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IN THE UNITED STATES DISTRICT COURT
EASTERN 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,

No.

Plaintiffs,

v.

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

UNITED STATES FOREST SERVICE,

Defendant.

INTRODUCTION

1. This is a civil action for declaratory and injunctive relief under the Administrative Procedures Act (APA), 5 U.S.C. § 551-706. The claims arise from defendant's violations of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370(d), and its implementing regulations, 40 C.F.R. §§ 1500-1508.

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

3. Defendant, the United States Forest Service ("Forest Service"), violated federal law in its preparation of the Delich Land Exchange Project, proposed for the Bergland, Ontonagon, and Watersmeet Ranger Districts on the Ottawa National Forest, U.S. Forest Service.

4. Plaintiffs challenge defendant'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 Delich Land Exchange and associated Decision Notice (DN) and Finding of No Significant Impact (FONSI). Plaintiffs further challenges defendant's failure to prepare an Environmental Impact Statement (EIS) examining all potentially significant environmental impacts of the Delich Land Exchange as required by NEPA.

5. Plaintiffs seek:

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

6. The requested relief is necessary to preserve the *status quo*, to prevent illegal

agency action, and to forestall irreparable injury to the environment.

JURISDICTION, VENUE, AND BASIS FOR RELIEF

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

8. The public lands at issue in this complaint are in Ontonagon County, Michigan; and the plaintiffs reside in this District. Venue is properly vested in this Court by 28 U.S.C. § 1391(e).

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

PARTIES

10. Plaintiff Partners in Forestry Cooperative (PIF) is a multi-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. The loss of the unique features of the affected parcels, including Wildcat Falls, Scott Creek, and Howe Creek, and the developing old-growth characteristics, to PIF's members, associates, and the public at large, would inflict great harm to

both PIF's members and to the well-being of PIF and how adequately it is able to serve its mission. Implementation of the project would adversely affect PIF and its members because of the resulting privatization and residential development of these areas. Partners in Forestry has been involved in the Delich Land Exchange project since its beginning and has been very outspoken against the trade of these parcels since January of 2010. PIF's colleagues of foresters and water resource professionals have viewed the lands to be acquired as early as late 2009, and again recently. PIF had concluded early on that the loss of these public lands with all their intrinsic features, near County Line Lake Road, were much too severe and were not properly compensated by this project trade. The private property to be acquired offers little incentive to PIF to use, as the timber was recently cut very heavily and offers little in aesthetic value or other features to attract the public. PIF's visits to the private parcel concluded that improper forestry practices had occurred. PIF commented on the draft Environmental Assessment. PIF prevailed in an administrative appeal of the first Decision Notice in May of 2011 concerning this same project, advised further in opposition to the revised EA in October-November 2011 and appealed to the Regional Forester again in February 2012. Some of PIF's members live in the area of the public lands to be lost. A key focus of PIF is sustainable forest management on the greater landscape, and the protection of water resources through implementing careful practices.

11. Plaintiff Northwood Alliance Inc. is a regional, nonprofit conservation organization with members living within and closely connected to the Ottawa National Forest. Northwood Alliance has offices in Conover, Wisconsin, and Ewen, Michigan. Its members commonly use and enjoy the special features of the Ottawa, including the parcels near County Line Lake Road, which feature Wildcat Falls, Scott and Howe Creeks, and unique geological

features. The close proximity of these parcels to the Watersmeet, Michigan, and Eagle River, Wisconsin, areas is very important, as any similar features on the Ottawa are a much further drive from the bulk of Northwood Alliance's membership. Its members are deeply vested in public land policy and continually use the project area. Northwood Alliance works to protect the most sensitive lands and strives for public access for recreation. It has a rich history of working with public land agencies and private land owners to accomplish conservation goals of clean water, clean air, and sustainable forestry policy, as a benefit to communities. The border lakes region of Wisconsin-Michigan and the Lake Superior Watershed are of the greatest importance to Northwood Alliance's membership of recreationists, naturalists, resource professionals, educators and everyday working families. The organization's interests, and those of its members who use and enjoy the affected areas, would be adversely affected if the land exchange proceeds.

12. Plaintiff Steven C. Garske is a resident of Gogebic County, Michigan, and lives within the proclamation boundary of the Ottawa National Forest. He is participating in this lawsuit because he will be directly harmed by the Regional Forester's decision to trade Ottawa National Forest lands away to a developer. Steven Garske has enjoyed visiting Forest Service parcels 3 and 4 for several years. He appreciates the unique subtle beauty of Wildcat Falls and the surrounding hemlock and upland cedar old-growth forest, the unique rock ridges and outcrops that run across much of these two parcels, and the 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) 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. Such forest is becoming more and

more rare as the Forest Service concentrates on timber production, and private forest land is logged and developed. The decision by the Regional Forester's office to trade these lands away to a developer will directly and adversely affect Steven Garske, and will forever eliminate his ability to enjoy this area.

13. Plaintiff Sid Haring is a forest owner and environmental activist and has been a regular user of the Ottawa National Forest since the late 1970s. He is concerned with the degradation of our national forests and wants to enhance the natural and wilderness qualities of these forests, particularly as habitat for reintroducing all of the native species that formerly lived there, including the wolverine. Sid Haring has visited Wildcat Falls and finds it a unique natural area. His aesthetic and recreational interests would be harmed if this land exchange proceeds.

14. Plaintiff Joe Hovel is President and acting Director of Partners in Forestry. He has been a primary writer of the correspondence regarding the Delich Land Exchange, beginning with scoping and through the second administrative appeal, and individually acted as a joint commenter and appellant along with PIF. Hovel listened to the pleas of members and associates in becoming involved in this project, has visited and studied the project lands, and has reached the same conclusions as the organization. Hovel's well-being is tied directly to, in part, the well-being of PIF and he will be adversely affected by the decision to implement this exchange for many of the same reasons the members will be affected.

15. Plaintiff Catherine Parker is a resident of Marquette County, Michigan, and is participating in this lawsuit because she will be directly harmed by the Delich Land Exchange. The federal lands to be traded away are in the Ottawa National Forest, which is one of her

favorite places to visit, anywhere. 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 is not like any place she has seen before. It is a unique combination of old-growth hemlock and cedar, springs, waterfalls, and unglaciated outcrops and boulders. The geology alone should make these parcels off-limits to private ownership. Removing these resources from the public domain means that she will never again be able to enjoy them. They will be owned by a developer who will log and subdivide these properties. The decision by the Regional Forester's office to trade them away will directly and adversely affect Catherine Parker, and will forever eliminate her ability to enjoy this area.

16. Plaintiff Rod Sharka is board member and treasurer of Partners in Forestry. He has also acted as an individual commenter and appellant regarding the Delich Land Exchange project. He was first introduced to the "Wildcat Falls" Forest Service parcel on June 28, 2008, as a participant on a Northwoods Native Plant Society field outing. This outing was advertised as a visit to a "unique and richly varied habitat containing old growth hemlock/cedar forest and swamps, high quality Scott & Howe Creek and wetlands, unique rock outcrops, and Wildcat Falls." All participants found the area to be a very special and mesmerizing place, especially given its close proximity to Watersmeet, Michigan. Sharka has revisited the parcel many times since then for its aesthetics, for wildlife and plant observation and bird-watching, and to contemplate the natural features. Implementation of the project will adversely affect Rod Sharka, because of the resulting privatization and residential development of these areas. The proposed significant increase in timber harvest will result in forest fragmentation, degradation of wildlife and fisheries habitat and the irretrievable loss of this unique ecosystem. Rod Sharka

would sustain injury to His interests if this land exchange is allowed to proceed. Carrying through with this land exchange may result in an increase the total acreage of the Ottawa National Forest, but at the expense of diminished quality. It is not just the loss of the falls, but the loss of the entire, unique ecosystem (the total package) consisting of the falls, Scott and Howe Creek, the old-growth characteristics of the forest surrounding the creek and falls, and the rock outcrops and ledges, that makes especially parcels two through four unique and appealing. In addition, this land exchange would encourage and promote the very forest fragmentation that the Forest Service has claimed to be working to prevent (this concern is true of all of the parcels).

17. Richard Sloat lives in Iron River, Michigan, which is on the fringe of the Ottawa National Forest (ONF). He lives forty miles from Wildcat Falls and owns a cabin surrounded by the Ottawa National Forest, only 22 miles from the Falls. Some of his recreation time is spent exploring the ONF. He feels extremely fortunate to be able to utilize the ONF in this way, and to take friends with him to special places including Wildcat Falls. He is participating in this lawsuit because he will be directly harmed by the proposed exchange of land; particularly Parcels 3 and 4 of the Delich Land Exchange. If the land is traded out of the public domain, he will never again be able to access the Wildcat Falls, walk through the old-growth hemlock and cedar or admire unique outcroppings in this area. He will be harmed because he will never be able to enjoy this portion of the Earth again; and is also concerned that neither will many others.

18. 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 Ottawa National Forest. 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. If this land goes into private hands, she, and the people who attend her hikes, will lose access to a relatively undisturbed native forest community with special features that do not exist together in a nearby area. In addition, generations of Watersmeet residents have been visiting this area for years and will also lose the opportunity to recreate or study a natural, native habitat. She knows from personal experience that while it may seem that with millions of acres in the Ottawa, there are many such natural places, on the contrary, much of the forest is in a recently logged condition, overgrown with raspberries, balsams, and other colonial species. Many acres are cedar swamps and relatively impassable on foot. There are relatively few places of this nature in the Watersmeet ranger district and it would be an irreparable loss to the plaintiff Zoars to trade these parcels to private ownership.

19. Plaintiffs commented on and administratively appealed the Delich Land Exchange Project.

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

SUMMARY OF FACTS

A. The Delich Land Exchange

21. 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).

22. The federal lands being traded include Wildcat Falls.

23. The federal lands being traded include Scott & Howe Creek, bluffs and ledges, old growth stands , beaver dam and meadow.

24. The federal lands being traded include 61 acres which were given old-growth status by the Forest Service about 20 years ago.

25. Much of the Forest Service lands in this exchange consists of old-growth and near old-growth dominated by northern white cedar and eastern hemlock, with scattered white pine.

26. Other portions of these parcels are dominated by mature sugar maple, with varying amounts of hemlock, yellow birch, and basswood.

27. Hemlock has declined on the Ottawa National Forest over the past 10 to 20 years.

28. There are currently only 7300 acres of cedar type on the ONF (0.73% of the ONF).

29. There are only 19,000 acres of hemlock type on the ONF (1.9% of the forest), although if stands are counted where hemlock is a minor component, it increases to 37,000 acres (3.7%).

30. The habitat around Wild Cat Falls is part of a winter deer yard.

31. In the Revised EA for the project, the Forest Service concludes that the additional acres of land acquired within the SPNM gained through the exchange would result in additional wildlife viewing opportunities and additional protection for the North Country Scenic Trail from

motorized encroachment.

32. The North Country Trail group has recently relocated the North Country Trail much further north, through the Porcupine Mountains State Park; after it is moved its closest approach to the current Delich property (which the Forest Service would receive) would be about three miles.

33. In January 2010 the Forest Service issued an Environmental Assessment (EA) for the Delich Land Exchange Project.

34. In February 2011 the Acting Forest Supervisor signed a Decision Notice and Finding of No Significant Impact (DN/FONSI) for the project, and administrative appeals were filed.

35. On May 13, 2011, 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. I found no violation in law, regulation or policy with respect to the issues in your appeal which were unrelated to the documented analysis of hemlock and potential old growth.

36. The Forest Service issued a Revised EA and in December 2011 a revised DN/FONSI.

37. Some of the plaintiffs in this lawsuit filed administrative appeals, and on April 12, 2011, the Regional Forester rejected those administrative appeals.

COUNT I

Violation of NEPA

**Failure to Adequately Disclose and Analyze
Environmental Impacts**

38. Plaintiffs incorporate by reference the foregoing paragraphs.

39. The National Environmental Policy Act (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)(1); 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).

40. An exchange of federal for non-federal land is a major federal action as defined by NEPA.

41. 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).

42. The EA fails to adequately analyze the direct, indirect, and cumulative effects of the land exchange on various parts of the environment, including but not limited to:

- a. old-growth stands and related wildlife habitat
- b. hemlock and cedar stands and related wildlife habitat
- c. loss of public access to Wildcat Falls, Scott & Howe Creek, bluffs and ledges, old growth stands, and other special parts of the public lands
- d. recreational opportunities
- e. winter deer yard and its benefit to both deer and wolves
- f. ease of public and Forest Service access to parcels

g. timber economic values on the public lands

43. Defendant's actions as described above are arbitrary, capricious, not in accordance with law, and without observance of procedures required by law, within the meaning of the APA, 5 U.S.C. § 706.

44. Plaintiffs are entitled to their reasonable fees, costs, and expenses associated with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

COUNT II

Violation of NEPA

Failure to Prepare an EIS

45. Plaintiffs incorporate by reference the foregoing paragraphs.

46. NEPA requires 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.

47. Defendant violated NEPA by preparing only an Environmental Assessment for the project, and by issuing a "Finding of No Significant Impact" for the project, because the project may significantly affect the environment, including (but not limited to) the following factors:

- a. impacts to old-growth, hemlock, cedar stands, winter deer yard, and related wildlife habitat;
- b. loss of public access to unique and rare geographic features, including Wildcat Falls, Scott & Howe Creek, bluffs and ledges, old growth stands, and other special parts of the public lands;

- c. impacts to recreational opportunities;
- d. impacts to public and Forest Service access to parcels
- e. impacts to timber economic values on the public lands
- f. uncertainty of impacts

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

49. Plaintiffs are entitled to their reasonable fees, costs, and expenses associated with this litigation pursuant to the Equal Access to Justice Act.

COUNT III

Violation of NEPA

Failure to Analyze an Adequate Range of Alternatives

50. Plaintiffs incorporate by reference the foregoing paragraphs.

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

52. The Delich Land Exchange EA analyzed in detail only one "action" alternative, and the "no-action alternative."

53. During the public comment period, plaintiffs and others suggested other feasible

alternatives.

54. Defendant's failure to analyze more than one "action" alternative was not in accordance with law, without observance of procedures required by law, and was arbitrary and capricious within the meaning of the APA. 5 U.S.C. § 706.

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

COUNT IV
Violation of NEPA
Failure to Prepare a Supplemental EIS

56. Plaintiffs incorporate by reference the foregoing paragraphs.

57. 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)(1).

58. Since the EA was issued, 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.

59. Defendant 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.

60. Defendant's actions as described above are arbitrary, capricious, not in accordance with law, and without observance of procedures required by law, within the meaning of the APA, 5 U.S.C. § 706.

61. Plaintiffs are entitled to their reasonable fees, costs, and expenses associated with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

RELIEF REQUESTED

Plaintiffs seek an order:

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

Respectfully submitted April 26, 2012.

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