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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' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

ORAL ARGUMENT REQUESTED

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Pursuant to Federal Rule of Civil Procedure 56, plaintiffs, by and through their undersigned attorney, hereby move the Court for summary judgment and the following relief.

INTRODUCTION

This is a challenge to a proposed exchange of National Forest lands for private lands. The Delich Land Exchange Project is proposed for the Bergland, Ontonagon, and Watersmeet Ranger Districts on the Ottawa National Forest. Plaintiffs challenge defendant Forest Service's failure to meet its procedural and substantive duties required by NEPA by failing to adequately perform environmental review procedures in its Environmental Assessment (EA) for the Land Exchange and associated Decision Notice (DN) and Finding of No Significant Impact (FONSI). Plaintiffs further challenges defendant Forest Service's failure to prepare an Environmental Impact Statement (EIS) examining all potentially significant environmental impacts of the Delich Land Exchange as required by NEPA.

The proposed exchange would remove Wildcat Falls, portions of Scott Creek and Howe Creek, and other sensitive areas from public ownership. The parcels to be exchanged contain hemlock and upland cedar old-growth forest, unique rock ridges and outcrops, and a wide variety of vegetation types, including alder swamp, a permanent stream and waterfall, mature and old-growth hemlock/cedar/northern hardwood forest, and a beaver pond and meadow. Dkt 53-54 - Administrative Record (AR) 386-87, 1241, 1243, 1371, 1563.

In contrast, on the private lands to be gained by the public, timber was recently heavily logged and offers little in aesthetic value or other features to attract the public. The close proximity of the now-federal parcels to the Watersmeet, Michigan, and Eagle River, Wisconsin, areas is very important, as any similar features on the Ottawa National Forest are a much farther

drive from the plaintiffs and other public users of the National Forest.

I. FACTUAL BACKGROUND

A. The Plaintiffs

Plaintiffs are two nonprofit organizations and seven individuals who are all concerned with, and have connections to, the public lands that are at issue. All of the individual plaintiffs, and members of the two organizational plaintiffs, previously submitted "standing declarations," documenting the harm that would be caused to their aesthetic, recreational, and scientific interests if the land exchange is completed. Dkt 41, 42, 45-50. The plaintiffs commented on and administratively appealed the Delich Land Exchange Project.

Partners in Forestry Cooperative (PIF) is a member-based, regional organization, deeply involved in the health and well-being of public lands in the Western Upper Peninsula of Michigan. This organization has participated in and has led field trips of groups into the project area for education, relaxation, research and recreation. These activities include, but are not limited to, viewing Wildcat Falls, studying the relationship between multiple species of trees as they age into old-growth forest types and the aging forest's relationship to ground-cover botanicals, simple meditation, wildlife viewing, snowshoeing, cross country skiing, hunting, rock-climbing and nature dialogue.

Plaintiff Joe Hovel is President and acting Director of Partners in Forestry. He has visited the lands in question, and has been a primary writer of PIF's comments on the Land Exchange, beginning with scoping and through the second administrative appeal, and individually acted as a joint commenter and appellant along with PIF. Plaintiff Rod Sharka is a board member and treasurer of Partners in Forestry. He has also acted as an individual

commenter and appellant regarding the Delich Land Exchange project. Mr. Sharka has revisited the Wildcat Falls area many times for its aesthetics, for wildlife and plant observation and bird-watching, and to contemplate the natural features.

Plaintiff Northwood Alliance Inc. is a regional, nonprofit conservation organization with members living within and closely connected to the Ottawa National Forest. Northwood Alliance's members commonly use and enjoy the special features of the Ottawa noted above, and the Alliance works to protect the most sensitive lands and strives for public access for recreation.

Plaintiff Steven C. Garske is a resident of Gogebic County, Michigan, and lives within the proclamation boundary of the Ottawa National Forest. Mr. Garske has enjoyed visiting proposed exchange parcels 3 and 4 for several years. He appreciates the unique subtle beauty of Wildcat Falls and its surroundings that these parcels support. As a professional botanist with considerable field experience, he enjoys spending time in forest that is essentially undisturbed and relatively healthy.

Plaintiff Sid Harring is a forest owner and environmental activist and has been a regular user of the Ottawa National Forest since the late 1970s. He has visited Wildcat Falls and finds it a unique natural area.

Plaintiff Catherine Parker is a resident of Marquette County, Michigan. The Ottawa National Forest is one of her favorite places to visit, and Wildcat Falls and the surrounding forestland are among the most beautiful features of this forest. She has been to see and to experience them regularly, and has plans to return. This unique combination of old-growth hemlock and cedar, springs, waterfalls, and unglaciated outcrops and boulders is not like any place she has seen before.

Plaintiff Richard Sloat lives in Iron River, Michigan, on the fringe of the Ottawa National Forest. He owns a cabin surrounded by the Ottawa National Forest, only 22 miles from the Falls and recreates at the Falls and elsewhere on the ONF.

Plaintiff Sherry Zoars is a resident of Watersmeet Township in Gogebic County, Michigan, and lives within ten miles of the proposed exchange area. She is a botanist and naturalist and coordinates the North Woods Native Plant Society (NWNPS), whose members regularly visit native plant communities throughout the western U.P., many of them on the ONF. The County Line Lake Parcels are the best riparian community closest to her home and she regularly visits the area to botanize, hike, and enjoy the pristine nature of the native forest, stream, wetland, rock formations, ponds, and waterfall.

B. The Defendants

Defendant U.S. Forest Service is a federal agency within the U.S. Department of Agriculture, which has proposed the Delich Land Exchange.

Defendants Robert D. Delich and Lisa Delich are the current fee simple owners of the private land for which the Forest Service proposes to exchange public lands. They are named in this complaint solely for purposes of obtaining effective injunctive relief. See, e.g., Kettle Range Conservation Group v. U.S. Bureau of Land Management, 150 F.3d 1083 (9th Cir. 1998) (in a public-private land exchange case, private landowner is a necessary party for purposes of obtaining effective injunctive relief should plaintiffs prevail) .

SUMMARY OF FACTS

A. Administrative Background

In January 2010 the Forest Service issued an Environmental Assessment (EA) for the

Delich Land Exchange Project. AR 1212. In February 2011 the Acting Forest Supervisor signed a Decision Notice and Finding of No Significant Impact (DN/FONSI). AR 1292. Plaintiff PIF filed an administrative appeal, and in May of 2011 prevailed in the administrative appeal. AR 1959, 1370. The Acting Regional Forester reversed the Forest Supervisor's decision, stating:

> After careful review of the PR and your appeal, as well as the recommendation of the ARO [Appeal Reviewing Officer], it is my decision to reverse the February 4, 2011, DN/FONSI for the Delich Land Exchange Project. Although the ARO recommended the decision be affirmed, I find the Ottawa should have more clearly documented and disclosed the analysis regarding hemlock and potential old growth on the federal properties to be exchanged.

AR 1370.

In October-November 2011 the Forest Service issued a Revised EA. 1554. In December 2011 the agency issued a revised DN/FONSI. AR 1886. Some of the plaintiffs filed administrative appeals, and on April 12, 2011, the Regional Forester rejected those administrative appeals. AR 928, 1942, 1959, 2016, 2059; 1940, 1957, 2014, 2045, 2075.

B. The Delich Land Exchange

The Forest Service's proposed Delich Land Exchange involves the conveyance of one parcel of non-federal land (421 acres) for five parcels of federal land (240 acres). AR 1889. The federal lands to be traded include Wildcat Falls, as well as Scott and Howe Creek, bluffs and ledges, old growth stands , beaver dam, and meadow. AR 386-87, 1241, 1243, 1371, 1563. The federal lands also include 61 acres which were designated as old-growth by the Forest Service about 20 years ago. AR 1581, 1906-07. Other portions of these parcels are dominated by mature sugar maple, with varying amounts of hemlock, yellow birch, and basswood. AR 1573.

As explained herein, the private Delich land is logged and degraded. It would therefore

take many years to restore. If left in private hands it is unlikely to be developed, thus bringing it into public ownership does not increase the probability of protecting it from development. That is because the Delich land has no adequate winter access, is very remote, lacks utilities, and provides an unappealing forest cover to new owners. AR 1962. The Ontonagon clay in these soils makes timber harvesting difficult in wet seasons and does not lend itself to waste disposal from any development with camps or cabins. Id.

In contrast, the Wildcat Falls area tracts are on sandy loam and loamy sand soils and provide better summer, fall and winter timber harvesting. Id. Thus they are likely to be logged once they are privatized; whereas if they are kept in public ownership they could be logged if that ever were deemed to be in the public interest.

II. STANDARD FOR SUMMARY JUDGMENT UNDER THE ADMINISTRATIVE PROCEDURES ACT

Under the Administrative Procedures Act, this Court must reject agency action that is not in accordance with law, or is without observance of procedures required by law, or is "arbitrary and capricious." 5 U.S.C. 706. Although the "arbitrary and capricious" standard of review applied in APA cases is deferential, the agency must "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made,'" and this Court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S. Ct. 2856, 2866-67 (1983) (citations omitted). "Agency deference has not come so far that we will uphold regulations whenever it is possible to 'conceive a basis' for administrative action." Bowen v. American Hosp. Ass'n, 476 U.S. 610, 626, 106 S. Ct. 2101, 2112 (1986). Reviewing courts must not merely "rubber-stamp

administrative decisions." Ocean Advocates v. U.S. Army Corps of Engineers, 361 F.3d 1108, 1119 (9th Cir. 2004). Under the Administrative Procedures Act, the Court is to consider whether the Forest Service's decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1149 (9th Cir. 1998). Although the court may not substitute its own judgment for that of the agency, review under the APA is "searching and careful." Ocean Advocates, 361 F.3d at 1118.

ARGUMENT

The Forest Service's Environmental Assessment for the Delich Land Exchange violates NEPA in several ways. A full Environmental Impact Statement was required because of the loss of Wildcat Falls, old-growth, and other public resources. The Forest Service violated NEPA by failing to analyze an adequate range of alternatives. The agency also failed to adequately disclose and analyze environmental impacts regarding Wildcat Falls and perennial streams; old-growth hemlock and other native species; and recreational importance. Finally, the agency violated NEPA by failing to prepare a supplemental NEPA analysis.

I. PLAINTIFFS HAVE STANDING

As demonstrated in the Declarations of Sharka, Garske, Parker, Sloat, Hovel, Warren, Harring, and Zoars (Dkt 41, 42, 45-50) each of the plaintiff groups has standing to bring this action. See Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 335, 343 (1977) (organizational standing); American Canoe v. City of Louisa Water, 389 F.3d 536 (6th Cir. 2004) (representational standing); Lujan v. Defenders of Wildlife, 504 U.S. 555, 572-73 n. 7, 112 S. Ct. 2130 (1992) ("normal standards for redressability and immediacy" are relaxed when a plaintiff has asserted a "procedural right"; therefore "one living adjacent to the site for proposed

construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an Environmental Impact Statement, even though he cannot establish with any certainty that the Statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.").

It is not necessary for all plaintiffs to have standing, as long as at least one does. Massachusetts v. EPA, 549 U.S. 497, 518, 127 S. Ct. 1438 (2007). "[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." Rumsfeld v. Forum for Academic & Institutional Rights, 547 U.S. 47 n.2, 126 S. Ct. 1297 (2006).

II. THE FOREST SERVICE VIOLATED THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

A. NEPA

The National Environmental Policy Act (NEPA) "declares a broad national commitment to protecting and promoting environmental quality." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 348 (1989). NEPA's disclosure goals are two-fold: (1) to ensure that the agency has carefully and fully contemplated the environmental effects of its action, and (2) "to ensure that the public has sufficient information to challenge the agency." Id. at 349. By focusing attention on the environmental consequences of its proposed action, NEPA "ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed and the die otherwise cast." Id.

The Council on Environmental Quality ("CEQ") promulgated uniform regulations to implement NEPA, which are binding on all federal agencies. 40 C.F.R. 1500-1508.

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). Agencies must disclose all foreseeable impacts from projects, both "direct" and "indirect." 40 C.F.R. 1502.16; City of Davis v. Coleman, 521 F.2d 661, 676 (9th Cir. 1975). NEPA requires a federal agency to consider all "relevant factors" relating to its assessment of direct and indirect effects. Rybachek v. EPA, 904 F.2d 1276, 1284 (9th Cir. 1990). In addition, the information must be of high quality. 40 C.F.R. 1500.1(b). Scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Id.; 40 C.F.R. 1502.24. A NEPA analysis must contain a "reasonably thorough discussion of the significant aspects of the probable environmental consequences," and must "[r]igorously explore and objectively evaluate" the impacts of a proposed federal action. Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1376 (9th Cir. 1998).

B. The Forest Service Violated NEPA in Failing to Prepare an EIS

The Forest Service issued an Environmental Assessment and Finding of No Significant Impact (EA/FONSI) rather than a full Environmental Impact Statement (EIS). As explained *infra*, an EIS is required if there *may be* significant impacts to the environment. This project may have significant impacts due to trading into private hands Wildcat Falls, old growth, hemlock, and other important public resources, and a full EIS is required.

1. Standard for requirement of an EIS

NEPA requires each federal agency to prepare an Environmental Impact Statement (EIS) for any major federal action that may significantly affect the quality of the human environment. 42 U.S.C. 4332(2)(c); 40 C.F.R. 1502.3; Kentucky v. Alexander, 655 F.2d 714, 718 (6th Cir. 1981); Friends of the Fiery Gizzard v. Farmers Home Admin., 61 F.3d 501, 504 (6th Cir. 1995).

Defendants violated NEPA by preparing only an EA rather than a full EIS, and by issuing

a "Finding of No Significant Impact" for the project. "An agency's determination not to prepare an EIS must be reasonable under the circumstances, when viewed in the light of the mandatory requirements and the standard set by (NEPA)." Kelley v. Selin, 42 F.3d 1501, 1519 (6th Cir. 1995). "[A]n EIS must be prepared if 'substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor.'" Idaho Sporting Congress, 137 F.3d at 1149 (9th Cir. 1998). "To trigger this requirement a 'plaintiff need not show that significant effects will in fact occur,' [but] raising 'substantial questions whether a project may have a significant effect' is sufficient." Id. at 1150.[1]

The NEPA regulations direct agencies to consider both "context" and "intensity" when determining whether environmental quality will be "significantly" affected. "Context" "means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality." 40 C.F.R. 1508.27(a). "Intensity" "refers to the severity of impact." 40 C.F.R. 1508.27(b). The NEPA regulations list the following ten "intensity" factors:

> (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
>
> (2) The degree to which the proposed action affects public health or safety.
>
> (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
>
> (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

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[1] Much of the NEPA case law is from the Ninth Circuit, because the large amount of federal land in the western states.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

40 C.F.R. 1508.27. Any one of these factors may be sufficient to require preparation of an EIS in appropriate circumstances. National Parks & Conservation Association v. Babbitt, 241 F.3d 722, 731 (9th Cir. 2001).

2. The loss of Wildcat Falls, old-growth, and other resources warrants a full EIS

As noted above, one of the factors requiring a full EIS is "[u]nique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas." 40 C.F.R. 1508.27(3). As discussed herein, the land exchange will trade away old-growth, hemlock, cedar stands, and related wildlife habitat; and will remove from public ownership unique and rare geographic features, including Wildcat Falls, Scott & Howe Creek, bluffs and ledges, and other special parts

of the public lands.

3. The public controversy over the project's impacts warrants a full EIS

The detailed concerns set forth in the plaintiffs' comments, along with the volume of the public comments file in the administrative record, demonstrate that there "[t]he effects on the quality of the human environment are likely to be highly controversial." 40 C.F.R. 1508.27(4).

The D.C. Circuit and Ninth Circuit have stated that "[t]he term 'controversial' refers to cases where a substantial dispute exists as to the size, nature, or effect of the major federal action." Town of Cave Creek v. FAA, 325 F.3d 320, 331 (D.C. Cir. 2003). The Forest Service's insistence that the trading away of Wildcat Falls, old growth, hemlock, cedar, and other public resources would not have a significant impact indicates that there is such a dispute.

The Sixth Circuit has not yet addressed what constitutes a "controversy" under NEPA. However, in the Seventh Circuit has held that if a plaintiff demonstrates that there is a controversial dispute, "NEPA then places the burden on the agency to come forward with a 'well-reasoned explanation' demonstrating why opinions disputing an EA's conclusions 'do not suffice to create a public controversy based on potential environmental consequences.'" Indiana Forest Alliance v. U.S. Forest Service, 325 F.3d 851, 858 (7th Cir. 2003).

C. The Agency Violated NEPA by Failing to Analyze an Adequate Range of Alternatives

The Delich Land Exchange EA analyzed in detail only one "action" alternative, and the "no-action alternative." AR 1567-69. Plaintiffs and others suggested other feasible alternatives, including purchasing the private parcels outright – for example, using Land and Water Conservation Fund monies. AR 1968. The Forest Service stated it did not consider outright purchase because the landowner was only interested in an exchange. AR 1893.

Another alternative proposed by the public but not addressed was withholding from the exchange three National Forest parcels that contain rare or declining resource values on the Ottawa National Forest. AR 1706. That too was rejected.

To make matters worse, in revising the project, the Forest Service removed less valuable federal parcels from the trade rather than Wildcat Falls and other sensitive areas. The revised DN/FONSI removed parcels 5 and 6, rather than the parcels (1-4) which commenters most objected to. While contiguous with Ottawa land on its north side, parcel 5 is the farthest from County Line Lake and probably the least remarkable of the parcels in this area. AR 2018-19. Parcel 6 is equally or more hemmed in by private land than parcels 1-4 are. AR 2019. Additionally, parcel 6 has been recently logged and now supports young aspen. AR 1602, 1607. The revised DN/FONSI stated that parcels 5 and 6 were removed from consideration in part because they "did not meet the interests of Mr. Delich." AR 1891, 1893. As explained *infra*, the interests of the private parties should not be driving the environmental analysis nor the selection of alternatives to review.

As the NEPA regulations explain, the alternatives section "is the heart" of the NEPA analysis, and it "should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." 40 C.F.R. 1502.14.

Thus, even if a full EIS is not required, NEPA requires defendants to "study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. 4332(2)(e). An agency must "rigorously explore and objectively evaluate all reasonable

alternatives, and for alternatives, which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. 1502.14(a).

"The existence of a viable but unexamined alternative renders an environmental impact statement inadequate." Citizens for a Better Henderson v. Hodel, 768 F.2d 1051, 1057 (9th Cir. 1985). See also Oregon Natural Desert Ass'n v. Bureau of Land Management, 531 F.3d 1114, 1121 (9th Cir. 2008) (reaffirming this standard).

NEPA does not allow the government to narrow the "purpose" of the project to one proposal – simply going forward with the project – even where a private party desires that outcome. In Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800 (9th Cir. 1999), the court addressed the very situation that is before the court today – an exchange of federal public land for private land. The court rejected the Forest Service's argument that it was constrained to consider only that particular land exchange. To the contrary, the court noted that the agency could and therefore must consider purchasing the desired private lands, for example using Land and Water Conservation Funds money. 177 F.3d at 814. The court held that the Forest Service's proffered interpretation of the project's "purpose and need" was too narrow to satisfy NEPA, because it restricted the scope of reasonable alternatives too tightly, down to one or two choices.

Specifically, the Ninth Circuit rejected the very argument that is being made here – that because the proposal was for a land exchange, only a land exchange could be considered:

> The Forest Service also contends that because the purpose of the transaction was to carry out an "exchange" and not a purchase, it was not required to consider this alternative. Seattle Audubon Society [v. Moseley, 80 F.3d [1401,] 1404 [(9th Cir. 1996)] (holding that an agency is not required to examine alternatives inconsistent with its basic policy objectives). To the extent that Weyerhaeuser would have been exchanging its lands for federal monies rather than federal lands, we do not recognize such an inconsistency. [FN7]

> FN7. Were we to construe the statement of purpose as limiting the transaction to land-for-land exchanges, it would certainly be too narrow to meet the standards for an appropriate statement of purpose as articulated in City of Carmel-By-The-Sea [v. U.S. Dept. of Transp.], 123 F.3d [1142,] 1155 [(9th Cir. 1997)].

Id.

In Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt, 606 F.3d 1058 (9th Cir. 2010) (as amended), the Ninth Circuit recently addressed another private/public land exchange, in which the BLM had reviewed six action alternatives. The court held that even so, the agency's stated "purpose and need" was "unreasonably narrow" because it restricted the proposed action to fulfilling the private entity's needs. The court noted that "[r]equiring agencies to consider private objectives . . . is a far cry from mandating that those private interests define the scope of the proposed project." 606 F.3d at 1070 (emph. added).

This restrictive approach that has been repeatedly rejected by the courts in reviewing NEPA analysis that has narrowed the decision down to a single "action" alternative. See, e.g., Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 195-96 (D.C. Cir. 1991), cert. denied, 502 U.S. 994 (1991) ("an agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action"); City of New York v. United States Dept of Transp., 715 F.2d 732, 743 (2d Cir. 1983), cert. denied, 456 U.S. 1005 (1984) ("an agency will not be permitted to narrow the objective of its action artificially and thereby circumvent the requirement that relevant alternatives be considered"); New Mexico ex rel. Richardson v. BLM, 565 F.3d 683, 709 n. 30 (10th Cir. 2009).

The Seventh Circuit noted:

One obvious way for an agency to slip past the strictures of NEPA is to contrive a

> purpose so slender as to define competing "reasonable alternatives" out of consideration (and even out of existence). The federal courts cannot condone an agency's frustration of Congressional will. If the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role. Nor can the agency satisfy the Act. 42 U.S.C. 4332(2)(E).

Simmons v. United States Army Corps of Eng'rs, 120 F.3d 664, 666 (7th Cir. 1997).

In failing to consider feasible alternatives, the Forest Service violated NEPA.

D. The Forest Service Failed to Adequately Disclose and Analyze Environmental Impacts

Even if a full EIS is not required, NEPA requires federal agencies to analyze the foreseeable environmental impacts, including direct, indirect, and cumulative impacts, of "major federal actions." 42 U.S.C. 4332(c)(I); 40 C.F.R. 1508.7. NEPA requires the analysis and consideration of cumulative effects which result from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions. 40 C.F.R. 1508.25(a).

An Environmental Assessment (EA) must "provide sufficient evidence and analysis for determining whether" the project will have a significant impact on the environment. 40 C.F.R. 1508.9(a)(1). The EA for the Delich Land Exchange fails to adequately analyze the direct, indirect, and cumulative effects of the land exchange on various parts of the environment which are discussed herein.

1. Wildcat Falls and perennial streams

While the Forest Service acknowledged the public objection to trading away Wildcat Falls, the importance of the Falls to the public was simply brushed off as one opportunity in many on the National Forest. AR 1313 ("Opportunities for . . . viewing . . . natural features, such as Wildcat Falls . . . maybe altered; however there are many other opportunities within the Ottawa to gain similar recreation experiences." Wildcat Falls is a relatively accessible waterfall,

near Watersmeet, in an area that has limited waterfall viewing opportunities. AR 1967. The Township of Watersmeet touts the public scenic values of Wildcat Falls in promoting tourism. www.watersmeet.org ("things to do"). This small but unique feature is much closer to the tourist visits that originate on the Hwy 45 region of Vilas County, Wisconsin, than are most other waterfalls in the ONF. AR 1967.

The Forest Service admitted that the land exchange would result in a loss of perennial streams. AR 1618. The agency downplayed the loss as being only 0.32 miles. But the agency's aquatic specialist noted:

> Scott and Howe Creek, within Parcels 2, 3, and 4 would not have assured protection. Alteration of stream associated wetlands, including beaver removal or discouragement, could affect the downstream conditions of flow timing and volume, particularly during the late summer low flow period, having adverse impacts on aquatic species population dynamics.
>
> Parcel 1 is located near Little County Line Lake and development within the parcel's southern third (within 500 feet of the lake) could have slight negative influence on the lake's water quality. It is anticipated the subdivided parcel would have homes constructed within the 5-acre lots. Rooftops, driveways, parking areas, patios, roadways, and compacted soils all can increase runoff. The increased runoff can wash lawn fertilizer, eroded soils, car fluids, and other pollutants into the nearby lake. If enough nutrients and sediments find their way to the lake water quality can be degraded by feeding algae blooms, increasing cloudy water, reducing light available to plants, and depleting oxygen supply to aquatic organisms, which can lead to fish kills.

AR 390-91. See also AR 386-87 (description and photos of water on federal parcels).

2. Old-growth hemlock and other native species

The EA acknowledges that federal Parcels 2 and 3 both contain forests with old growth characteristics as well as hemlock. AR 1241, 1574, 1576-77. The Forest Service asserted that because these parcels are not contiguous with other old growth parcels, it is not significant to trade them away. However, forests that contain these characteristics, no matter the size or

whether adjacent, are rare. Once traded to a private entity they can and likely will be logged and/or developed (see AR 1581-82), and the habitat and other benefits of the old growth characteristics will be lost forever. As the Ninth Circuit has noted, "the loss of old growth forest is permanent" and protection of such forests is in "the public interest." League of Wilderness Defenders v. Allen, 615 F.3d 1122 (9th Cir. 2010).

More specifically, the land exchange runs contrary to the 2006 Final Forest Plan, in that it relinquishes old-growth in Management Area (MA) 2.1 and adds cut-over young forest to MA 6.1, contrary to the "desired condition" for both of these Management Areas. Chapter 3, pages 3-56 and 3-57 of the Forest Plan (AR 4335-36) states that the purpose of "Management Prescription 6.1" is to:

• Provide a semi-primitive non-motorized recreational environment.

• Maintain potential conditions for low to moderate densities of non-game wildlife species, with particular emphasis on species requiring remoteness or closed canopy conditions.

• Maintain moderate to high amounts of the northern hardwood forest type along with associated habitat conditions and timber products.

• Emphasize uneven-aged management of the northern hardwood forest type to provide for high visual quality, habitat conditions for wildlife species such as fishers, ovenbirds, red-eyed vireos and barred owls, and production of low to moderate amounts of high quality northern hardwood sawtimber and veneer.

• Provide a natural appearance that is predominantly forested with infrequent permanent upland openings.

• Provide mostly later successional community types.

AR 4334-35.

The Delich parcel that would be included in MA 6.1 (Parcel 8) has been heavily and repeatedly logged, and generally does not have these characteristics. AR 1574-75, 1604, 1746, 2017-18. In fact, the uplands are dominated by young, heavily logged-over forest that "would not support commercial timber harvest for another 40 years." AR 1581.

Conversely, the Revised EA states that the goal of Management Area 2.1 is between 8 and 10% old growth, and that the percentage of old growth on MA 2.1 is currently 7.7%. AR 1576. Yet this exchange would trade away parcels in MA 2.1, which supports significant old-growth stands, resulting in a net loss of old-growth in this Management Area. AR 1896.

The Revised EA states that the Ottawa "strives to achieve the desired conditions outlined in the Forest Plan." AR 1566. This exchange does just the opposite.

While the administrative appeal was pending, plaintiff Garske wrote to the agency and noted that his conversation with the decision maker caused concern as to the failure to address scientific information about old-growth forests. Mr. Garske noted that Forest Supervisor Scardina had stated that even if the Forest Service retained these parcels, all or nearly all of the old-growth trees comprising this forest would eventually "fall down" and would be replaced by younger, early-successional forest. AR 2026-27. As Garske noted:

> Mr. Scardina's view runs counter to the well-understood and well-documented process of gap dynamics that drives the structure of old-growth temperate hardwood and mixed hardwood-conifer forests. As these forests reach an old-growth condition, individual trees (or occasionally two or three trees) occasionally fall, creating relatively small gaps in the canopy (Frelich and Graumlich 1994). Within these gaps, formerly suppressed tree seedlings and saplings respond to the increased light by rapid growth. Generally one or two of these trees win the race to the canopy, eventually replacing the tree(s) that fell. Random repetition of this process results in a stable forest dominated by large old-growth trees, but with small pockets of younger forest. Frelich and Lorimer (1991) estimated average canopy mortality in these "equilibrium" forests to be 5.7% to

6.9% per decade, and the average residence time of a canopy tree at 145-175 years.

> Assuming they are not logged, these forests normally return to an early successional stage only through severe, relatively rare disturbances such as major wind events (mostly localized downbursts) and fire. Frelich and Lorimer (1991) estimate the frequency of major blowdowns (> 60% of canopy) in northern hardwood-hemlock forests at >1500 years, and frequency of fires at 1273 years and 4545 years for surface and canopy fires, respectively.
>
> The Revised EA mentions that the hemlock stands in parcels 3 and 4 are "overstocked", yet these stands are simply following the normal trajectory of late-successional forests. In their study of old-growth hemlock stands in northern Wisconsin and Upper Michigan (Sylvania Wilderness), Tyrell and Crow (1994) found that density of large hemlock trees (greater than 50 cm dbh) increased for stands of around 300 years old, then began to decrease (Tyrell and Crow 1994, Figure 7).

AR 2027.

The Forest Service attempts to minimize the loss of old growth from the exchange, stating that "the exchange would result in less than .003% reduction in total acres of classified Old Growth within Management Area 2.1." AR 1895-96.

This information was ignored. The government has a duty to use high quality information and accurate scientific analysis. 40 C.F.R. 1500.1(b). The Ninth Circuit held in Foundation for North American Wild Sheep v. U. S. Dept. of Agriculture that the government, in an EA, "failed to take the requisite 'hard look' at the environmental consequences of its action," noting that the EA "failed to address certain crucial factors, consideration of which was essential to a truly informed decision whether or not to prepare an EIS." 681 F.2d 1172, 1178, 1179 (9th Cir. 1982). The omitted factors in Wild Sheep included increased traffic and impacts on bighorn sheep, and "significant questions raised by respondents to the initial draft of the EA were similarly ignored or, at best, shunted aside with mere conclusory statements." Id. at 1179-80. Because of these omissions, the Ninth Circuit rejected the EA. See also Save the Yaak

Committee v. Block, 840 F.2d 714, 719 (9th Cir. 1988) (holding EA inadequate for lack of wildlife discussion).

The 2006 Forest Plan for the Ottawa National Forest states that white pine and hemlock restoration will be a priority. AR 3559. By trading these parcels with their old-growth cedar and hemlock forests, this trade moves the forest in the opposite direction from that outlined in the Forest Plan.

The Revised EA points out that for a variety of reasons ranging from climate change to deer herbivory of seedlings to the almost certain future arrival of the hemlock woody adelgid, regeneration of hemlock and cedar on the Ottawa is difficult now and will become even more difficult in the future. AR 1477-78. The Environmental Impact Statement for the 2006 Forest-Wide "Land and Resource Management Plan states: "[A]ttempts to maintain and regenerate white pine and hemlock on the Ottawa have been met with limited success due to factors such as failure to remove the overstory drought and deer browse." AR 3559.

The land exchange would trade away old-growth stands of both species for a parcel which supports lesser stands of hemlock and cedar. Hemlock is a rare resource in this area. Citizens and conservation entities are attempting to reestablish and replant hemlock in the region. AR 2059. Both of these important northwoods species are experiencing reproductive failures across the upper Midwest, including in the ONF. AR 1710.

3. Recreational importance

In the EA the Forest Service implied that the County Line Lake area is not of interest to the general public, such as hikers, botanists, and so forth. However, the plaintiffs noted in their comments and appeals that this area is diverse as to plant communities, wildlife habitat, and

scenic appeal to hikers. See, e.g., AR 2059. There are few trails and quiet recreation sited in that portion of the Ottawa, especially with the unique riparian ecosystem. Id. The Wildcat Falls area is closer Watersmeet and Highway 45 than are the private parcels, making them much more accessible to the public. AR 1962. The Delich parcel, although close to the Porcupine Mountain Park, cannot compete with the park's appeal to hikers and recreationists because of its poor condition. Id.

E. The Forest Service Violated NEPA by Failing to Prepare a Supplemental NEPA Analysis

NEPA requires that agencies prepare supplemental analysis if "[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns" or "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. 1502.9(c)(l).

The Supreme Court has emphasized the need for federal agencies to use current environmental information in considering the continuing impact of federal projects on the environment.

> NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct. . . . It would be incongruous with this approach to environmental protection, and with the Act's manifest concern with preventing uninformed action, for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval.

Marsh, 490 U.S. at 371-72, 109 S. Ct. at 1858 (1989) (citation omitted).

A supplemental NEPA analysis is therefore required when new information "presents a seriously different picture of the likely environmental consequences of the proposed action not adequately envisioned by the original EIS." Wisconsin v. Weinberger, 745 F.2d 412, 420 (7th

Cir. 1984). A change in information, requiring NEPA supplementation

> need not be strictly environmental . . . ; the test is whether the new information so alters the project's character that a new 'hard-look' at the environmental consequences is needed.". . . [I]nformation "that does not seriously change the environmental picture, but that nevertheless affects, or could affect, the decisionmaking process, is subject to the procedural requirements of NEPA."

Natural Resources Defense Council v. Lujan, 768 F. Supp. 870, 886-87 (D.D.C. 1991). In Lujan, for instance, the court held that the Department of Interior had to issue an SEIS because a new report on oil reserves in the Alaska National Wildlife Refuge significantly changed the framework within which the Department made its decisions on management of the Refuge. See also California v. Block, 690 F.2d 753, 761 (9th Cir. 1982) (rejecting NEPA analysis where the selected alternative was a new, cobbled-together one that had never been presented to the public or analyzed regarding its environmental impacts).

Since the EA was issued for the Delich Land Exchange, significant new circumstances and information relevant to environmental concerns and bearing on the actions governed by the EA have developed, regarding the North Country Trail being moving north; and regarding the potential presence of lynx habitat on the federal parcels.

One of the reasons the Forest Service offered in support of the land exchange was that the Delich property (nonfederal parcel 8) to be received is just north of the North Country National Scenic Trail (NCNST). The October 13, 2012, Revised EA states:

> The area of analysis for the direct and indirect effects is limited to the project area's parcels, except for the section of the North Country Scenic Trail located just south of Non-Federal parcel 8. This is because the immediate direct and indirect changes to recreation would occur within the confines of the project area for the management activities proposed, or very close proximity to the project area.

AR 1599. The Forest Service asserted that acquisition of the Delich parcel is necessary to

protect the NCNST and to increase recreational opportunities.

However, as plaintiffs pointed out to the agency while the administrative appeal was pending, this conclusion was based on outdated information and is no longer valid. The Ni-Miikanaake Chapter of the North Country Trail Association is the local chapter responsible for this section of trail (see http://northcountrytrail.org/trail/states/michigan/explore-by-section/ni-miikanaake-chapter/). According to Ni-Miikanaake Chapter President Richard Swanson, this entire section of the NCNST is being rerouted. AR 2025. The new route will enter the west side of the Porcupine Mountains Wilderness State Park (PMSP) at the Presque Isle campground. From there it will continue east not far from Lake Superior to Lake of the Clouds, then cut southeast to Lost Creek Campground and across South Boundary Road, continuing southeast until it crosses Hwy M64. The closest the NCNST will get to the Delich tract will be about three miles. 2025-26. Therefore, acquiring the Delich tract will not protect the NCNST or enhance the experience of Trail users at all.

During the pendency of the administrative appeals, the plaintiffs also pointed out to the agency that the data regarding lynx needed to be updated. The only mention of lynx in the revised EA for the Delich exchange is: "Pursuant to the Endangered Species Act, determinations of effect must be made for all federally-listed species. A No Effect determination was reached for gray wolf, Canada lynx and Kirtland's warbler under both alternatives." AR 1609. However, the Wildcat Falls area includes the type of terrain that is favored by lynx. As plaintiffs pointed out, wild cats favor areas with boulders, rock ledges, cliffs, etc. because no other predator can negotiate them as well as the cats can. AR 2029. The Wildcat Falls area includes a large,

wooded rock outcrop as well as boulders and other rugged relief and mature conifer forest, all of which are known to be used by lynx. Id.

The Forest Service violated NEPA by failing to prepare a Supplemental EA or EIS to consider these substantial changes in the proposed action and new and significant information.

CONCLUSION

Based on this brief, the Administrative Record (Dkt 53-54), and the Declarations filed earlier in this case (Dkt 41, 42, 45-50), plaintiffs respectfully request that the Court grant them summary judgment, and provide the relief stated in the complaint.

DATED November 7, 2013.

Respectfully submitted,

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