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RE: PolyMet Land Exchange Supplemental Draft EIS Scoping

Dear Mr. Sanders and Mr. Ahlness:

The following comments are submitted on behalf of WaterLegacy, a non-profit organization dedicated to the protection of Minnesota waters and the communities that depend on them. They pertain to the proposed land exchange of surface rights to Superior National Forest land for the purpose of facilitating the PolyMet “NorthMet” mining project (PolyMet Land Exchange).

As reflected in the Federal Register Notice dated October 13, 2010 (Vol. 75, pp. 62756-62758), the Superior National Forest (SNF) and United States Army Corps of Engineers (USACE) will use public scoping comments to “identify significant issues that will guide the analysis of impacts associated with the land exchange.” (p. 62757).

In these comments, WaterLegacy identifies analysis that must be completed in the supplemental draft environmental impact statement (SDEIS) for the PolyMet Land Exchange to comply with applicable law and provide an adequate factual record. WaterLegacy submits that, if the SDEIS were prepared with rigor and in compliance with law, it would demonstrate that the proposed PolyMet Land Exchange does not meet the requirements of applicable federal statutes and rules, conflicts with the applicable Forest Plan, is contrary to the public interest and would cause irreparable and irretrievable harm to the natural environment.

The proposed exchange of surface rights to approximately 6,650 acres of the Superior National Forest does not meet the threshold requirements of federal law. The valuation of the Federal estate appears to have been made without considering the future use of the property, which mining project is detailed in the PolyMet DEIS and is the sole purpose for proposing

this land exchange. Considering the fair market value and future use of the Federal land, the proposed PolyMet Land Exchange would produce a private windfall, rather than an equal exchange, in violation of federal statutes, rules and policies.

The PolyMet Land Exchange would also conflict with the Resource Management Plan for the Superior National Forest (Forest Plan). The PolyMet Land Exchange does not qualify as a “land adjustment” under the Forest Plan, would fail to protect the Federal surface and would violate many of the Plan’s provisions with respect to watersheds, vegetation and endangered species.

In order to comply with the Federal Land Management and Policy Act (“FLMPA”) and the National Environmental Policy Act (“NEPA”), the SDEIS for the PolyMet Land Exchange must provide detailed evaluation of existing conditions and resources on the Federal and non-Federal¹ estates and then evaluate all impacts of the proposed Land exchange, including the proposed use of the Federal land. The SDEIS must include environmental impacts of the proposed PolyMet open pit mine and related processing activities as well as the potential for future mineral exploitation on the balance of the Federal lands. The SDEIS must analyze both a no action alternative that would preclude the PolyMet open pit mine and analyze cumulative impacts of the proposed PolyMet Land Exchange and other current and future mining developments impacting watersheds, air sheds, habitats and endangered species. The analysis must describe impacts on management objectives for adjacent and downstream national forest lands and Indian trust lands. If the SDEIS were completed with appropriate depth and integrity, WaterLegacy believes it could not support a determination that the PolyMet Land Exchange is in the public interest.

WaterLegacy, finally, submits that the Feasibility Analysis does not reflect even a minimal procedural consultation with Indian Tribes.² The SDEIS must not only document consultation, but also comply with federal rules and Forest Plan requirements that prevent adverse impacts on lands to which Tribes have treaty rights. WaterLegacy’s members would seek to hold our United States government to its legal and fiduciary obligations in undertaking a land exchange ostensibly on our behalf.

1. The SDEIS Must Provide Detailed Information Regarding PolyMet’s Proposed Uses of the Federal Land for Mineral Exploitation and the PolyMet Land Exchange Must be Rejected if the Fair Market Value of Federal and non-Federal Lands is Not Equal Considering Future Use of the Federal Lands.

SUMMARY

Federal statutes and rules preclude an exchange of Forest Service land for non-federal land unless the non-federal land is of equal value. A discrepancy of more than 25 percent in value may not even be compensated with cash payments. Federal rules, Uniform Appraisal Standards and case law consistently provide that the value of land must include the fair

¹ Capitalization is used where these comments specifically refer to the Federal and non-Federal lands being proposed for the PolyMet Land Exchange.

² The proposed PolyMet Land Exchange would affect Tribal rights and interests of the Fond du Lac Band of the Lake Superior Chippewa, the Bois Forte Band of Chippewa, and the Grand Portage Band of Ojibwe.

market value considering the use to which the land would be put, including mineral exploitation. The SDEIS must evaluate the Federal and non-Federal estates, applicable deeds, and the proposed use of the Federal lands for which the PolyMet Land Exchange is contemplated, along with other factors affecting fair market value. If this analysis were done with anything approaching reasonable rigor, the PolyMet Land Exchange would be found to violate federal statutes enacted to protect public lands and prevent private windfalls.

DISCUSSION

The Federal Land Planning and Management Act (FLPMA) and rules promulgated under the FLPMA require that National Forest System lands may only be exchanged for lands of equal value. If values are not equal, they may only be equalized with a cash payment if the discrepancy in value does not exceed 25 percent. 43 U.S.C. §1716(a); 36 C.F.R. 254.12(a) and (b).

In simple terms, lands or interests proposed to be exchanged for public forest land must be of equal market value. 36 C.F.R. §254.3(c). The policy behind this law is to avoid conferring an untoward private benefit and resulting public loss in exchanging federal for non-federal estates.

The Forest Service Feasibility Analysis suggests that a comparison was made between features of the surface of the Federal land and the surface of the non-Federal land, without reference to the future use of the Federal land for the PolyMet mining project. The single page in Feasibility Analysis Section 7,³ Valuation Feasibility Opinion, seems to comment only on the gross similarities of size of the tracts, without any reference to mining proposed on the Federal land:

In my opinion, the Non-Federal lands do not deviate more than 25% from the value of the Federal Tract. However, the balance is likely approaching the Non-Federal lands being 25% less than the Federal lands, with some potential risk for exceeding that limit. *The Federal Tract and Non-Federal Hay Lake Tract are relatively similar and fall within a similar value range per acre.* The Non-Federal Wheaton Tract appears to have sufficient value to compensate for the smaller size of the Hay Lake Tract compared to the Federal Tract, bringing the exchange into sufficient balance. (emphasis added).

Forest Service staff at the information sessions for the PolyMet Land Exchange confirmed that the market value to PolyMet of the Federal land due to its potential for lucrative mining activities had not been considered in the Feasibility Analysis.

On its face, this Feasibility Analysis is inadequate. Failure to consider the highest and best use for the Federal land based on its proposed future use for the PolyMet open pit mine violates federal rules, the Uniform Standards of Appraisal for Federal Land Acquisition, the Forest Service Handbook and applicable case law. This is not a close question.

³ Section references are from the Feasibility Analysis Summary, identified as Section 1, and last updated on November 6, 2009. Where a Section of the Feasibility Analysis also has a title, reference will be made to both.

Federal rules require an appraiser, in estimating market value of Federal land, to determine the “highest and best use of the property to be appraised” and to “estimate the value of the lands and interests as if in private ownership and available for sale in the open market.” 36 C.F.R. 254.9(b)(i) and (ii). In addition to including resource values and amenities in determining value, federal rules explicitly require appraisal to “Consider the contributory value of any interest in land such as water rights, minerals, or timber, to the extent they are consistent with the highest and best use of the property.” 36 C.F.R. 254.9(b)(iv).

The Forest Service Handbook reflects these rules in providing that value is based on the highest and best use of the property, F.S.H. 5409.12, §13.34, and that considerations for valuation include physical characteristics such as water, improvements, oil, gas and mineral and recreation potential. F.S.H. 5409.12, §12.22.

Uniform Appraisal Standards for Federal Land Acquisitions⁴ are also applicable to this proposed Exchange of National Forest land. These Standards require that minerals in the property “are to be considered to the extent that they enhance the market value of the property as a whole.” (Uniform Appraisal Standards, p. 33).

Where federal land may be exchanged to allow mining to proceed, a rigorous process of appraising value from the minerals extraction is required by the Uniform Appraisal Standards. Highest and best use analysis of lands containing minerals requires assessment of the market demand and issues such as the accessibility of the minerals and the feasibility of extraction. (Uniform Appraisal Standards, pp. 95-96). Property having a highest and best use for minerals production may be appraised by an income approach or a sales comparison approach. (Uniform Appraisal Standards, pp. 44, 97).

The Forest Service Handbook similarly provides, “Where the potential for the occurrence of a valuable mineral deposit is alleged, market value is the value of the property as a whole in light of all its attributes,” and directs, “Appraise mineral property as a whole and include contributory mineral values as part of the overall property value.” F.S.H. 5409.12, §23.2. Mineral experts should be consulted, and both sales comparison and income approaches may be used to value property with mineral value. F.S.H. 5409.12, §§23, 23.1, 23.3, 23.4, 23.5.

The highest and best use for the PolyMet NorthMet project site and the use for which the exchange of Superior National Forest lands is contemplated in this proceeding is for PolyMet’s open pit mine for copper, nickel and precious metals. Valuation cannot be limited to the features of the land surface, and non-Federal lands proposed to be exchanged for the mine site must equal the market value including PolyMet’s proposed minerals extraction use.

Undervaluation of federal lands for proposed land exchanges has been a national scandal,

⁴ Uniform Appraisal Standards for Federal Land Acquisitions (2000) available at http://www.justice.gov/enrd/ENRD_Assets/Uniform-Appraisal-Standards.pdf

resulting in in-depth federal investigations.⁵ Courts have reversed and rejected land exchanges where the proposed future use of federal lands was not properly evaluated.

The leading case of *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172 (9th Cir. 2000) blocked a Bureau of Land Management (BLM) land exchange due to failure to consider the highest and best use of the federal property. The *Bisson* case involved transfer of private land to the BLM in exchange for a parcel of federal land that was planned for use as a landfill. The BLM's appraisal of the federal land did not consider the land's future use, so significantly undervalued its market value. The Court held that Uniform Appraisal Standards for Federal Land Acquisition applied and found the appraisal defective due to its failure to consider the feasible and reasonable future use of the federal property in determining its market value. 231 F. 3d at 1181. The Court explained:

In general, if a proposed use is reasonable and not merely speculative or conjectural, an element of risk is an insufficient basis upon which to exclude that use from consideration. . . Here, the use of the land as a landfill was not only reasonable, it was the specific intent of the exchange that it be used for that purpose. There is no principled reason why the BLM, or any federal agency, should remain willfully blind to the value of federal lands by acting contrary to the most elementary principles of real estate transactions. 231 F. 3d at 1184.

In the *Bisson* case, the value of the federal lands as landfill was more than 130 times the value of open land, \$46,000 as compared to \$350 per acre, so that the difference in value for the 1,745 acres was nearly \$80 million dollars. The Court held, "The government must not wear blinders when it participates in a real estate transaction, particularly if the result, as here, is the transfer of a flagrantly undervalued parcel of federal land to a private party." 231 F. 3d at 1187.

The *Bisson* case was recently followed in *National Parks & Conservation Ass'n v. Bureau of Land Management*, 586 F. 3d 735 (9th Cir. 2009). In that case a company sought to acquire 3,418 acres of federal land from the BLM to build a landfill on a former mining site near Joshua Tree National Park. The appraisal for the land exchange valued the land as a holding for investment, without considering its probable ad profitable highest and best use as a landfill. Citing federal rules, Uniform Appraisal Standards and the *Bisson* case, the Court of Appeals granted summary judgment for the Conservation Association that the valuation was deficient and failed to comply with the Federal Land Planning and Management Act.

To analyze value, it is significant that the deed for the Federal land proposed for the PolyMet Land Exchange only contemplates underground mining and protects surface lands, stating:

2. In prospecting for, and in mining and removing minerals, oil and gas, and in manufacturing the products thereof, only so much of the surface shall be occupied, used or disturbed as is necessary for the purpose.

⁵ See GAO Report, *Land Exchanges Need to Reflect Appropriate Value and Serve the Public Interest* (2000) available at <http://www.gao.gov/archive/2000/rc00073.pdf>

3. In underground operations all reasonable and usual precautions shall be made for the support of the surface, and to that end tunnels, shafts or other workings shall be subject to inspection and examination by the Forest Officers, Mining Experts or Inspectors of the United States.⁶

From the perspective of evaluating market value of the Federal land, the exchange is a but-for condition, without which the PolyMet company or another private owner or successor in interest would be unable to pursue an open pit mine.

Considerable research and investment has been made in demonstrating the market and feasibility of extraction of minerals from the Federal site proposed for the PolyMet mine. Based on the draft EIS, output from extraction of minerals from the PolyMet mine would exceed \$276 million by the third year of operation. (DEIS, p. 4.10-26). That is an enormous private benefit. To consider the Federal land as merely surface land comparable to non-Federal open lands is willful and illegal blindness.

Total mineral exploitation from the Federal lands could exceed even this substantial output. The Federal Register Notice for the Land Exchange described the exchange of 6,650 acres of Federal land as necessary in order to “eliminate conflicts if minerals development were to expand in the future.” (pp. 62757-62758). The Feasibility Analysis notes that, in addition to the Duluth Complex formation proposed for the PolyMet NorthMet mine, the Federal lands include Biwabik Iron Formation on the north portion of the Federal lands. This formation is being mined for iron ore by the Northshore Mining Company on the northern edge of the project area. (Feasibility Analysis, Mineralization Section 11,⁷ Fall 2010 Update, p. 4).

The Feasibility Analysis states that no developments of any kind are planned on any of the non-Federal lands. (Feasibility Analysis, Summary Section 1,⁸ p. 6). The mineral potential of most of the non-Federal land is low. Describing two tracts that make up the bulk of the non-Federal acreage, the Feasibility Analysis concluded, “The mineral formations beneath the Hay Lake tract are generally considered to be of low potential for economic development. The McFarland tract in Cook County is underlain by gabbroic and sedimentary formations. The mineral potential is also considered low.” (Feasibility Analysis, Summary Section 1, p. 12). The more recent Fall 2010 Update confirms low mineral potential on the Hay Lake Tract, the Hunting Club Lands and the McFarland Lake tract, comprising 4,842 acres or 72 percent of the non-Federal land. No geologic investigation has been done for the remaining two non-Federal tracts, and no plans for mineral development on these sites have been identified. (Feasibility Analysis, Mineralization Section 11, Fall 2010 Update, pp. 4-5).

It strains credulity to believe that the value of the Hay Lake and other non-Federal parcels,

⁶ 1935 Deed between Duluth and Iron Range Rail Road Company and the United States of America, pp. 30-31, electronic copies of pages available on request.

⁷ Feasibility Analysis, Section 11, *Mineral Characterization Determination Related to Exchange of Lands Between PolyMet Mining and USFS – 2009* (July 2009).

⁸ Feasibility Analysis, Section 1, *Feasibility Analysis Pre-Decisional Working Document*, date of last revision November 6, 2009.

presumably as open land, comes anywhere close to the value of the Federal land slated for a major international mining operation.

The value to the public of the non-Federal lands may be further diminished on closer analysis of the title and character of those lands. Although it is unusual for the Forest Service to consider an exchange where only limited title would be acquired, most of the non-Federal land proposed in the PolyMet Land Exchange has a divided mineral estate.⁹ With divided ownership, at some future date, even the benefits that the non-Federal surface could afford to the public would be uncertain, diminishing the value of the non-Federal lands. Extensive clear cutting of timber on non-Federal land, which appears on aerial photographs, and the fact that there are three unauthorized dump sites on the Hay Lake non-Federal tract (Feasibility Analysis, Summary Section 1, p. 13) may also reduce the public value of the non-Federal lands.

The SDEIS for the PolyMet Land Exchange must contain the following:

- A comprehensive and rigorous valuation of the fair market value of the Federal land, including its proposed use for the PolyMet open pit mine, acknowledging that private control of the Federal surface estate is a but-for condition of the development of a mine project projected to have \$276 million per year in output within three years.
- The valuation of the fair market value of the Federal land should also examine the potential for mining uses on the balance of the Federal land, including the feasibility of iron ore extraction from the Biwabik formation in conjunction either with the PolyMet Project or other nearby mining uses.
- Assessment of valuable resource conditions on the Federal estate, including undisturbed forest and wetland resources.
- Analysis of the likely and feasible proposed use of the non-Federal lands absent the land exchange and if the land exchange were to take place.
- Assessment of conditions on non-Federal land potentially diminishing their public value, including divided estates, clear-cutting of forests and previous disturbance of wetland and upland resources.
- Assessment of dump sites in the Hay Lake non-Federal tract, including potential impacts on valuation of the non-Federal land and a Phase I and Phase II analysis.

Based on the information available in the PolyMet DEIS and the Forest Service Feasibility Analysis, it appears that there is no reasonable scenario under which the non-Federal land even approaches the fair market value of the Federal land. The PolyMet Land Exchange would provide PolyMet with an enormous private windfall at the expense of the public and

⁹ See Feasibility Analysis, Mineralization Section 11, Fall 2010 Update, p. 2.

the taxpayer, failing the threshold legal standard for a land exchange under the Federal Land Planning and Management Act.

2. The SDEIS Must Provide a Detailed Analysis of the PolyMet Land Exchange and the Superior National Forest Resource Management Plan -- Correctly Applying Forest Plan Standards and Reflecting Conflicts between the Proposed Use of the Federal Land and Desired Conditions, Objectives and Standards Pertaining to Watersheds, Vegetation and Wildlife.

SUMMARY

Land exchanges are discretionary and may not be approved if the intended use of the conveyed federal land will substantially conflict with established management objectives on adjacent federal lands, including Indian trust lands. The Feasibility Analysis is incomplete and, in places, inaccurate, in its identification of salient provisions of the Superior National Forest Resource Management Plan (Forest Plan) and its analysis of the impacts of the PolyMet Land Exchange and resulting mining activities on national forest and Tribal trust lands. The PolyMet Land Exchange conflicts with standards in the Forest Plan protecting the Federal surface and discouraging acquisition of divided estates as well as with desired conditions, objectives, standards and policies in the Forest Plan. The SDEIS must provide a candid and comprehensive analysis of conflicts between the existing Forest Plan and the PolyMet Land Exchange. The SDEIS should recognize that any revision of the Forest Plan could not be considered without coordination with Tribal resource management plans.

DISCUSSION

The fact that an exchange of Superior National Forest land for non-Federal land would be beneficial for the PolyMet mining company does not require the Forest Service to provide the company with that benefit. Federal rules state, "The Secretary is not required to exchange any Federal lands. Land exchanges are discretionary, voluntary real estate transactions between the Federal and non-Federal parties." 36 C.F.R. 254.3(a).

A federal land exchange that is inconsistent with forest resource management plan must be rejected under 36 C.F.R. 254.3 (f) which states, "The authorized officer shall consider only those exchange proposals that are consistent with land and resource management plans."

In addition, an exchange of federal land may only be completed after a determination is made "that the public interest will be well served." 36 C.F.R. 254.3(b). Among other findings, the public interest determination must include a specific finding that "The intended use of the conveyed Federal land will not substantially conflict with established management objectives on adjacent Federal lands, including Indian Trust lands." 36 C.F.R. 254.3(b)(2)(ii).

The Forest Service Handbook contains parallel language:

The public interest determination must show that the resource values and the public objectives of the non-Federal lands equal or exceed the resource values and the public objectives of the Federal lands and that the intended use of the conveyed Federal land

would not substantially conflict with established management objectives on adjacent Federal lands, including Indian trust lands. F.S.H. 5409.13, § 33.41b.

Recent case law has confirmed that the actual use to which federal lands will be put must be considered in determining whether a land exchange complies with the applicable resource management plan and that amending a resource plan is, itself, a major federal action. In *Ctr. for Biological Diversity v. United States Dep't of the Interior*,¹⁰ the Court of Appeals reversed a land exchange for mining purposes authorized by the Bureau of Land Management (BLM).

The *Ctr. for Biological Diversity* case arose out of plans by the Asarco mining company to obtain fee simple ownership of Bureau of Land Management (BLM) lands in Arizona on which they owned mineral rights in order to excavate and process approximately three billion tons of materials. The BLM assumed that mining was the foreseeable use of the federal land, whether or not the land exchange took place, and the final environmental impact statement (FEIS) supporting the BLM record of decision made no comparative analysis of the impacts of mining activities under the action and no action alternatives.

The Court of Appeals in its 2009 decision rejected both the FEIS and the BLM land exchange due to the failure of the FEIS to analyze differential environmental impacts from the foreseeable use of the land. The Court stressed that even if mining would take place under either alternative, a Mine Plan of Operation would be required if the land were under BLM ownership, potentially affecting the manner and intensity of mining activities if the exchange were to proceed. The Court's ruling was challenged and the case reheard before the entire Ninth Circuit panel, which confirmed the prior decision rejecting both the FEIS and the BLM land exchange due to failure to consider a change in the proposed use of the federal land.

In holding that the proposed land exchange violated both the Federal Land Planning and Management Act (FLPMA) and the National Environmental Policy Act (NEPA), the Court also stated that changes in the resource management plans for the federal land from Long - Term Management Area retention to "disposal" were "prerequisites to the conveyance of the selected lands from public ownership" and themselves constituted a "major federal action" requiring NEPA analysis. *Ctr. for Biological Diversity v. United States Dep't of the Interior*, 2010 decision, *supra* at pp.15, 35.

Mineral Reservation and Protecting the Federal Surface

Federal rules and the Superior National Forest Resource Management Plan (Forest Plan)¹¹ call into question the proposed acceptance of non-federal tracts with split estates and reserved

¹⁰ *Ctr. for Biological Diversity v. United States Dep't of the Interior*, 581 F.3d 1063 (9th Cir. 2009), rehearing en banc 2010 U.S. App. LEXIS 19767 (9th Cir. 2010).

¹¹ 2004 Final Superior National Forest Resource Management Plan available at http://www.fs.usda.gov/wps/portal/fsinternet!/ut/p/c5/04_SB8K8xLLM9MSSzPy8xBz9CP0os3gjAwhwtDDw9-AI8zPwhQoY6leDdGcCqCPOBqwDLG-AAjgb6fh75uan6BdnZaY6OiooA1tkqIQ!!/dl3/d3/L2dJOSEvUUt3QS9ZQnZ3LzZfMjAwMDAwMDBBODBPSEhWTjJNMDAwMDAwMDA!/?navtype=BROWSEBYSUBJECT&cid=fsm91_049716&navid=1301000000000000&pnavid=1300000000000000&ss=110909&position=Not%20Yet%20Determined.Html&tttype=detail&pname=Superior%20National%20Forest-%20Planning

mining rights. The Forest Plan states, “Fee simple estate will generally be acquired, but less than fee simple interest may be acceptable.” (Forest Plan G-LA-1, p. 2-51). The underlying federal rule clearly limits the situations where a split estate may be accepted:

The United States shall not accept 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).

The Forest Service hasn’t demonstrated that the split estates on the non-Federal land would protect the non-Federal surface or any other justification for accepting less than the fee simple interest usually required under Forest Service rules and policies.

Conveyance for PolyMet’s open pit mining of Federal land also conflicts with the Forest Plan language stating, “The use of National Forest System land for exploration and development of nonfederal mineral rights will be governed by the reserved or outstanding rights indicated in the chain of title.” (Forest Plan, S-MN-10, p. 2-10) In its current public ownership, the chain of title on the Federal lands grants no rights to destroy the Federal surface. The Forest Plan also provides, “The protection of federal surface will be accomplished through negotiating with the mineral owner or operator and implementing applicable State and federal Laws.” (Forest Plan, S-MN-12 p. 2-10) The PolyMet Land Exchange would excavate, rather than protect the Federal surface.

The SDEIS must:

- Explicitly recognize that the proposed land exchange is prompted by the PolyMet Company’s desire to destroy the surface of lands in the Federal estate, which surface would be protected under deed conditions but for the land exchange. The SDEIS must address the inconsistency between this purpose and Forest Plan provisions regarding protection of the Federal surface.
- Evaluate and address the inconsistency between acceptance of title to the non-Federal lands that include reserved mineral rights and divided estates and provisions of federal rules and policies favoring acceptance of fee simple estates in land exchange.

Misapplication of Forest Plan Provisions in the Feasibility Analysis

The Feasibility Analysis is incomplete, if not disingenuous, in its statements suggesting that the PolyMet Land Exchange and the resulting PolyMet open pit mine would comply with the Forest Plan and the FLPMA. The SDEIS must candidly analyze Forest Plan provisions in light of the PolyMet Land Exchange and proposed mining use, rather than distorting its language to conceal inconsistencies. The SDEIS must also recognize that lands adjacent to and downstream of the proposed PolyMet project are also Superior National Forest lands within the Ceded Territories so that impacts to watersheds and habitats affect management on adjacent Federal land and Indian trust lands.

The Feasibility Analysis implies that the Management Area within which the Federal land is located, General Forest – Longer Rotation is somehow favorable for disposal to private ownership for “land adjustment.” (Feasibility Analysis, Summary Section 1, p. 2). This misconstrues the term “longer rotation,” which does not indicate less intrinsic value, but rather is a classification that differs from General Forest in that it provides less emphasis on logging and more emphasis on managing for older and larger trees. (Forest Plan, p. 3-10).

The Feasibility Analysis erroneously refers to the conveyance of 6,650 acres of mostly undisturbed Federal wetlands and forests as a “land ownership adjustment.” (Feasibility Analysis, Summary Section 1, p. 2). But the term “land adjustment” refers to priorities for land sought to be acquired by the Forest Service for resource protection.¹² The Federal land proposed to be removed from public ownership and excavated in the PolyMet Land Exchange is, in fact, the type of land that is a first priority for *acquisition* under the Forest Plan. The Federal land is needed as habitat for federally listed, endangered and threatened species (Forest Plan G-LA-2, Priority 1(a), p. 2-51). The Federal land also includes wetlands needed to protect designated and unique resources, including the Lake Superior Basin, designated by Congress in the Great Lakes Initiative legislation. (Forest Plan G-LA-2, Priority 1(c), p. 2-52). The PolyMet Land Exchange would turn these priorities upside-down.

Similarly, the assertion that the huge tract of Federal land proposed for the PolyMet Land Exchange is a “land adjustment” making Federal lands “potentially available for conveyance.” (Feasibility Analysis, Section 1, p. 3) misapplies the Forest Plan. The Forest Plan’s statement that “land adjustment” may “reduce the need for landline maintenance and corner monumentation” implies that this type of conveyance pertains to small acreage adjustments, not to removing public ownership of a contiguous tract of over six thousand acres of land. (Forest Plan G-LA-3, p. 2-52).

In attempting to find a fit between the Forest Plan and the PolyMet Land Exchange, the Feasibility Analysis then asserts that the PolyMet Land Exchange is consistent with the goal that the Forest “provides commodity resources in *an environmentally sustainable* and acceptable manner to contribute to the social and economic sustainability and diversity of local communities.” (Feasibility Analysis, Section 1, p. 3 *citing* Forest Plan, D-SE-1, p. 2-37, *emphasis added*). Characterizing a plan for open pit sulfide mining, destruction of undisturbed wetlands and forests and impairment of water quality for thousands of years, if not in perpetuity,¹³ as “environmentally sustainable” is arbitrary and capricious.

The Feasibility Analysis also seems to assume that because the 6,650 acres of Federal land demanded by PolyMet are located near other lands that have been degraded by mining these

¹² Forest Plan Revision Final Environmental Impact Statement for Chippewa and Superior National Forests, (including Glossary) available at http://www.fs.usda.gov/wps/portal/fsinternet!/ut/p/c5/04_SB8K8xLLM9MSSzPy8xBz9CP0os3gjAwhwtDDw9_AI8zPwhQoY6leDdGCqCPOBqwDLG-AAjgb6fh75uan6BdnZaY6OiooA1tklQ!!/dl3/d3/L2dJQSEvUUt3QS9ZQnZ3LzZfMjAwMDAwMDBBODBPSEhWTjJNMDAwMDAwMDA!/?navtype=BROWSEBYSUBJECT&cid=fsm91_049717&navid=13010000000000&pnavid=1300000000000000&ss=110909&position=Not%20Yet%20Determined.Html&ttype=detail&pname=Superior%20National%20Forest%20-%20Planning

¹³ See e.g. PolyMet DEIS, Appendix d, pp. 3-19, 4.1-97 to 4.1-98, 4.1-101, 4.1-130.

lands are “*chiefly valuable for non-National Forest System purposes.*” (Feasibility Analysis, Section 1, p. 3). This is irresponsible from an ecological point of view. The PolyMet DEIS documents that the Federal land on which its mine would be located provides one of the few remaining corridors for endangered species, including the gray wolf and the Canada lynx, the movements of which have been restricted due to the cumulative impacts of other nearby mining projects. (PolyMet DEIS, pp. 4.4-31 to 4.4-33)

Adverse impacts on high quality wetlands within the Lake Superior Watershed may be even more significant given the impacts of other mining projects on water quality and aquatic ecosystems. The U.S. EPA believes that the coniferous and open bogs of the Partridge River Watershed that would be destroyed by the PolyMet Land Exchange and mine project are aquatic resources of national importance (“ARNI”) “due to the values they provide in terms of unique habitat, biodiversity, downstream water quality, and flood control specifically, to the Lake Superior Watershed and the Great Lakes Basin.” (EPA DEIS Letter, p. 3)¹⁴ Protection of habitats and wetlands on the Federal lands are critical Forest System values and purposes.

The SDEIS must:

- Identify any basis in law or fact for the Feasibility Analysis characterization that the future use of the Federal estate by PolyMet for open pit sulfide mining represents “*an environmentally sustainable*” use of forest resources.
- Identify any basis in law, fact or practice for the characterization in the Feasibility Analysis that release of 6,650 acres of contiguous Forest Service land for the purpose of private mineral exploitation is a “*land adjustment*” under the Forest Plan. Include discussion of the consistency of relinquishing ownership of the Federal land with priorities for *acquisition* of land in the Forest Plan.
- Identify any basis in law or fact for the Feasibility Analysis claim that the 6,650 acres of Federal lands are “*chiefly valuable for non-National Forest Service purposes.*” In this connection, the SDEIS must explicitly analyze the value of the Federal lands as habitat and wildlife corridors for endangered species and the value of Federal wetlands as aquatic resources of national importance within the Lake Superior watershed.

Inconsistency with Forest Plan Protections of Watersheds, Vegetation and Wildlife

The Feasibility Analysis reviewed few substantive provisions of the Forest Plan, although it suggested that additional analysis should be included in the scoping process. (Feasibility Analysis, Summary Section 1, p. 16). The SDEIS must provide a comprehensive assessment of the impacts of the PolyMet Land Exchange, including future use of the Federal estate, and its potential conflict with desired conditions, standards, objectives and guidelines of the Forest Plan, including but not limited to the specific provisions listed herein:

¹⁴ Letter of Bharat Mathur, Acting Reg’l Adm’r, U.S. Env’tl Prot. Agency (“EPA”) to Col. Jon L. Christensen, U. S. Army Corps of Eng’rs, p. 3 (Feb. 18, 2010) (“EPA DEIS Letter”), available at http://waterlegacy.org/sites/default/files/EPA_NorthMet_Rating.pdf

WATERSHEDS

- Desired condition: “Management activities do not reduce existing quality of surface or groundwater or impair designated uses of surface and ground water.” (Forest Plan D-WS-4, p. 2-10)
- Desired condition: “Water quality, altered stream flow, and channel stability do not limit aquatic biota or associated recreational uses. Water in lakes, streams, and wetlands meets or exceeds State water quality requirements.” (Forest Plan, D-WS-5 p. 2-10)
- Objective: “Improve and protect watershed conditions to provide the water quality, water quantity, and soil productivity necessary to support ecological functions and intended beneficial water uses.” (Forest Plan, O-WS-1, p. 2-12)
- Guideline: “Wetland impacts will be avoided whenever possible. Where impacts are unavoidable, minimize and compensate for loss when undertaking projects.” (Forest Plan, G-WS-13, p. 2-15)
- Guideline: “Wetlands will be managed to prevent the reduction of their water quality, fish and wildlife habitat, and aesthetic values. Management actions will not reduce water quality within a wetland, or upstream or downstream of a wetland, unless restoration of natural conditions is the primary goal of the activity.” (Forest Plan, G-WS-15, p. 2-15)

VEGETATION

- Objective: “Maintain acres of non-forested wetlands.” (Forest Plan, O-VG-4, p. 2-23)
- Objective: “Increase acres of young lowland black spruce and tamarack forest communities. Increase acres of old-growth lowland black spruce and tamarack forest communities.” (Forest Plan, O-VG-16, p. 2-24)
- Objective: “In mature or older upland forest types managed to maintain large patches (>300 acres of all types) manage patches to maintain the characteristics of mature or older native upland forest vegetation communities and promote the maintenance or development of interior forest habitat conditions.” (Forest Plan, O-VG-17, p. 2-24)
- Objectives: “In Spatial Zones 1 and 2 maintain or increase amount of interior forest habitat. Provide interior habitat in a variety of upland and lowland vegetation communities.” (Forest Plan, O-VG-22, p. 2-26) “In Spatial Zone 3 strive to minimize the decrease in interior forest habitat in a variety of upland and lowland vegetation communities (Forest Plan, O-VG-25, p. 2-27)

WILDLIFE/ENDANGERED SPECIES

- Record of Decision: “The Revised Plan affords special attention to the conservation of bald eagle, gray wolf, and Canada lynx and the habitats upon which they depend. . .

incorporation of conservation measures into the Revised Plan, helped lead to the Fish and Wildlife Service's concurrence that implementation of the Revised Plan would not adversely affect the bald eagle or critical habitat for gray wolf. It also helped lead to a Fish and Wildlife Service Biological Opinion that issued the finding that implementation would not jeopardize the continued existence of the gray wolf and Canada lynx on the Superior National Forest."¹⁵

- Desired Condition: "Contribute to the conservation and recovery of federally-listed, proposed, or candidate threatened and endangered species and the habitats upon which these species depend." (Forest Plan, D-WL-3(c), p. 2-27)
- Desired Condition: "Provide structure, composition, connectivity, function, and spatial patterns of aquatic and terrestrial habitats that maintain or restore opportunities for species to interact, disperse, and migrate and to reduce negative impacts associated with forest habitat fragmentation." (Forest Plan, D-WL-3(h), p. 2-28)
- Objective: "Maintain, protect, or improve habitat for all threatened and endangered species by emphasizing and working toward the goals and objectives of federal recovery plans and management direction in the Forest Plan. (Forest Plan, O-WL-4, p. 2-29)
- Objective: "Promote the conservation and recovery of Canada lynx and its habitat." (Forest Plan, O-WL-8, p. 2-29)
- Objective: "Maintain and, where necessary and feasible, restore sufficient habitat connectivity to reduce mortality related to roads and to allow lynx to disperse within and between LAUs [lynx analysis units] and between LAUs and Boundary Waters Canoe Area Refugium on NFS land." (Forest Plan, O-WL-11, p. 2-29)
- Guideline: "Within LAUs on NFS land, moderate the timing, intensity, and extent of management activities, if necessary, to maintain required habitat components in lynx habitat, to reduce human influences on mortality risk and inter-specific competition, and to be responsive to current social and ecological constraints relevant to lynx habitat." (Forest Plan, G-WL-1, p. 2-30)
- Guideline: "Limit disturbance within each LAU on NFS land as follows: if more than 30% of the total lynx habitat (all ownerships) within an LAU is currently in unsuitable condition, no further reduction of suitable conditions should occur as a result of vegetation management activities by the National Forest. (Forest Plan, G-WL-3, p. 2-30)
- Standard: "Management activities on NFS land shall not change more than 15% of lynx habitat on NFS land within an LAU to an unsuitable condition within a 10-year

¹⁵ Superior National Forest Resource Management Plan Amendments Record of Decision, Final EIS (July 2004), p. 12, available at http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsm91_048973.pdf

period.” (Forest Plan, S-WL-1, p. 2-30)

- Objective: “Maintain, protect, or improve habitat for all sensitive species.” (Forest Plan, O-WL-18, p. 2-31)
- Guideline: “Avoid or minimize negative impacts to known occurrences of sensitive species. (Forest Plan, G-WL-11, p. 2-31)
- Guideline: “Within northern goshawk post-fledging areas, minimize activities, to the extent practical, that may disturb nesting pairs during critical nesting season (March 1 – August 30) and, to the extent practical, within a 500 acre area encompassing all known nest areas within the territory: Maintain suitable habitat conditions on a minimum of 60% of the upland forested acres in post-fledging areas. Suitable habitat: jack pine and spruce/fir forest types >25 years and all other forest types >50 years with semi-closed to closed canopy (>70%).” (Forest Plan, G-WL-22, p. 2-35).

Once the provisions of the Forest Plan are evaluated more comprehensively and with a candid recognition of the proposed use of the Federal lands and their ecological value, it is unlikely that the Superior National Forest Resource Management Plan could authorize the proposed land exchange without substantial revision.

The FLPMA permits revision of land use plans in the National Forest System, but requires in that process that the Secretary of Agriculture “coordinate land use plans for lands in the National Forest System with the land use planning and management programs of and for Indian Tribes by, among other things, considering the policies of approved Tribal land resource management programs.” 43 U.S.C. §1712(b). The Feasibility Analysis and conversations with staff confirm that the Forest Service has not reviewed Tribal land resource management plans that might be affected by the PolyMet Land Exchange.

The Fond du Lac Integrated Resource Management Plan, in particular,¹⁶ discusses the need to protect and improve wild rice harvest (p. 6), the importance of improving in-stream habitat for fishing (p. 29), the need to preserve traditional hunting, fishing and gathering rights in the 1854 and 1837 Ceded Territories (p.53), the need to ensure that the quality and quantity of wildlife and wildlife habitat is not depleted in the Ceded Territories (p. 54, p. 57) and the importance of environmental protection such as enforcement of water quality standards affecting the Reservation. (p. 63). Any proposed changes to the Forest Plan to facilitate the PolyMet Land Exchange must be coordinated with the policies expressed by Tribes, including the Fond du Lac Band, in their plans to protect natural resources on the Reservation and in the Ceded Territories.

The SDEIS must:

¹⁶ Fond du Lac Resource Management, Integrated Resource Management Plan (2008), available at <http://www.fdlrez.com/newnr/IRMP.pdf>

- Specify with which provisions the PolyMet Land Exchange would be inconsistent with the Forest Plan unless the Plan is revised and which revisions would be proposed to allow the PolyMet Land Exchange and mining uses to proceed.
- Evaluate the consistency of proposed changes in the Forest Plan that might be required to permit the PolyMet Land Exchange with all provisions and policies of Tribal Resource Management Plans, including the 2008 Fond du Lac Integrated Resource Management Plan.

Changes to the Forest Plan to support impairment and destruction of wetlands, upland vegetation and endangered species habitat for the proposed PolyMet Land Exchange and use of Federal lands are likely to be inconsistent with the standards of other federal agencies, such as the U.S. Fish and Wildlife Service and the U.S. Environmental Protection Agency as well as in substantial conflict with established management objectives on adjacent Federal lands, including Indian trust lands.

3. The SDEIS Must Evaluate Current Resource Conditions and Impacts of the Land Exchange on Public and Ecological Values, Evaluating a Wide Range of Ecological Values and Standards and Considering the Future Use of the Federal Land for the PolyMet Sulfide Mine, Future Exploitation of the Entire Federal Estate and Cumulative Impacts of other Mining Projects.

SUMMARY

The Federal Land Planning and Management Act (FLPMA) precludes a land exchange unless the public interest will be well served. Determining whether the resource values and public objectives served by the non-Federal lands equal or exceed those served by the Federal lands and the degree to which the intended use of the conveyed Federal land substantially conflicts with Forest Service management objectives requires a rigorous and complete environmental analysis. The SDEIS must replace inaccurate and incomplete Feasibility Analysis discussions with a thorough analysis of all adverse impacts of the proposed PolyMet project, including potential future impacts of usage of the entire 6,650 acre Federal estate and an analysis reflecting the cumulative impacts of existing and future mining projects and developments. If resource values, public objectives and environmental effects of the proposed use of the Federal lands are rigorously analyzed in the SDEIS, the PolyMet Land Exchange cannot meet the public interest test required by federal law.

DISCUSSION

The FLPMA forbids land exchanges unless the "public interest will be well served." 43 U.S.C. §1716(a). Rules promulgated under the FLPMA explain that in determining whether the public interest will be well served, natural resource values and objectives must be considered including, "protection of fish and wildlife habitats, cultural resources, watersheds, and wilderness and aesthetic values." 36 C.F.R. §254.3(b)(1). Determining that an exchange well serves the public requires the following specific findings:

- (i) The resource values and the public objectives served by the non-Federal lands or

interests to be acquired must equal or exceed the resource values and the public objectives served by the Federal lands to be conveyed, and
(ii) The intended use of the conveyed Federal land will not substantially conflict with established management objectives on adjacent Federal lands, including Indian Trust lands. 36 C.F.R. §254.3(b)(2).

The Forest Service Handbook reflects these federal rules in requiring:

The public interest determination must show that the resource values and the public objectives of the non-Federal lands equal or exceed the resource values and the public objectives of the Federal lands and that the intended use of the conveyed Federal land would not substantially conflict with established management objectives on adjacent Federal lands, including Indian trust lands. F.S.H. 5409.13, § 33.41b.

Under the FLMPA and under the National Environmental Policy Act (NEPA), the future use to which the Federal land will be put must be considered to determine the public interest. The case of *Ctr. for Biological Diversity v. United States Dep't of the Interior*,¹⁷ previously summarized (*infra*, p. 9) explains the critical importance of this analysis under both applicable federal statutes. In this case, the federal lands were proposed to be used for mining whether or not the exchange took place. However, the exchange would remove the requirement of a Mine Plan of Operation, which might change the manner and intensity of mining activities.

The failure of the final environmental impact statement (FEIS) to evaluate the potential change in intensity of the proposed use rendered the FEIS fatally flawed and resulted in the Court's determination that the public interest requirements of the FLPMA had not been met. This decision was reached by the Court of Appeals in its initial 2009 opinion and confirmed by the full panel of the Court on rehearing in September 2010. In its 2010 ruling, the Court again stressed the central importance of comparing the environmental effects of the proposed use resulting from the land exchange with effects under a no action alternative:

[T]he BLM assumed that the manner and extent of Asarco's new mining operations would be the same whether or not the United States owned the land. Because of this assumption, the BLM did not compare the environmental effects of exchanging the land with the effects of not exchanging the land.

Under these circumstances, we hold that the BLM has not "taken a 'hard look' at the environmental consequences of its proposed action" in violation of NEPA, and that its action was therefore arbitrary and capricious. *Blue Mountain Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998). We also hold that the BLM's approval of the proposed land exchange was a violation of FLPMA and similarly arbitrary and capricious. *Webb v. Lujan*, 960 F.2d 89, 91 (9th Cir. 1992). We therefore reverse the decision of the district court approving the actions of the BLM. *Ctr. for Biological Diversity v. United States Dep't of the Interior*, 2010 decision, pp. 3-4.

¹⁷ *Ctr. for Biological Diversity v. United States Dept of the Interior*, 581 F.3d 1063 (9th Cir. 2009), *decision affirmed in rehearing en banc* 2010 U.S. App. LEXIS 19767 (9th Cir. 2010) filed September 23, 2010.

The SDEIS in these proceedings must contain a hard look at the environmental consequences of the PolyMet Land Exchange, including an analysis of PolyMet's proposed mining activities on the Federal land resulting from the land exchange. The SDEIS must address any misleading or incomplete assessments in the Feasibility Analysis, covering the full range of significant potential adverse impacts from the PolyMet Land Exchange and proposed future use.

The SDEIS must evaluate the no action alternative and potential adverse impacts of the PolyMet Land Exchange at several levels of intensity, including implementation of the proposed PolyMet Project, implementation of the PolyMet Project and additional future mining on the 6,650 Federal acres and cumulative impacts of these mining uses and other activities affecting the watershed, air shed, habitats, species and other resources impacted by the PolyMet Land Exchange.

Feasibility Analysis of Environmental Effects

It is understandable that a Feasibility Analysis of environmental effects, as a preliminary analysis, would be incomplete. With respect to the PolyMet Land Exchange, some statements in the Feasibility Analysis are misleading, while others raise issues which challenge the conclusion that the land exchange could serve the public interest.

The Feasibility Analysis suggests that there would be a net loss of approximately 1,310 acres of wetlands to the Federal estate and that, "Factors suggesting loss in wetland function to the Federal estate are judged to be much stronger than [sic.] those suggesting gains." (Feasibility Analysis, Wetlands Section 10,¹⁸ p. 3-1). These factors included the following:

- The 1,337-acre net reduction in the number of forested wetland acres under federal management.
- The sheer magnitude of the wetland function loss associated with the loss of 1,337 forested wetland acres is the strongest factor suggesting a net loss of wetland function. (Forested wetlands total 3,373 acres on the federal parcels and 2,036 acres on the nonfederal parcels.)
- The 98-acre net reduction in the number of emergent and bog wetland acres under federal management. (Emergent and bog wetlands total 117 acres on the federal parcels and 19 acres on the nonfederal parcels.)
- The large-block/contiguous nature of the federal parcel as opposed to the large-block/small-block nature of the non-federal lands. The federal land consists of one large block of 6,621 acres of mostly contiguous ownership. This compares to two blocks of contiguous nonfederal ownership. The Hay Lake block is 4,760 acres and the McFarland block is 30 acres.
- The loss of One Hundred Mile Swamp, an ecologically important bog wetland dominated by bog and forest bog wetland plants. The swamp is drained by Yelp Creek and the

¹⁸ Feasibility Analysis, *Wetland, Lake Shoreline, Stream Frontage and Floodplain Assessment for the Proposed PolyMet Land Exchange*, Section 10 (October 2009)

Partridge River. (Feasibility Analysis, Wetlands Section 10, pp. 3-1, 3-2).

Although the Feasibility Analysis Summary suggests that deed restrictions limiting future use on 1,310 wetland acres of the Federal land outside the PolyMet NorthMet mining area could prevent net loss of wetlands,¹⁹ the Wetlands Section proposes nothing more than reliance on existing regulations to protect these additional wetlands from destruction after conveyance to private ownership. (Feasibility Analysis, Wetlands Section 10, p. 3-1).

In addition, the PolyMet Land Exchange would result in a net loss of 1,472 acres of floodplain to the Federal estate and 1,845 acres of floodplain associated with Yelp Creek and the Partridge River, including much of the One Hundred Mile Swamp. (Feasibility Analysis, Wetlands Section 10, pp. 2-1, 6-3).

In terms of functional value for downstream water quality and habitat, loss of wetlands within a specific watershed is of critical importance. The Federal lands have 4,166 acres of wetlands within the Lake Superior Watershed. All 2,827 acres of Hay Lake wetlands and most of the Wolf Lands 1,259 acres of wetlands are outside the Lake Superior Basin. Although not specifically discussed in the Feasibility Analysis, the PolyMet Land Exchange could result in loss to the National Forest of approximately 3,800 acres of wetlands within the Lake Superior Watershed. (Feasibility Analysis, Wetlands Section 10, Fall 2010 Update, pp. 2-3).²⁰

The Feasibility Analysis also underestimates wetlands loss to the environment resulting from the PolyMet Land Exchange. It states that 864 acres of wetlands would be subject to wetland function loss due to the PolyMet project, assumes that the remaining 3,302 acres of wetlands on the Federal lands would be undisturbed and assumes that wetlands on the non-Federal land would likely become “more functional.” (Feasibility Analysis, Species and Habitat Section 8,²¹ pp. 2-1, 3-1).

However, the best evidence available predicts the PolyMet Project would impact 1122.9 acres of wetlands on the Federal mine site through excavation, changes in hydrology, chemical inputs and other disruption. (PolyMet DEIS, pp. 4.2-9, 4.2-18). Likely use of additional acreage of the Federal parcel for iron or other minerals extraction would increase wetlands loss. Finally, no facts support the assumption that currently undeveloped non-Federal land would improve wetland functions as a result of an ownership change.

The Feasibility Analysis recognizes that 98 percent of the wetlands on Federal lands “were determined to have high overall quality due to minimal or no current disturbance, while disturbed wetlands accounted for less than 2 percent of all wetlands within the study area.”

¹⁹ Feasibility Analysis, Summary Section 1, p. 7 (last revised November 6, 2009)

²⁰ Based on pages 2-3 of the Fall 2010 Update to this Wetlands Section, 155 acres of Lake Country wetlands and, an estimated 200 acres of Wolf Lands may be located within the Lake Superior Watershed.

²¹ Feasibility Analysis, Section 8, *Threatened, Endangered, and Sensitive Species and Habitat Assessment for the Proposed PolyMet Land Exchange* (October 2009).

(Feasibility Analysis, Wetlands Section 10, pp. 5-2 to 5-3)²² The PolyMet DEIS states that the PolyMet Project would impact 3.4 percent of the total wetlands in the Partridge River Watershed and acknowledges that, due to the high quality, relative isolation and lack of human disturbance of the wetlands impacted, “the function and values served by the wetlands in the watershed would be expected to be significantly affected” by the direct and indirect losses of wetlands from the PolyMet project. (PolyMet DEIS, p. 4.2-48). The SDEIS must thoroughly evaluate environmental impacts to wetlands and wetlands function.

The Feasibility Analysis glosses over impacts of the PolyMet Land Exchange on threatened, endangered and sensitive species and habitat. The Feasibility Analysis acknowledges that the Federal lands contain two state endangered, two state threatened and nine state plant species of special concern, and that nine of these species are also Forest Service sensitive species and admits that the non-Federal lands have not been surveyed much. Without identifying the specific plant species on the Federal land, let alone whether the same species are found on the non-Federal land, the Feasibility Analysis represents, “There would likely be no net change of plant species of special concern to the Federal estate.” (Feasibility Analysis, Species and Habitat Section 8, p. 2-1).

This is an irresponsible statement. The PolyMet DEIS explains that the Project would result in direct impacts to the following plant species that are endangered, threatened or of special concern: Prairie moonwort (*Botrychium campestre*), pale moonwort (*B. pallidum*), least grapefern (*B. simplex*), neat spikerush (*Eleocharis nitida*), lapland buttercup (*Rununculus lapponicus*), clustered burreed (*Spartinum glomeratum*), and Torrey’s manna-grass (*Torreyochloa pallida*). (DEIS, p. S-10, pp. 4.3-5 to 4.3-9) and indirect impacts to the following plant species that are endangered, threatened or of special concern: pale moonwort (*B. pallidum*), ternate grapefern (*B. regulosum*), least grapefern (*B. simplex*), floating marsh mallow (*Caltha natans*), neat spikerush (*Eleocharis nitida*), lapland buttercup (*Rununculus lapponicus*), and clustered bur-reed (*Spartinum glomeratum*). (DEIS, pp. S-10, 4.3-5 to 4.3-9).

For one particular state endangered species, the floating marsh marigold (*Caltha natans*), the PolyMet Land Exchange would create a certain net loss. There are only 12 known populations of *Caltha natans* in the state of Minnesota. Five of these -- 42 percent of the *Caltha natans* population in the State -- occur on or near the PolyMet mine site and may be indirectly impacted by changes in hydrology, chemistry or other disturbance at the mine. (DEIS, p. 4.3-15, Table 4.3-9). The remaining populations of this endangered plant are located near the mine site along the Partridge River. (DEIS, p. 4.3-16). Even if some other species may be located there, the non-Federal land would provide no protection for *Caltha natans*. Similar net losses may apply to other species as well.

The Feasibility Analysis similarly claims, despite contrary evidence that “There would likely be no net change of animal species of Federal concern to the Federal estate.” (Feasibility Analysis, Species and Habitat Section 8, p. 2-1).

²² See also Feasibility Analysis, Section 8, *Threatened, Endangered, and Sensitive Species and Habitat Assessment for the Proposed PolyMet Land Exchange* (Oct 2009), p. 6-6.

The Feasibility Analysis acknowledges that the PolyMet Land Exchange would result in a net loss of 521 upland acres to the Federal estate, with a net loss of young mature and mature forest habitat. (Feasibility Analysis, Species and Habitat Section 8, p. 2-2). It admits, “Young mature and mature upland habitat is important to several TES [threatened, endangered, special concern] wildlife species, including northern goshawk, owls, other cavity nesting birds, and bats,” but then adds that with proper management uplands on the non-Federal parcels “should provide mature forest habitat within 20 to 40 years.” (Feasibility Analysis, Species and Habitat Section 8, p. 2-2). However, if a species is endangered, threatened or of special concern, restoration of habitat in a remote location in 20 or 40 years is clearly irrelevant to its survival.

The Feasibility Analysis appears to conclude that the PolyMet Land Exchange would create no net impacts on federally listed Canada lynx and gray wolf since both species have been found within a mile of Federal and non-Federal lands. (Feasibility Analysis, Species and Habitat Section 8, p. 2-1). The Feasibility Analysis does not discuss the fact that Federal lands are designated critical habitat and provide wildlife corridors for lynx and wolf in an area where few wildlife corridors remain. This information is readily available in the PolyMet DEIS, which states that portions of the PolyMet mine site are federally designated lynx critical habitat (DEIS, pp. 4.4-2, 4.4-3) and that the site is located within Zone 2 of the designated critical habitat for the Gray Wolf. (DEIS, p. 4.4-3). Cumulative impacts of the PolyMet Project and other mining and related actions have the potential to eliminate all but three of the 13 wildlife corridors identified by researchers as critical to species in the area, including wolf and lynx. (DEIS, pp. 4.4-31 to 4.4-33).

In addition to incompletely addressing wetlands, floodplain, uplands, species and habitat impacts of the PolyMet Land Exchange, the Feasibility Analysis contains no discussion of many potential adverse impacts of the PolyMet Land Exchange and resulting development of the PolyMet project, including acid mine drainage; seeps, discharge and leachate of copper, nickel, arsenic, manganese and other metals; mercury methylation; degradation of surface waters; violation of standards for groundwater and surface water; release of air toxics and particulates; increases in regional haze; and consumption of fossil fuel decreases in carbon sequestration affecting global climate change.

Requirements for the SDEIS

WaterLegacy requests that a candid and thorough analysis be conducted in the SDEIS to determine the environmental effects of the proposed PolyMet Land Exchange.

The SDEIS must analyze the existing nature and characteristics of resources on the Federal and non-Federal lands, including but not limited to the following:

- Delineation of the quality, ecology, nature and functionality within a particular watershed of all wetlands on the Federal and non-Federal lands.

- Specific identification of any portions of the Federal lands likely to be designated as aquatic resources of national importance (ARNI) and the functional reason for that ARNI designation.
- Delineation of the quality, ecology, nature and maturity of all forests on the Federal and non-Federal lands, identifying the degree and timing of past timber harvesting, including clear-cutting on these lands.
- Analysis of the three unauthorized dump sites on the Hay Lake non-Federal tract, including both a Phase I and Phase II analysis to determine the nature and extent of materials dumped and potential soil and groundwater contamination.
- Assessment of the biodiversity and habitat characteristics of all Federal and non-Federal lands including, but not limited to the following:
 - Biodiversity of plant species, including identification of native and non-native plants and the existence of invasive species;
 - Plant species on the lands that are rare, threatened, endangered or of special concern, specifying for any such plant species the percentage of that species located on and near the Federal or non-Federal lands as compared to the entire population in Minnesota and in the Superior National Forest;
 - Animal species that are rare, threatened, endangered or species of special concern using the Federal or non-Federal lands as habitat, specifying for any such animal species whether the lands are critical habitat and the characteristics of the land that make it suitable habitat for the specified species;
 - The degree to which the Federal or non-Federal or non-Federal land has been used as a wildlife corridor for endangered species and the degree to which adjacent developments and degradation of land have reduced the number of wildlife corridors available in the immediate geographic area;
 - The specific Forest Service lynx analysis units (LAU) within which the Federal and non-Federal land are located, and for each such LAU (all ownerships) the acreage of the LAU and the percentage of that LAU which is currently in unsuitable condition for lynx habitat.

The SDEIS must also evaluate all foreseeable impacts of the proposed PolyMet Land Exchange, including but not limited to:

- Destruction and impairment of wetlands, identifying the quality, classification and watershed functionality of any impacted wetlands;

- Adverse impacts on wetlands that may be aquatic resources of national importance (ARNI) under the Clean Water Act and adverse impacts on wetlands with reference to Executive Order 11990,²³ which precludes damage to wetlands unless no reasonable alternative exists and potential harms are minimized;
- Destruction and impairment of forests and forest habitat, identifying the maturity and degree to which the forest canopy is semi-closed or closed on any impacted uplands;
- Impacts of destruction of wetlands on carbon sequestration as related to global climate change;
- Discharge of sulfates, metals and other contaminants to groundwater, identifying with specificity all potential violations of groundwater standards, Health Risk Limits, or health advisories, including potential human health consequences;
- Discharge of sulfates, metals and other contaminants to surface water, identifying with specificity all potential degradation of surface waters as well as all potential violations of water quality standards, including consequences for aquatic ecosystems, drinking water and human health;
- Impacts of discharge of sulfates to water and air, discharge of mercury to water and air, wetlands disruption, and hydrological change on increases in methylmercury in fish, including consequences for piscivorous wildlife and for human health, including the health of infants, children and subsistence fishing communities;
- Impacts of sulfate discharge on waters with natural stands of wild rice, including potential violations of water quality standards and impacts on water quality, wildlife and fish habit and Tribal resources as a result of such impacts;
- Impacts on plant species that are rare, endangered, threatened or of special concern, including the percentage of plant communities affected as compared to total Minnesota populations and total populations within the Superior National Forest and the degree to which such plant species are or are not located on the non-Federal lands;
- Impacts on animal species that are rare, endangered, threatened or of special concern, evaluating the availability of suitable habitat for the affected species within the geographic area adjacent to the Federal habitat that would be adversely impacted;
- Impacts on the number of wildlife corridors for Canada lynx and gray wolf within the geographic areas of the Federal lands;
- The number of acres and the percentage within each LAU within the Federal and non-Federal land that would be destroyed, impaired or otherwise placed in unsuitable condition for lynx habitat overall and within a 10-year period;

²³ Exec. Order No. 11990, 42 FR 26961, May 24, 1977.

- Impacts on air quality, including diesel, air toxics, particulates, asbestos-like fibers, and mercury emissions as related to human cancer and non-cancer health consequences and impacts to regional haze, particularly in the Boundary Waters Canoe Area Wilderness;
- Consumption of fossil fuels required for mining and processing activities, including impacts on air quality and global climate change of power generation for these purposes;
- Impacts on Tribal usufructuary rights within the Ceded Territories, including access to hunting, fishing and gathering of wild rice and other plants identified by Tribes as significant;
- Impacts on Tribal resources within Reservations, including potential impacts of mercury contamination and impairment of aquatic ecosystems on Tribal fisheries.

With respect to adverse impacts on the Federal lands, the SDEIS must analyze each potential impact, including but not limited to those detailed above, at the following scales:

- Impacts on the nature of resources of the Federal estate as a consequence of the PolyMet Land Exchange of surface lands;
- Impacts of the PolyMet Land Exchange, including implementation of proposed PolyMet open pit mining and minerals processing activities;
- Impacts of the PolyMet Land Exchange, including the PolyMet Project and additional future use of the balance of the 6,650 Federal acres, including but not limited to potential minerals extraction activities related to iron in the Biwabik formation;
- Cumulative impacts of the PolyMet Land Exchange, including the PolyMet Project, future mining use on the balance of the Federal lands and impacts of current and future mining activities and developments affecting adjacent lands and natural resources;
- Evaluation of the no action alternative, including avoidance of the impacts of the PolyMet project and additional future mining use on the balance of the Federal lands and prevention of cumulative environmental impacts to watersheds, habitats, species, air sheds and global climate change.

Were a thorough SDEIS prepared in compliance with law, it would demonstrate that the PolyMet Land Exchange is not in the public interest and would interfere with Forest Service management objectives on Federal lands and Tribal ceded territories adjacent to and downstream from the PolyMet project site.

4. The SDEIS Must Demonstrate Compliance of the Forest Service not only with Procedural “Consultation” with Indian Tribes Regarding Heritage Resources, but Consistency of the PolyMet Land Exchange and Proposed Use with Management Objectives for Indian Trust Lands and Federal Trust Obligations.

SUMMARY

The Forest Service must first consult with Tribes regarding the nature of heritage resources that might be impacted by the PolyMet Land Exchange. The Feasibility Analysis demonstrates no such consultation. In addition to consultation regarding potential historical sites, the FLMPA and the Forest Service Handbook contain requirements that the intended use of the conveyed Federal land would not substantially conflict with established management objectives on adjacent Federal lands, including Indian trust lands. This requirement is substantive. Federal fiduciary responsibilities applicable to the Federal land and adjacent lands within the 1837 and 1854 Ceded Territories also require protection of Tribal rights and Tribal resources on and downstream of the Federal land. In assessment of the impacts of the PolyMet Land Exchange and intended use of the conveyed Federal land, the SDEIS must review the record that has already been made of Tribal concerns about impacts to Indian trust lands, rights and resources as contained in Appendix D of the PolyMet DEIS. If conflicts with the Forest Plan and concerns in these Tribal Comments cannot be resolved, federal laws, policies and trust obligations require rejection of the PolyMet Land Exchange.

DISCUSSION

Federal law implementing the National Historic Preservation Act (NHPA) requires Tribal consultation to determine the nature and existence of heritage resources. As stated in federal rules:

The agency official shall ensure that consultation in the section 106 process provides the Indian tribe or Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects. . . Consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties. 36 C.F.R. 800.2(c)(2)(ii)(A)

Federal rules recognize that historic properties of religious and cultural significance are frequently located on ceded lands of Indian Tribes. 36 C.F.R. 800.2(c)(2)(ii)(D). An agency is obligated to gather information from Indian Tribes to assist in identifying properties, including those located off Tribal lands, which may be of religious and cultural significance to them and may be eligible for the National Register. 36 C.F.R. 800.4(a)(4). Among other responsibilities, the agency is required to use “good faith effort to carry out appropriate identification efforts,” which may include background research, consultation and oral history interviews as well as field sampling. 36 C.F.R. 800.4 (b)(1).

It is puzzling that no such consultation is reflected in either of the Heritage Resources reports contained in the Feasibility Analysis.

The initial Archaeological Survey included in the Feasibility Analysis acknowledged that the archaeological potential of the large area that will be affected by the PolyMet open pit mining operations (approximately 3,300 acres) is “unknown, primarily because very little field survey has been conducted in such areas.”²⁴ This Phase I analysis identified one previously unrecorded archaeological site located in the north central part of the project area as a “a pre-contact Native American site characterized by lithic materials” and recommended that mining activities avoid this site, since “Pre-contact archaeological sites are rare in this landscape and this site is potentially eligible to the National Register of Historic Places.”²⁵

However, after limited surveys and a Phase II investigation of one site that included three shovel tests and only 4.25 square meters of excavation,²⁶ the Feasibility Analysis concluded, “there are no heritage resource concerns with this proposal.”²⁷

The Feasibility Analysis documents, including the methodology discussions for the Phase I and Phase II evaluations, include no reference to oral interviews or other Tribal histories and no indication that any effort was made to gather information from Indian Tribes to assist in identifying sites that might be of religious, cultural or historical significance. There is no indication that the limited field sampling conducted covers any, let alone all properties believed by the Tribes to have historical significance. This deficiency must be corrected in the SDEIS.

Courts have invalidated federal actions where Tribes were not consulted to identify historic properties of significance and mitigate any adverse impacts on such historic properties. *Muckleshoot Indian Tribe v. United States Forest Serv.*, 177 F.3d 800 (9th Cir. 1999). Violation of statutory procedural requirements in itself may violate the minimum fiduciary obligation to Tribes. *Pit River Tribe v. United States Forest Serv.*, 469 F.3d 768, 787-788 (9th Cir. 2006).

WaterLegacy’s comments (*infra*, pp. 8-9) previously discussed federal rules and provisions of the Forest Service Handbook providing that a land exchange under the FLPMA must serve the public interest and that a public interest determination must include a finding that the intended use of the conveyed Federal land will not substantially conflict with established management objectives on adjacent Federal lands, including Indian trust lands. These comments then identified various provisions of the Superior National Forest Resource Management Plan (Forest Plan) pertaining to watersheds, vegetation and wildlife that must be

²⁴ Feasibility Analysis, Section 9, *Heritage Resources, Attachment II, Phase I Archaeological Survey NorthMet Mine Impact Area* (January 2006), p. 4.

²⁵ *Id.*, p. ii.

²⁶ Feasibility Analysis Section 9, *Attachment III, Phase II Archaeological Evaluation of NorthMet Archaeological Site* (September 2007), p. 7.

²⁷ Feasibility Analysis Heritage Resources, Section 9, Summary of Walt Okstad, Heritage Program Manager (April 2008).

analyzed in the SDEIS to determine whether conflicts require rejection of the proposed PolyMet Land Exchange.

Conflicts with Forest Plan requirements to protect watersheds, vegetation and wildlife will impact Tribal rights and resources. In addition, the Forest Plan contains provisions directly pertaining to Tribal usufructuary rights and Tribal cultural, social and economic interests. The PolyMet Land Exchange may not be determined to be in the public interest if it conflicts with the provisions of the Forest Plan specifically protecting Tribal rights and interests.

Tribal rights in the Ceded Territories are governed by 1837 and 1854 Treaties between the United States Government and the Chippewa (Ojibwe) Tribes as follows.

The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guaranteed to the Indians, during the pleasure of the President of the United States. 1837 Treaty, Art. 5.²⁸

[T]he Indians shall not be required to remove from the homes hereby set apart for them. And such of them as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President. 1854 Treaty, Art. 11.²⁹

Forest Service staff members have stated that their obligation to consult with Tribes regarding the proposed PolyMet Land Exchange is more than a procedural requirement and that they value the relationship with Tribes. Moreover, both the Forest Service Manual and case law state that protecting Tribal rights and interests is obligatory.

The Forest Service Manual states that treaty rights are considered property rights protected by the 5th Amendment and, “The Forest Service must administer lands subject to off-reservation treaty rights in a manner that protects Tribes’ rights and interests in the resources reserved under treaty.” The Forest Service Manual further states, paraphrasing case law, “Treaty rights must be interpreted as the Tribes understood them at the time of treaty signing and ambiguous treaty provisions are to be interpreted in the Tribe’s favor. Treaty rights are held by the sovereign Tribes who signed the treaties.” F.S.M. §1563.01d.

The United States Supreme Court has upheld the rights of Chippewa (Ojibwe) Indian bands to hunt, fish, and gather rights on land in present-day Minnesota that they ceded to United States in the 1837 treaty. *Minnesota v. Mille Lacs Band of Chippewa*, 526 U.S. 172; 119 S. Ct. 1187 (1999). Many courts have found that there is federal trust responsibility to protect reservation water rights, fisheries and wildlife as well as a fiduciary duty to protect Tribal hunting, fishing and gathering rights.³⁰

²⁸ 1837 Treaty with the Chippewa, available at http://www.dnr.state.mn.us/aboutdnr/laws_treaties/1837/index.html

²⁹ 1854 Treaty with the Chippewa, available at http://files.dnr.state.mn.us/aboutdnr/laws_treaties/1854/treaty1854.pdf

³⁰ See e.g. Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: a New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH LAW REVIEW 109, see fn.100 for cases on Tribal resources, fn. 258-260 on usufructuary rights.

Compliance with federal trust obligations is a matter of concern both to Indian Tribes, who have their own representation as sovereign entities, and to citizens and taxpayers represented in applicable treaties by the government of the United States.

In connection with conflicts between the PolyMet Land Exchange and Tribal rights protected under the Forest Plan, the FLPMA and federal case law, WaterLegacy would emphasize that a record has already been made of Tribal assessments of the impacts of the PolyMet Project. Tribal Comments in Appendix D of the PolyMet DEIS detail Tribal concerns about impacts to watersheds, vegetation, wildlife and resources of particular salience to Tribes, including water quality, fish, wild rice and species hunted and gathered by Tribes. These Tribal Comments should be considered in the SDEIS in assessing whether the PolyMet Land Exchange is appropriate or feasible in keeping with federal law and fiduciary responsibilities.

Finally, as with other impacts of the PolyMet Land Exchange, the scale of potential impacts, cumulative impacts from other mining developments and the no action alternative must be analyzed with reference to Tribal rights and interests.

More specifically, the SDEIS must:

- Document thorough consultation with Tribes regarding potential heritage resources on the Federal lands, including but not limited to those on the proposed PolyMet mine site.
- Document consultation with Tribes and detailed assessment of conflicts between the proposed use of the Federal land for the PolyMet Project and management objectives for Tribal trust lands, including but not limited to provisions of the Forest Plan that specifically reference the well-being, rights and resources of Tribes, as follows:
 - Desired condition: “Lands within the Forest serve to help sustain American Indians’ way of life, cultural integrity, social cohesion, and economic well-being.” (Forest Plan, D-TR-1, p. 2-37)
 - Desired condition: “Superior National Forest facilitates the exercise of the right to hunt, fish and gather as retained by Ojibwe whose homelands were subject to treaty in 1854 and 1866 (10 Stat. 1109 and 14 Stat. 765). Ongoing opportunities for such use and constraints necessary for resource protection are determined in consultation with the following Ojibwe Bands: Fond du Lac, Grand Portage, and Bois Forte.” (Forest Plan, D-TR-3, p. 2-37)
 - Standard: Forest management activities will be conducted in a manner to minimize impacts to the ability of Tribal members to hunt, fish, and gather plants and animals on Forest Service administered lands. (Forest Plan, S-TR-3, p. 2-38)

- Identify all specific provisions of Tribal resource management plans that may conflict with the PolyMet Land Exchange or any proposed amendments to the Forest Plan to permit such an Exchange.
- Identify all Tribal rights and resources that might be impacted by the PolyMet Land Exchange, including but not limited to the following:
 - Hunting, gathering and fishing rights on the Federal land proposed for the PolyMet Land Exchange, addressing any Tribal perceptions of the differential value of usufructuary rights on the Federal and non-Federal lands;
 - Hunting, gathering and fishing rights on Federal land within the Ceded Territories adjacent to or downstream of the land proposed for the PolyMet Land exchange, specifically discussing impacts on natural stands of wild rice and mercury methylation affecting fish and wildlife;
 - Tribal Reservation resources that may be affected by the PolyMet Land Exchange and proposed use, specifically discussing impacts on water quality, air quality, aquatic ecosystems, mercury methylation and impacts on endangered animal species.
- Specifically analyze in connection with potential conflicts between the PolyMet Land Exchange and proposed and Forest Plan management objectives regarding watersheds, vegetation and wildlife as well as Tribal rights and interests all evidence and concerns reflected in Tribal Comments pertaining to the PolyMet Project in Appendix D of the PolyMet DEIS;
- Specifically analyze in connection with federal fiduciary obligations to Indian Tribes all evidence and concerns regarding adverse impacts of the PolyMet intended use of Federal lands reflected in Tribal Comments pertaining to the PolyMet Project in Appendix D of the PolyMet DEIS;
- Analyze impacts to Tribal rights to hunt fish and gather in the Ceded Territories and Tribal Reservation resources at the following scales of impact:
 - Exchange of the Federal surface estate, considering Tribal assessments of the relative values of the Federal and non-Federal surface estates;
 - Impacts of the intended use of the Federal lands for the proposed PolyMet Project;
 - Impacts of the PolyMet Land Exchange, including the proposed PolyMet Project and additional future use of the balance of the 6,650 acres of Federal land;
 - Cumulative impacts of the PolyMet Land Exchange and future uses of the land and other current and future mining activities and developments;

- A no action alternative preserving federal ownership and avoiding the PolyMet Project and other destruction of the Federal surface.

If the SDEIS were to include consultation required by federal law and analyze in detail the Forest Service's substantive obligations to protect Tribal resources and rights it would support a decision rejecting the PolyMet Land Exchange.

CONCLUSION

WaterLegacy requests that a candid, complete and thorough SDEIS be prepared in connection with the proposed PolyMet Land Exchange, as described in detail in the preceding pages.

A rigorous SDEIS consistent with these comments would demonstrate that the proposed PolyMet Land Exchange does not meet the threshold requirements of federal law. The proposed Exchange would provide a private windfall to a foreign corporation and an enormous loss to the public rather than an exchange of equal value; would substantially conflict with federal law, policy and provisions of the Forest Plan protecting natural resources and Tribal rights, would cause irreparable harm to the natural environment, would be contrary to the public interest and would be inconsistent with federal trust obligations.

We request that the Forest Service follow the requirements of applicable law and reject the proposed PolyMet Land Exchange.

Respectfully submitted,



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