

POLYMET “NORTHMET” STRIP MINE LAND EXCHANGE AND ENVIRONMENTAL REVIEW¹ (October 2009)

The PolyMet “NorthMet” copper-nickel strip mine project is proposed to be sited on approximately 6,700 acres of United States Forest Service lands in the Superior National Forest. Pursuant to law, the project depends on the completion of a successful land exchange of Superior National Forest lands for non-federal lands. See PolyMet NorthMet Project Preliminary Draft Environmental Impact Statement, July 31, 2009 (PDEIS), p. 1-3. The proposed land exchange tracts and the characteristics of such land are not described in the PDEIS and have not yet been publicly disclosed.

Across Minnesota, there are dozens of applications for permits to prospect for non-ferrous metals. Understanding land exchange and mineral rights is critical for the PolyMet Project and for future proposed strip mine development.

This paper explains the need for a land exchange prior to permitting of the PolyMet strip mine project, summarizes the land exchange process and concludes that the environmental impact statement (EIS) for the PolyMet project must include an analysis of the environmental impacts of the land transfer, including potential impacts on tribal rights.

Reserved Mineral Rights do not support Strip Mining on Superior Forest Land

PolyMet proposes to develop a copper-sulfide strip mining operation located primarily on Superior National Forest Lands. Although PolyMet has claimed that the mineral rights “reserved” in its 1935 deed authorize mining in any form, the U.S. Forest Service has maintained that the deed does not permit strip mining, so PolyMet must buy land to exchange before obtaining permits for the NorthMet mining project. The analysis conducted by the U.S. Forest Service is consistent with prevailing law.

Strip mining necessarily entails massive removal of soil and plant life to access underground minerals. This results in irretrievable loss to the environment as well as a fundamental change in forest land use.

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In the case of Superior National Forest Lands proposed for the NorthMet strip mine, the deed for the land did expressly reserve certain rights to enter on the land and develop mineral deposits. However, this reservation clearly contemplated and pertained to underground mining.

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.

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. 1935 Deed between Duluth and Iron Range Rail Road Company and the United States of America pp. 68-69.

Minnesota courts have not ruled yet on the appropriate limits for reserved mineral rights. However, there is clear precedent from cases in other jurisdictions that denies strip mining based on deeds reserving similar mineral rights:

It is beyond all reason to conclude that the parties to the deed by which the United States acquired title to these lands, at the time of the execution of such deed, had in contemplation the possible complete destruction and removal of the entire surface of said lands, together with everything growing thereon. *U. S. v. Polino*, 131 F. Supp. 772, 776 (N.D.W.Va. 1955)

In the *Polino* case, the Davis Land Company had conveyed acreage to the United States, reserving the mineral rights. Portions of this land later became the Monongahela National Forest. Bowden, a company that leased the mineral rights, conducted underground mining operations without complaint from the Forest Service. Then Bowden began strip mining, and the Forest Service protested. A district court in West Virginia held in favor of the United States by deciding that the mineral rights reserved in the transfer prohibited strip mining. The land at issue in *Polino*, like the PolyMet NorthMet property, was acquired by the US for National Forest purposes.

Mining case law developed primarily in West Virginia, Kentucky and other coal mining states. The courts' view of mining rights evolved from granting almost unlimited rights to mining companies to the current view, which limits strip mining based on the intent of the parties and methods in use at the time of transfer.

In Kentucky, courts once granted mineral owners complete sovereignty, allowing any action that was not “oppressive, arbitrary, wanton or malicious.” This meant that the mining companies were free to rip up the earth, even if the “overburden” contained homes or farms. These cases have been overturned and a more environmentally and socially-conscious approach has evolved. Today, even in Kentucky, most courts prohibit strip mining unless expressly stated in the deed or a common method at the time of deed execution. *Ward v. Harding*, 860 S.W.2d 280, 287 (KY 1993)

Given the trend of relevant case law, United State Forest Service practice and a growing concern for the environment it is highly unlikely that Minnesota courts would authorize strip or open pit mining without requiring PolyMet to purchase Superior National Forest land.

Land Exchange Process Requires Equal Value and Environmental Review

In order for PolyMet to purchase Superior National Forest land, a land exchange needs to occur. PDEIS, p. 3-1. Under The Federal Land Policy and Management Act of 1976 § 206, 43 U.S.C. §1716, lands exchanged must be of equal value, in the public interest and in line with the forest land and resource management plans. Public interest assessment examines the needs of State and local community, looking at the economy, recreation, fish and wildlife as well as food, fiber and minerals. 43 U.S.C. § 1716(a). Environmental concerns are clearly included.

Land exchanges are voluntary and discretionary, so the U.S. Forest Service is not required to find proposed land acceptable for exchange. Land Acquisition, Forest Service Handbook 5409.13, § 31 (2004). The exchange process requires multiple phases. The public must be notified, and land surveys, water rights determinations, environmental assessments and valuations must take place.

A critical first step in a public lands exchange is the public interest determination. No land exchange can take place unless it is in the public interest.

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.

The public interest determination considers the needs of State and local residents, fish and wildlife habitats, wilderness and recreation values, economic interests and cultural resources, and watershed issues. 36 C.F.R. § 254.3(1).

Specialist reports and property inspection documentation must be prepared. These reports must consider, at a minimum, sensitive, threatened and endangered species, floodplains, wetlands, minerals, hazardous substances and heritage resources. F.S.H. 5409.13, §33.43. A biological evaluation must be completed to assess potential effects on vulnerable species on both federal and non-federal lands. The wetlands analysis is guided by Executive Order 11990 (1977), which precludes construction on wetlands unless no reasonable alternative exists, and all is done to minimize potential harms. Exec. Order NO. 11990, 42 FR 26961, May 24, 1977.

Valuation is another critical requirement of the land exchange process. Lands proposed to be exchanged for public forest land must be of equal market value. 36 C.F.R. § 254.3(c). Considerations include economic factors, physical characteristics such as water, improvements, oil, gas and mineral and recreation potential. F.S.H. 5409.12, §12. Value is based on the highest and best use for the property. F.S.H. 5409.12, §13.34. The highest and best use with the greatest market value for the NorthMet project site would be a copper-nickel strip mine, and lands proposed to be exchanged for the proposed mine site must equal the market value resulting from this proposed use. Courts have rejected land exchange proposals that do not comply with the valuation guidelines governing highest and best use. *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172 (9th. Cir. 2000).

In addition to requiring analysis and comparable economic value, a public land exchange process requires environmental review under the National Environmental Policy Act (NEPA) and Forest Service environmental policies and procedures. F. S. H., 5409.13, §33.41.

Environmental Review – National Environmental Policy Act

The National Environmental Policy Act (NEPA) calls for the preparation of an Environmental Impact Statement (EIS) for any Federal activity that will have a significant impact on the environment. It is clear that the land exchange proposed for the PolyMet strip mine, which would involve approximately 6,700 acres of Superior National Forest land, will require an EIS. Tribal lands and rights will be impacted, with potential environmental justice as well as Treaty rights implications. Wildlife and wetlands, including pristine areas, would be

acquired by PolyMet and disrupted or degraded to develop the NorthMet strip mine and processing facility.

The PDEIS appears to assume that a separate EIS may be prepared for the PolyMet Project land exchange at some future time. However, the U. S. EPA Office of Enforcement and Compliance Assurance for NEPA Implementation reached a different conclusion after reviewing the PDEIS in an interagency review process. The U.S. EPA questioned whether a separate EIS is appropriate for the land exchange, because it is a “connected action” clearly related to the PolyMet project.

EPA finds it difficult to consider the U.S. Forest Service (USFS) land exchange as a separate action. Based on the interpretation of its authorities, USFS maintains that a land sale or transfer must occur for the applicant to access the mineral body, currently on public land. The PDEIS indicates that effects of land transfer will be addressed in a separate analysis prepared by the USFS. We further note that some direct impacts to tribal uses are related to the transfer of public land out of the Ceded Territory. We question how assessing the impacts of the connected action can be deferred to a separate analysis. Letter from Kenneth Westlake, U.S. EPA to Army Corps of Engineers, p.5 (August 25, 2009).

Federal Regulations require that connected actions must be discussed together in the same EIS. 40 C.F.R. § 1508.25(1). The connection between the land exchange and the NorthMet project is clear. The entire NorthMet project is predicated on the occurrence of a successful land exchange between PolyMet and the USFS. The courts have defined connected actions as actions that would not take place independently of one another. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 894 (9th Cir. 2003). This is clearly the case with the NorthMet project and the proposed land exchange. Case law makes it clear that connected actions must be addressed in the same EIS. *Klamath-Siskiyou Wildlands Ctr. v. B.L.M.*, 387 F.3d 989, 998-999 (9th Cir. 2004) (“[R]egulations implementing NEPA require that an agency consider 'connected actions' and 'cumulative actions' within a single EA or EIS.”)

As noted by the U.S. EPA, the transfer of Superior National Forest land will implicate tribal uses in Ceded Territory governed by treaty rights. The effect of the proposed exchange on these rights is not known because it has not yet been disclosed whether the land proposed to be exchanged is within or outside Ceded Territory. PDEIS, pp. 4.14-6,7. There could be a net loss of acreage in Ceded Territory or the quality of lands on which usufructuary rights may be

exercised could be reduced. Impacts on tribal rights are among the issues that would be addressed in the land exchange process.

Conclusion

Before the PolyMet NorthMet project could proceed, the PolyMet Company would need to find approximately 6,700 acres of land to exchange for the Superior National Forest lands on which the strip mine and processing facility would be located. According to the guidance of the U.S. EPA's NEPA Compliance Office and pursuant to applicable law, the NorthMet proposal and the land exchange are connected actions, requiring environmental review in a single EIS. It is inappropriate to release a draft EIS or commence substantive evaluation of the NorthMet project until an EIS analysis is performed for the proposed land exchange, addressing tribal rights and economic valuation as well as environmental issues.