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Of Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

SAVE OUR SKY BLUE WATERS;
SAVE LAKE SUPERIOR ASSOCIATION;
SIERRA CLUB,

No. 0:17-cv-909

Plaintiffs,

v.

UNITED STATES; UNITED STATES FOREST
SERVICE; THOMAS TIDWELL, Chief of the U.S.
Forest Service, in his official capacity; POLYMET
MINING CORPORATION; and POLYMET MINING,
INC.,

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF
(WEEKS ACT; NEPA; APA)

Defendants.

INTRODUCTION

1. This is a civil action for declaratory and injunctive relief under the Administrative Procedures Act (APA), 5 U.S.C. § 551-706. The claims arise from defendants' violations of the Weeks Act, 16 U.S.C. §§ 515-521, and its implementing regulation, 36 C.F.R. § 254.15; and the

National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370(d), and its implementing regulations, 40 C.F.R. §§ 1500-1508.

2. This action is brought pursuant to the right of review provision of the APA, 5 U.S.C. § 702.

3. Defendants United States; United States Forest Service (USFS); and Tidwell (in his official capacity as Chief of the USFS) violated federal law in their issuance of the Polymet Land Exchange Decision on the Superior National Forest, U.S. Forest Service.

4. Plaintiffs challenge the failure of defendants United States, USFS, and Tidwell to comply with the Weeks Act, by accepting private lands in trade "in which there are reserved or outstanding interests that would interfere with the use and management of the land by the United States or would otherwise be inconsistent with the authority under which, or the purpose for which, the lands are to be acquired"; and by not ensuring the public interest will be met by conducting the land exchange.

5. Plaintiffs also challenge the failure of the United States, USFS, and Tidwell to meet their procedural and substantive duties required by NEPA by making an irretrievable commitment of resources prior to the final decision regarding the NorthMet Mining Project; and by failing to analyze a reasonable range of alternatives.

6. Plaintiffs seek:

- a. An order declaring that the defendants failed to comply with the Weeks Act, in violation of the APA;
- b. An order declaring that defendants failed to comply with NEPA, in violation of the APA;

- c. An order enjoining defendants from undertaking activities unless and until defendants comply with the Weeks Act; NEPA; and the APA;
- d. An award of plaintiffs' reasonable attorneys' fees and costs associated with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412;
- e. Such additional and further relief as the Court deems just and equitable.

7. The requested relief is necessary to preserve the *status quo*, to prevent illegal agency action, and to forestall irreparable injury to the environment.

JURISDICTION, VENUE, AND BASIS FOR RELIEF

8. This Court properly has jurisdiction over this action under 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1346 (United States as defendant). Judicial review is authorized by 5 U.S.C. § 706 because plaintiffs are adversely affected within the meaning of relevant statutes.

9. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(1) and (e)(1) because this is a civil action naming a federal agency. USFS and its Acting Administrator in his official capacity reside in this venue for purposes of this suit.

10. Venue is also proper in this Court pursuant to 28 U.S.C. § 1391(b)(2) and 28 U.S.C. § 1391(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.

11. Declaratory relief is appropriate under 5 U.S.C. § 703 and 28 U.S.C. § 2201. Injunctive relief is appropriate under 5 U.S.C. § 703 and 28 U.S.C. § 2202.

PARTIES

12. Plaintiff Save Our Sky Blue Waters (SOSBW) is a Minnesota nonprofit public interest organization formed under Minnesota Statute 317A; and a 501(c)(3) tax exempt, public interest conservation organization, based in Duluth, Minnesota. SOSBW's mission is to protect the waters, forests, wildlife and ecology of Minnesota's Arrowhead Region. From Lake Superior to the Boundary Waters, the Arrowhead Region has been known as one of the most magnificent areas of the country, for its majestic forests, wetlands, and waters and because it contains the headwaters of three great watersheds north to Rainy River, east to Lake Superior, and south to the Mississippi. The protection of these valuable resources, which is under severe threat from sulfide mining, is SOSBW's core mission. Members of SOSBW visit and enjoy the Superior National Forest for educational, recreational, and scientific activities, including hiking, canoeing, camping, fishing, harvesting, photography, and observing wildlife such as Canada lynx, moose, wolves, loons, and eagles. SOSBW's members would sustain injury and harm to their interests if the PolyMet NorthMet land exchange is allowed, in violation of the environmental protections under NEPA and the Weeks Act.

13. Plaintiff Save Lake Superior Association (SLSA) is a Minnesota nonprofit organization formed under Minnesota Statute 317A and headquartered in Two Harbors, Minnesota, with members residing in the three states and one province on Lake Superior's shoreline and watershed. SLSA has about 300 members, many of whom fish and recreate along the North Shore of Lake Superior, in its watershed and in the St. Louis River estuary. The mission of SLSA is to prevent further degradation of Lake Superior and to promote its rehabilitation. SLSA was formed in 1969 to stop the discharge of taconite tailings into Lake

Superior by Reserve Mining Company. The waste material from the proposed NorthMet mine would contain many of the same toxins, such as mercury, toxic metals and asbestos-like fibers. As stakeholders SLSA is concerned about the potential destruction of natural habitat and the pollution of both air and water in Lake Superior and its watershed that would be associated with this project and prerequisite land exchange, and that Lake Superior's watershed would be treated as a "brownfield." Members of SLSA visit and enjoy the Superior National Forest for educational, recreational, and scientific activities, including hiking, canoeing, camping, fishing, harvesting, photography, and observing wildlife such as Canada lynx, moose, wolves, loons, and eagles. SLSA's members would sustain injury to their interests if the PolyMet NorthMet land exchange were undertaken in violation of the environmental protections under NEPA and the Weeks Act.

14. Plaintiff Sierra Club was founded in 1892 and is the nation's oldest grassroots environmental organization. Headquartered in San Francisco, California, it has more than 700,000 members nationwide. The Sierra Club's North Star Chapter located in Minnesota has over 16,000 members. The Sierra Club is dedicated to the protection and preservation of the natural and human environment, including the Superior National Forest. The Sierra Club's purpose is to enable its members to explore, enjoy, and protect the wild places of the Earth; to practice and promote the responsible use of the Earth's ecosystems and resources; and educate and enlist humanity to protect and restore the quality of the natural and human environments. Sierra Club members use and enjoy the Superior National Forest for recreational, aesthetic, scientific, and commercial purposes. Sierra Club members would sustain injury to their interests if the PolyMet NorthMet land exchange were undertaken in violation of the environmental

protections under NEPA and the Weeks Act.

15. Plaintiffs commented on and objected to the land exchange.

16. Defendant United States is a governmental entity, of which two agencies – the U.S. Forest Service and the U.S. Army Corps of Engineers – jointly propose the Northmet Mining Project and jointly issued the Final Environmental Impact Statement for the Project.

17. Defendant U.S. Forest Service is a federal agency within the U.S. Department of Agriculture, within defendant United States. The Forest Service is, by law, responsible for the management policies and actions undertaken with respect to the public lands. By statutory authority, and the agency's own regulations, defendant is also responsible for implementing the Weeks Act; NEPA; and other land management laws and regulations pertaining to actions and decisions on lands administered by defendant.

18. Defendant Thomas Tidwell is the Chief of the USFS and is sued in his official capacity.

19. Defendant PolyMet Mining Corporation is a publicly traded company exclusively focused on developing the NorthMet copper-nickel-precious metals project, through its wholly owned subsidiary, defendant PolyMet Mining, Inc. One or both Polymet entities are the current fee simple owners of the private real property for which the Forest Service proposes to exchange public lands. They are named in this complaint solely for purposes of obtaining effective injunctive relief.

SUMMARY OF FACTS

20. In November 2015 the U.S. Forest Service (USFS) and the U.S. Army Corps of Engineers (USACE) jointly issued a Final Environmental Impact Statement for the NorthMet

Mining Project and Land Exchange.

21. The NorthMet Project would create an open pit copper, nickel, and platinum group element mine with adjacent temporary stockpiles and a permanent stockpile; refurbish a portion of the former LTV Steel Mining Company (LTVSMC) processing plant and construct a new hydrometallurgical facility at the plant site; construct an upgraded tailings basin facility on the existing LTVSMC tailings facilities; construct waste water treatment facilities at both the mine site and plant site; and add to existing utility infrastructure and rail lines.

22. The Land Exchange portion of the project would consist of USFS conveyance of Superior National Forest Lands encompassing the NorthMet mine site and surrounding lands to PolyMet, and USFS acquisition from PolyMet of up to five tracts of private lands within the Superior National Forest proclamation boundary.

23. When it issued the Draft Environmental Impact Statement (DEIS) for the Northmet Project, the federal government did not include any analysis of the impacts of the land exchange portion of the project.

24. In February 2010, the U.S. Environmental Protection Agency (EPA), commented on the DEIS, noting that the federal government had stated that "mining activities cannot take place without the transfer of land from the USFS to PolyMet"; that "[t]he National Forest land in question would not be transferred out of USFS ownership if not for the nature of the proposed mining project"; and that therefore, under NEPA, the proposed land exchange was therefore a "connected action" that must be analyzed together with the project as a whole in a single Environmental Impact Statement.

25. The Center for Biological Diversity (CBD) made similar comments on the DEIS

in February 2010, noting that "the proposed NorthMet mine triggered the need for the proposed land exchange, and the proposed mine and land exchange are both interdependent parts of a larger action that depend on each other for their justification."

26. Accordingly, the final EIS did include the land exchange as part of the project, with the USFS and USACE jointly analyzing the impacts of the project.

27. On January 9, 2017, the USFS issued a Final Record of Decision (Final ROD) on the NorthMet Project Land Exchange portion of the project.

28. However, there is not yet a decision on USACE portion of the Project (the permit for the mining), nor is there yet a final determination as to the adequacy of the EIS for the Project; and there is no upcoming issuance date that plaintiffs are aware of.

29. It appears from the information available to the public that the deeds will be exchanged for the land exchange portion of the project prior to the permitting decision being made.

30. The proposed land exchange would convey 6,650 acres of federal USFS 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.

31. The lands to be conveyed to Polymet are underlain by a mineral ore body of copper-nickel-platinum group elements, the mineral rights to which are already controlled by PolyMet.

32. The stated 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 has stated is incompatible with open-pit mining.

33. The land exchange would unify the surface and subsurface rights, thereby eliminating that conflict.

34. Plaintiffs commented on and objected to the Northmet Project EIS.

35. Because the final decision on the NorthMet Mining Project has not yet been issued, legal claims regarding the project as whole are not yet ripe, and plaintiffs give notice that additional claims regarding the project as a whole may be filed in the future when that decision is issued.

36. However, in the meantime, because the federal government has chosen to bifurcate the project and issue the Land Exchange portion of the decision before the final permitting decision has been made, plaintiffs file these claims to avoid irreparable harm to the public's lands likely to be caused after the deeds are traded but before the permitting decision has been made.

COUNT 1

NEPA - Irretrievable Commitment of Resources Before Final Decision

37. Plaintiffs incorporate by reference the foregoing paragraphs.

38. The National Environmental Policy Act (NEPA) provides in pertinent part:

The Congress authorizes and directs that, to the fullest extent possible . . . (2) all agencies of the Federal Government shall—

. . .

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."

42 U.S.C. § 4332.

39. Accordingly, the regulations that were promulgated to effectuate NEPA require that, until an agency issues a Record of Decision, "no action concerning the proposal shall be taken which would: (1) have an adverse environmental impact; or (2) limit the choice of reasonable alternatives." 40 C.F.R. § 1506.1(a).

40. Defendant United States has not yet issued the final Decision for the NorthMet Mining Project (the USACE permit).

41. As the EPA noted, "[t]he National Forest land in question would not be transferred out of USFS ownership if not for the nature of the proposed mining project," and the Land Exchange therefore does not have independent utility, and must be considered a "connected action" together with the USACE permit.

42. The decision to complete the Land Exchange portion of the project prior to the final decision on the Mining Project will have an adverse environmental impact and/or will limit the choice of reasonable alternatives for the Mining Project, and therefore violates NEPA.

43. These actions were taken not in accordance with law, without observance of procedures required by law, and are arbitrary and capricious within the meaning of the APA. 5 U.S.C. § 706.

44. Plaintiffs are entitled to recover costs, disbursements and attorney's fees pursuant to the EAJA.

COUNT 2

Violation of Weeks Act

45. Plaintiffs incorporate by reference the foregoing paragraphs.

46. The Weeks Act was enacted to authorize the USFS to purchase or trade for lands to add to the Forest Service system. 16 U.S.C. §§ 515-521.

47. Lands to be federalized through the Weeks Act must be deemed by the Secretary of Agriculture necessary for "regulation of the flow of navigable streams or for the production of timber." 16 U.S.C. § 515.

48. Additional requirements for exchanging (rather than purchasing) lands pursuant to the Weeks Act are a finding by the Secretary of Agriculture that: 1) the "public interests" will be benefitted thereby; 2) the lands are, in the Secretary's opinion, chiefly valuable for the stated purposes of the Weeks Act; and 3) the federal and non-federal lands are of equal value. 16 U.S.C. § 516.

49. Although the Weeks Act allows the Secretary of Agriculture to accept lands that are encumbered by "rights of way, easements, and reservations," in accepting such lands the Secretary must be of the opinion that those encumbrances "will in no manner interfere with the use of the lands" for the stated purposes of the Weeks Act. 16 U.S.C. § 518.

50. Accordingly, the USFS regulations governing land exchanges prohibit the agency from accepting lands "in which there are reserved or outstanding interests that would interfere with the use and management of the land by the United States or would otherwise be inconsistent

with the authority under which, or the purpose for which, the lands are to be acquired." 36 C.F.R. § 254.15(c)(ii).

51. Because private parties will retain the mineral rights to the lands that would be conveyed to the federal government in the proposed Land Exchange, plaintiffs commented and objected that the mineral reservations could interfere with the use and management of the land by the United States and/or could otherwise be inconsistent with the authority under which, or the purpose for which, the lands are to be acquired.

52. The USFS unreasonably rejected all such arguments on the grounds that the mineral value of the lands to be received by the public is low.

53. That is not correct – as explained in detail by plaintiffs in their comments and objections, the lands being received by the USFS have sufficient mineral value that it is clearly foreseeable they could be mined in the future, and that such mining would interfere with the use of the lands for USFS purposes.

54. In addition, the resource values of the non-federal lands do not equal or exceed the resource values of the federal lands to be conveyed, violating 36 C.F.R. § 254.3(b)(2)(i).

55. Furthermore, the intended use of the conveyed federal lands would substantially conflict with management objectives on adjacent federal lands, violating 36 C.F.R. § 254.3(b)(2)(ii).

56. These actions were taken not in accordance with law, without observance of procedures required by law, and are arbitrary and capricious within the meaning of the APA. 5 U.S.C. § 706.

57. Plaintiffs are entitled to recover costs, disbursements and attorney's fees pursuant

to the EAJA.

COUNT 3

Violation of NEPA - Failure to Analyze an Adequate Range of Alternatives

58. Plaintiffs incorporate by reference the foregoing paragraphs.

59. NEPA requires the agency to "study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 102(2)(E).

60. NEPA requires any Environmental Impact Statement (EIS) to include the "no-action" alternative, but requires agencies to in addition "rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a) (emph. added).

61. The EIS proposed only two "action" alternatives for the land exchange – the exchange as it was proposed; and an alternative involving less acreage.

62. During the public comment period, plaintiffs requested that the defendants consider several other reasonable alternatives, including placing restrictions on the land that protect the environment; an alternative that would preserve lands that protect the Partridge River and other important public resources; and an alternative that would give the federal government fee simple to both the surface and subsurface.

63. Defendants did not consider any such reasonable alternatives in the EIS.

64. These actions were taken not in accordance with law, without observance of procedures required by law, and are arbitrary and capricious within the meaning of the APA. 5

U.S.C. § 706.

65. Plaintiffs are entitled to recover costs, disbursements and attorney's fees pursuant to the EAJA.

RELIEF REQUESTED

Plaintiffs seek an order:

- a. declaring that defendants United States, USFS, and Tidwell violated the Weeks Act and the APA;
- b. declaring that defendants United States, USFS, and Tidwell failed to comply with NEPA and the APA;
- c. enjoining all defendants from undertaking any activities related to the Land Exchange unless and until defendants United States, USFS, and Tidwell have complied with the Weeks Act; NEPA, and the APA;
- d. awarding plaintiffs their reasonable attorneys fees and costs incurred in this action pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412; and
- e. granting plaintiffs such additional relief as the Court deems just and equitable.

Respectfully submitted March 27, 2017.

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