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IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MICHIGAN

NORTHERN DIVISION

PARTNERS IN FORESTRY COOPERATIVE; NORTHWOOD ALLIANCE, INC.; JOE HOVEL; ROD SHARKA; SHERRY ZOARS; STEVE GARSKE; RICH SLOAT; SID HARRING; and CATHERINE PARKER,

Plaintiffs,

v.

UNITED STATES FOREST SERVICE; ROBERT D. DELICH and LISA DELICH,

Defendants.

No. 2:12-cv-00184-RHB

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiffs submit this reply in support of their Motion for Summary Judgment

I. THE FOREST SERVICE FAILED TO TAKE THE "HARD LOOK" REQUIRED BY NEPA, AND ITS ANALYSIS WAS ARBITRARY AND CAPRICIOUS

The government's basic argument is that it is due 100% deference and can almost never be deemed to have acted in an "arbitrary and capricious" manner. The case law cited in plaintiffs' opening brief makes clear this is not true. NEPA requires agencies to take a "hard look" at a project's potential environmental effects. 42 U.S.C. 4332(2)(c); Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 374, 109 S. Ct. 1851, 1859 (1989). It is arbitrary and capricious to address no "action" alternatives other than the proposed land exchange; to rely on outdated and incomplete information; and to refuse to prepare a full Environmental Impact Statement (EIS) in the face of uncertainty and controversy about the project, as well as the loss of beloved natural features, recreational areas, and valuable public timber lands. Any one of these problems invalidates the NEPA analysis and requires an injunction pending preparation of a valid EA or EIS.

II. WILDCAT FALLS IS A GEOGRAPHICALLY UNIQUE AREA THAT WARRANTS A FULL EIS

The government contends there is nothing "unique" about Wildcat Falls, because there are other similar waterfalls on the Ottawa National Forest; for example, defendant mentions the falls along Black River Harbor Rd. But, as explained in the opening brief, the Wildcat Falls area is unique, because of the following combination of attributes: 1) old growth cedar/hemlock; 2) boulders, rock ledges, cliffs, and vegetation which are unusual for the Ottawa; and 3) the proximity of Wildcat Falls to the communities of Eagle River, Land O Lakes, and Watersmeet. There are very few waterfalls on the Watersmeet Ranger District, and certainly none that have

the attributes that Wildcat Falls does.

It is more than 70 miles from Watersmeet to the falls along Black River Harbor Road. Anyone from the Watersmeet/LOL/Eagle River area who only has a few hours to spend enjoying a beautiful waterfall cannot simply drive to Black River Harbor Road and return for an enjoyable experience.

In contrast, the Village of Watersmeet, on its website, touts the importance of this nearby public, easily accessible waterfall:

> Wildcat Falls - Access is off County Line Lake Road just north of County Road 206 about 1-1/2 miles. If you begin hiking from a hill just to the south of where the creek crosses the road and go west (using map and compass), you will come to the Scott and Howe Creek. If the creek is running north south, then follow it downstream to the falls. The creek makes a rather sharp turn to the east right at the base of the falls so if it is flowing east when you get to it, walk upstream. There was an old trail marked with blue paint blazes but these have all but disappeared over the years. Orienteering skills will help find this beautiful little waterfall. The distance you will have to hike is only 1/4 to 1/2 mile.

See www.watersmeet.org/thingstodo.shtml.[1]

III. THE LAND EXCHANGE MEETS THE "CONTROVERSY" FACTOR

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[1] Plaintiffs request that the Court take judicial notice of this information pursuant to Fed. R. Evid. 201. Judicial notice is mandatory "if requested by a party and supplied with the necessary information," and is appropriate for any fact "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Id. See, e.g., Denius v. Dunlap, 330 F.3d 919, 926 (7th Cir. 2003) (taking judicial notice of material on government website and citing supporting caselaw); New Mexico ex rel. Richardson v. Bureau of Land Mgmt, 565 F.3d 683, 702 n.22 (10th Cir. 2009) (taking judicial notice of information on government websites in an Administrative Procedures Act (APA) case).

See also Ottawa National Forest website listing Wildcat Falls as an important public resource on the Forest, http://www.fs.usda.gov/wps/portal/fsinternet/!ut/p/c4/04_SB8K8xLLM9MSSzPy8xBz9CP0os3gDfxMDT8MwRydLA1cj72BTSw8jAwjQL8h2VAQAng7kaQ!!/?ss=110907&navtype=BROWSEBYSUBJECT&cid=null&navid=110250000000000&pnavid=110000000000000&position=BROWSEBYSUBJECT&ttype=activity&pname=Ottawa.

REQUIRING A FULL EIS

The proposed action is controversial, as defined by NEPA. While it is true that mere public outcry is enough to constitute a "controversy" requiring a full EIS, contrary to defendant's arguments, the public comments indeed indicate controversy over the size, nature, and effect of the land exchange. Nothing could be clearer after review of the parties' respective briefs, than that the Forest Service and the Deliches want to downplay the project's impacts; whereas the plaintiffs have expressed great concern over those impacts. The defendants insist that Wildcat Falls is simply one of many waterfalls, not entitled to any special recognition. They insist that trading such recreational lands and heavily wooded forests for cutover lands will have "no significant impact." As explained in the opening brief and this reply brief, that is incorrect.

IV. THE LAND EXCHANGE MEETS THE "UNCERTAINTY" FACTOR REQUIRING A FULL EIS

The effects of the proposed action are not "reasonably predictable," as defendant contends they are. For example, the government does not really know how the area will be logged by Delich once the public land is privatized; and therefore cannot know for certain what all of the effects of such logging will be on National Forest and State of Michigan resources. Under existing laws, Delich could log the parcel bordering Scott and Howe Creek right up to the streambank, which could have negative consequences with regard to water quality and aquatic habitat. Such impacts are not addressed in the NEPA analysis.

Therefore, the environmental effects of Delich's future logging of lands that are now owned by the public are unknown. An agency must generally prepare an EIS if the environmental effects of a proposed agency action are highly uncertain. Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1213 (9th Cir. 1998), cert. denied, 527 U.S.

1003 (1999) ("significant environmental impact" mandating preparation of an EIS where "effects are 'highly uncertain or involve unique or unknown risks'"); National Parks & Conservation Association v. Babbitt, 241 F.3d 722, 731-32 (9th Cir. 2001).

V. THE BEST MANAGEMENT PRACTICES ARE NOT BINDING AND THEREFORE CANNOT BE USED TO SUPPORT A "FINDING OF NO SIGNIFICANT IMPACT"

The government states that the Deliches would comply with State Best Management Practices (BMPs) when they log the land, but compliance with Michigan BMPs is voluntary, not mandatory. Therefore, it is entirely speculative whether Delich will comply with the BMPs.

Where an environmental assessment relies on mitigation measures to reach a finding of no significant impact, that mitigation must be assured to occur and must "completely compensate for any possible adverse environmental impacts." Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson, 685 F.2d 678, 682 (D.C. Cir. 1982). In order to uphold a FONSI and EA (in lieu of a full EIS), the court cannot simply accept conclusory statements that mitigation measures are effective; the agency must be able to support its conclusions with information in the administrative record. Sierra Club v. Peterson, 717 F.2d 1409 (D.C. Cir. 1985). In making a "finding of no significant impact," the agency cannot rely on mitigation measures that "are speculative without any basis for concluding they will occur." Davis v. Mineta, 302 F.3d 1104 (10th Cir. 2002). In order for mitigation measures to form the basis of a FONSI, "the mitigation measures must be more than a possibility. They must be imposed by statute or regulation or have been so integrated into the initial proposal that it is impossible to define the proposal without the mitigation." Wyoming Outdoor Council decision in the Dist. of Wyoming, 351 F. Supp. 2d 1232 (D. Wyo. 2005) (citing Davis v. Mineta and the Council on

Environmental Quality's Forty Most Asked Questions, 46 Fed. Reg. 18,038).

As the Second Circuit noted: "[W]e emphasize the requirement that mitigation measures be supported by substantial evidence in order to avoid creating a temptation for federal agencies to rely on mitigation proposals as a way to avoid preparation of an EIS." National Audubon Society v. Hoffman, 132 F.3d 7, 17 (2nd Cir. 1997). See also Friends of the Ompopompoosuc v. FERC, 968 F.2d 1549, 1556-57 (2nd Cir. 1992). Similarly, the Ninth Circuit rejected a timber sale where "[t]he Forest Service's broad generalizations and vague references to mitigation measures do not constitute the detail as to mitigation measures that would be undertaken, and their effectiveness, that the Forest Service is required to provide." Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1380-81 (9th Cir. 1998).

VI. THE FOREST SERVICE DID NOT ANALYZE A REASONABLE RANGE OF ALTERNATIVES

As fully explained in the opening brief, the EA did not include a reasonable range of alternatives," and the government's position to the contrary is misleading and even disingenuous. The government asserts that two additional alternatives (beyond the proposed action and the required "no action" alternative) were considered, "but eliminated from detailed study." The government states that these two alternatives were eliminated from detailed study mainly because they "did not meet the purpose and need of the proposal." This "over-narrowing" tactic by the Forest Service has repeatedly been rejected by the courts. See, e.g., Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800 (9th Cir. 1999). If these two alternatives do not meet the asserted purpose and need of the proposal, then the purpose and need was defined too narrowly by the government.

The government asserts (on page 20 of its brief) that the Deliches would only agree to

trade their land, and would not sell it. That assertion is not found in the record itself, and is a *post hoc* position, which is not entitled to any deference. Furthermore, even if that assertion were supported in the record, such an approach is the exact same NEPA violation noted in the Muckleshoot case. 177 F.3d at 814 n. 7.

The government also argues that a narrower range of alternatives is allowed in an Environmental Assessment, compared to a full EIS. That makes no sense, especially in this context, where literally no alternatives were analyzed (other than the always-required "no action" alternative). "Any proposed federal action involving . . . the proper use of resources triggers NEPA's consideration of alternatives requirement, whether or not an EIS is also required." Bob Marshall Alliance v. Hodel, 852 F.2d 1223 (9th Cir. 1988), cert denied, 489 U.S. 1066 (1988). Thus, the Court in Bob Marshall Alliance held that Bureau of Land Management had to consider alternatives even in the context of executing an oil and gas lease that prohibited surface disturbing impacts. The courts have reiterated this repeatedly. See Akiak Native Community v. United States Postal Serv., 213 F.3d 1140, 1148 (9th Cir. 2000) (EA must consider a reasonable range of alternatives); Klamath-Siskiyou Wildlands v. U.S. Forest Service, 373 F. Supp. 2d 1069 (E.D. Cal. 2004).

In Bob Marshall the Ninth Circuit explained why in detail:

> Moreover, consideration of alternatives is critical to the goals of NEPA even where a proposed action does not trigger the EIS process. This is reflected in the structure of the statute: while an EIS must also include alternatives to the proposed action, 42 U.S.C. § 4332(2)(C)(iii) (1982), the consideration of alternatives requirement is contained in a separate subsection of the statute and therefore constitutes an independent requirement. See id. § 4332(2)(E). The language and effect of the two subsections also indicate that the consideration of alternatives requirement is of wider scope than the EIS requirement. The former applies whenever an action involves conflicts, while the latter does not come into play unless the action will have significant environmental effects. An EIS is required where there has been an irretrievable commitment of resources; but unresolved

> conflicts as to the proper use of available resources may exist well before that point. Thus the consideration of alternatives requirement is both independent of, and broader than, the EIS requirement. See City of New York v. United States Department of Transportation, 715 F.2d 732, 742 (2d Cir.1983), cert. denied, 465 U.S. 1055, 104 S. Ct. 1403, 79 L.Ed.2d 730 (1984); Environmental Defense Fund, Inc. v. Corps of Engineers, 492 F.2d 1123, 1135 (5th Cir. 1974); California v. Bergland, 483 F. Supp. 465, 488 (E.D. Cal. 1980), aff'd sub nom. California v. Block, 690 F.2d 753 (9th Cir. 1982).

852 F.2d at 1228-29.

It is not the range of alternatives that can be narrower in an EA compared to an EIS, but rather than detail of analysis. See Environmental Protection Information Center v. Blackwell, 389 F. Supp. 2d 1174 n. 10 (N.D. Cal. 2004) ("The discussion of alternatives in an EIS, however, may be more rigorous than that in an EA. Compare 40 C.F.R. § 1502.14 (stating that an EIS must "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated"), with id. § 1508.9(b) (stating that an EA "[s]hall include brief discussions . . . of alternatives").

VII. THE FOREST SERVICE'S CONCLUSION THAT THE LAND EXCHANGE SERVES RECREATIONAL OR OTHER PUBLIC INTERESTS IS ARBITRARY AND CAPRICIOUS

The government contends that National Forest recreationists would benefit from the exchange. But the 420-acre Delich parcel along South Boundary Road offers very little recreation benefit at this time, other than to perhaps a very few hunters each year. Nothing in the EA indicates a study, a survey, or general public request urging the Forest Service to acquire the Delich parcel for recreation. The parcel is very remote, deer populations are very low on that part of the Ottawa NF, and there are many other places for deer and grouse hunters to go on the Ottawa, much closer to population areas. With regard to hikers, it is very unlikely that the

parcel would see even a few hikers each year, as there is nothing to draw hikers there. As explained in the opening brief, the area has been logged heavily by Delich, seriously detracting from its visual qualities. The Delich parcel has no outstanding features such as bluffs, big trees that some might call old growth, cascading waterfalls, etc to attract recreationists. Nothing was identified in the EA that remotely compares with the many attractions of the Wildcat Falls parcels. The State-owned Porcupine Mountains State Park ("the Porkies") is very close, just across the road, and encompasses 60,000 acres. Thus, anyone interested in hiking is going to hike in the Porkies, where there are improved hiking trails, old growth forests, bluffs, Lake Superior views, and other attributes and amenities desired by hikers. This is in addition to 25,000 acres of adjoining/nearby Ottawa National Forest Semi Primitive Non-Motorized (SPNM) lands. There is no indication in the EA or FONSI that staff from the Porkies have urged the Forest Service to acquire the small Delich parcel for recreational purpose.

The Revised EA (at 3, AR 1560) states there is a "need" to provide SPNM opportunities, and refers to Ottawa Forest Plan page 3-57 for direction. But that page of the Forest Plan describes SPNM, but makes no mention of a "need" for further "opportunities." AR 4336.

It is simply not rational to believe that the logged-over Delich parcel would provide any significant benefits to people interested in recreating on the Ottawa NF. In contrast, Wildcat Falls is a small but unique waterfall in close proximity to Eagle River/LOL/Watersmeet, with a trail leading to it through old growth cedar/hemlock/hardwood forest, that is visited by numerous people every year seeking a quality recreational experience. As noted supra at footnote 2, the Ottawa NF lists Wildcat Falls on its website as a waterfall worth visiting.

The agency also overstates concern over "trespass" problems. Def's Br. at 4. The EA

identified no existing or past or suspected trespass incidents on which to base this "need" in the vicinity of Wildcat Falls, or for that matter, anywhere on the Ottawa NF. Many County Line Lake cabin and home owners close to the Wildcat Falls parcels, in a good position to report immediately any trespass. In contrast, the Delich parcel is in an isolated corner of the Ottawa.

The government argues that "[t]he Project also reduces management costs and enhances land management efficiencies for the Forest Service." However, the agency does not explain why simply letting the timber continue growing and providing wildlife habitat is overly costly, compared to replanting and managing Deliches' cutover lands. The EA and FONSI failed completely to identify any Wildcat Falls area expenses of ownership.

Furthermore, Delich parcel 8 has no dependable wintertime logging access, as the only vehicle access (the South Boundary Road) is closed to all but snowmobile access. In contrast, Wildcat Falls area parcels 1,3 and 4 have winter access on the County Line Lake Road, a public road snow plowed by the Ontonagon County Road Commission and available for log hauling. The EA fails to address the likely higher cost of "managing" the Delich lands.

VIII. THE GOVERNMENT'S DOWNPLAYING OF THE LOSS OF OLD-GROWTH IS ARBITRARY AND CAPRICIOUS

The government unreasonably attempts to downplay the value of the old-growth features on the Wildcat Falls/County Line Lake parcels. The government asserts that most of the Ottawa NF is second-growth timber, less than 100 years old. But the stands on the parcels to be traded are over 100 years old, much of it more than 130 years old. The 2010 appraisal reports prepared for the Forest Service by Compass Land Consultants sets forth the extensive timber inventory and clearly shows the following information in chart form referring to the parcels in sections 34,

35 and 27:[2]

a) A northern hardwood stand (NH) of about 48 acres has a basal area (ba) of 123.33 (very well stocked).[3] That stand contains an average of 125 trees per acre larger than 16 inches diameter at breast height (dbh), of which 45 trees per acre are larger than 19" dbh.[4] That parcel has 3600 board feet (BF) of wood – about 38 cords per acre – predominantly sugar maple.

b) A second stand of predominantly hemlock and cedar of almost 50 acres has an average of 190 trees per acre larger than 16"dbh, of which 63 per acre are larger than 19" dbh. This stand has a basal area of 182 (very well stocked).

c) A third stand of about 39 acres is 89% maple and exhibits an impressive 5100 BF/36 cords per acre.

CONCLUSION

Based upon this brief and plaintiffs' opening brief, the administrative record, and the judicially noticed facts cited herein, plaintiffs respectfully request that the Court grant them summary judgment.

Respectfully submitted March 17, 2014.

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[2] Plaintiffs have attempted to locate this document in the administrative record, but have not yet had success in locating it. Once located, plaintiffs will file a supplemental notice.

[3] "Basal area" is the area of a given area of land that is occupied by the cross-section of tree trunks and stems at their base. en.m.wikipedia.org/wiki/Forest_Inventory. Michigan Department of Natural Resources, in a 2005 study on timber harvest trends, listed a range of basal areas for upland hardwoods from less than 60 to greater than 150, in increments of 10. Michigan State Forest Timber Harvest Trends, Dr. Larry Pedersen, submitted to DNR, 9/16/05, at 22 (available at http://www.michigan.gov/documents/dnr/TimberHarvestTrends_173133_7.pdf).

[4] DBH is the measurement of a tree's girth, standardized at 1.3 meters (about 4.5 feet) above the ground. en.m.wikipedia.org/wiki/Forest_Inventory.

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