the requirement to report any vehicle collisions with lynx or wolves within 72 hours; the requirement to report any sick, injured, or dead bats; and the requirement for PolyMet to provide FWS with

an annual report by January 31 of the following calendar year.

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

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

FWS's 2016 Biological Opinion Violates the ESA and APA

87. Plaintiffs hereby incorporate by reference all preceding paragraphs.

88. FWS's 2016 Biological Opinion for the proposed NorthMet Mine is unlawful under the ESA, and arbitrary and capricious under the APA, for at least the following reasons:

- a) FWS failed to analyze or consider the effects of the NorthMet Mine on the recovery of the Canada lynx;
- b) FWS failed to adequately explain why it was impracticable to express a numerical population measure of the anticipated incidental take of lynx, wolves, and northern long-eared bats caused by habitat destruction resulting from the NorthMet Mine;
- c) FWS failed to choose a proper surrogate instead of a numerical population measure of the incidental take of lynx, wolves and northern long-eared bats caused by habitat destruction, as the chosen surrogate fails to provide an adequate trigger for the reinitiation of consultation;

- d) FWS failed to provide reasonable and prudent measures, or terms and conditions, to minimize the incidental take of lynx, wolves, and northern long-eared bats caused by habitat destruction;
- e) FWS relied on inadequate conservation and mitigation measures that are not reasonably specific, certain to occur, capable of implementation, or enforceable;
- f) FWS failed to include any terms and conditions to implement Reasonable and Prudent Measure #1 concerning vehicle collisions;
- g) FWS failed to consider or address that the NorthMet Mine's permanent destruction of lynx critical habitat would revise FWS's critical habitat designation for lynx by expanding the "mining district" in Minnesota that is excluded from the designation;
- h) FWS failed to use the best scientific data available in making its findings and determinations; and
- i) FWS's determination that the NorthMet Mine is not likely to adversely modify the designated critical habitat for the Canada lynx or gray wolf is unsupported, arbitrary, and capricious.

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

SECOND CLAIM FOR RELIEF

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

90. Plaintiffs hereby incorporate by reference all preceding paragraphs.

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

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

93. The Forest Service's Record of Decision for the NorthMet Mine is arbitrary, capricious, an abuse of discretion, and contrary to the ESA. 5 U.S.C. § 706(2)(A). The Record of Decision should be held unlawful, set aside, and remanded to the Forest Service. *Id.*

RELIEF REQUESTED

WHEREFORE, the Center respectfully requests that this Court:

A. Declare that the 2016 Biological Opinion is unlawful under the ESA and arbitrary and capricious under the APA;

B. Declare that the Forest Service's reliance on the unlawful 2016 Biological Opinion violates the ESA;

C. Enjoin any implementation of the proposed NorthMet Mine pending completion of a legally adequate Biological Opinion;

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

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

Dated: March 28, 2017.

Respectfully submitted,

/s/ Marc D. Fink

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