Taking a “Hard Look”: The Legality and Policy Implications Surrounding the PolyMet Mine Land Transfer

Kyle Hoffmeister

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I. INTRODUCTION

The PolyMet Mine proposal is a microcosm of an even larger and timeless debate on how public lands should be used and valued. This issue is particularly salient with land exchanges – transactions between private companies and government entities that seek to
utilize the land for natural resources.¹ The discussion becomes increasingly convoluted when the site of the proposed operation sits in an environmentally and ecologically sensitive area. These situations engender additional layers of debate, frequently pitting environmentalists against mining companies and struggling families in the region. The PolyMet Mine proposal is no exception. What has further contributed to the controversy surrounding the land exchange was a federal bill seeking to streamline the exchange that would, if successful, essentially prohibit environmental groups from challenging the land exchange in court.² Thus, the bill targeted a significant part of the process of determining the viability of large-scale mining proposals.³ The bill has since failed to pass but, nonetheless, it should prompt an important discussion on checks and balances and the role of the judiciary in the administrative permitting process.⁴

The following article does not purport to affirmatively resolve the complex issues surrounding the PolyMet mine or land transfer. The mine exposes a myriad of environmental and legal issues—some very familiar to mining communities and those privy to environmental regulation and some that present novel legal and economic questions. This discussion focuses on the land exchange between the United States Forest Services and PolyMet. The following analysis discusses the legal standards by which courts, legislatures, and agencies determine the legality and viability of land exchanges and, in particular, whether these standards were upheld with the PolyMet land exchange.

From a legal perspective, the exchange likely is not in the public interest, and there is evidence that the lead state and federal agencies did not take the requisite “hard look” as required by NEPA.⁵ Using Ninth Circuit decisions for guidance, the lead agencies appear to have conducted a mere cursory investigation into the environmental risks and erred in the valuation of the land, which is at the crux of land transfers.⁶ As a normative discussion, the following also evaluates the various standards for determining valuation.

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² See infra pp. Part IV(F).
³ Id.
⁴ Id.
⁶ See infra Part III(B).
Ultimately, it is evident there is need for a clearer rule. This will reduce the risk of arbitrary or politically charged valuations and should, theoretically, benefit both the public and the organizations seeking the transfers by providing guidance and predictability for land transfers.

The following discussion will also explore the legality and public policy implications of a recent federal bill that, ostensibly, would bar environmental groups from challenging land transfers and which would, indisputably, expedite the finalization of the mine. The bill ultimately did not pass, but the implications of such attempted legislation are important to discuss for future projects and bills or if this bill is reintroduced for the PolyMet Mine. If successful, the bill would have eviscerated a fundamental constitutional check on the land exchange’s administrative process by cutting judicial challenges out of the equation. Opponents of the bill argued that it was a mere political move to stifle challenges to land exchanges and expedite the administrative permitting process. Considering the scope of the mine and land exchange, the deeply political underpinnings, and how it has the potential to impact the livelihoods of many—for better or for worse—such motivations are not beyond the realm of possibility.

II. BACKGROUND OF THE POLYMET MINE AND LAND EXCHANGE

To have an understanding of the various legal processes and issues at play with the PolyMet Mine and land exchange, it is appropriate to provide some rudimentary facts to understand the underlying context. The area of the proposed mine is located in the Iron Range of Northern Minnesota near the cities of Hoyt Lake and Babbitt. This is a rural and mineral-abundant region that sits in the St. Louis River watershed roughly 175 miles away from Lake Superior. The location in the watershed is significant because unregulated runoff or wastewater would, theoretically, run into

7. See infra Part III(C).
8. Id.
9. Id.
10. Id.
12. See id. at 1117.
rivers that empty into the Lake Superior basin, thus implicating the Great Lakes in addition to rivers and local water sources.\textsuperscript{13} The region is not unfamiliar to such proposals as many of the towns originated from, and have, deep historical roots in mining operations.\textsuperscript{14} However, PolyMet—a Toronto-based corporation—is proposing to build the first open-pit mine and processing facility to mine copper, nickel and other precious metals—resources abundant in the region.\textsuperscript{15} This project would operate on the site of a mine that failed in the 1950’s, LTV Steel Mining Company (LTVSMC).\textsuperscript{16} PolyMet procured the mining assets of LTVSMC, which include a railroad line, rock crushing facility, and four square miles of tailings pit which store the polluted water used throughout the mining operations.\textsuperscript{17} The old LTVSMC mine was a failed mining operation, which itself has generated controversy about the economic and environmental feasibility of establishing a new massive mining operation on the site of the old facility.\textsuperscript{18} Taking over the ghost mine has been especially alarming because PolyMet intends to use many of the assets and structures left behind by LTVSMC, including the tailings basin.\textsuperscript{19} Tailings are the byproducts created from mining, so the basins are tasked with holding in the wastewater and preventing it from seeping into and polluting the ground water or other water sources.\textsuperscript{20} PolyMet will—as required by permits—process any water that leaves the basin

\begin{footnotes}
\begin{itemize}
\item \textsuperscript{13} Id. at 1111.
\item \textsuperscript{14} Minnesota Mining History, MINN. DEP’T OF NAT. RES., https://www.dnr.state.mn.us/education/geology/digging/history.html [https://perma.cc/7C3U-WTTY].
\item \textsuperscript{15} Reid Forgrave, In Northern Minnesota, Two Economies Square Off; Mining vs. Wilderness, N.Y. TIMES MAG. (Oct. 12, 2017), https://www.nytimes.com/2017/10/12/magazine/in-northern-minnesota-two-economies-square-off-mining-vs-wilderness.html [https://perma.cc/FL3C-YDBB].
\item \textsuperscript{16} Maccabee, supra note 11, at 1121.
\item \textsuperscript{18} Id.
\item \textsuperscript{19} Maccabee, supra note 11, at 1121.
\end{itemize}
\end{footnotes}
through a reverse osmosis filter system.\textsuperscript{21} The water would flow into the Partidge and Embarrass rivers, continue to the St. Louis River, and empty into Lake Superior.\textsuperscript{22} PolyMet is required to have a dam safety permit from the Minnesota DNR in order to build on and fortify the existing basin.\textsuperscript{23} In addition to salvaging and reinforcing what assets and infrastructure were left from LTVSMC, PolyMet will also need to construct a substantial portion of the facility.\textsuperscript{24}

PolyMet has projected that the mine will immediately bring 300 new jobs to the area.\textsuperscript{25} Moreover, it claims that the mine will have an expansive and profound economic effect on the region by generating many spinoff jobs, thereby increasing economic activity in an otherwise struggling region.\textsuperscript{26} These positive economic projections have invigorated the pro-mining movement and garnered passionate local support for the operation.\textsuperscript{27} However, opponents contend that PolyMet’s economic projections are inflated and that they erroneously rest on the assumption that PolyMet will acquire additional funding for the project.\textsuperscript{28} Additionally, as with most massive projects that involve intensive, industrial use of land and extracting natural resources, the proposal has engendered stark environmental opposition.\textsuperscript{29}

A fundamental issue with these projects is whether the organization has sufficient financing not only to build and operate the mine, but to remedy cleanup and potential disasters that may

\textsuperscript{22} Maccabee, supra note 11, at 1118.
\textsuperscript{23} Marcotty, supra note 17, at 1117.
\textsuperscript{24} Myers, supra note 21.
\textsuperscript{25} Marcotty, supra note 17.
\textsuperscript{28} See Kraker, supra note 26.
\textsuperscript{29} See id.
occur. Generally, if the initiating organizations do not have adequate funding for disasters, the burden theoretically falls on the taxpayer. From an environmental perspective, the PolyMet mining proposal has been particularly polarizing due to the location of the site in the Lake Superior Watershed and the notorious nature of mining operations in precipitating hazards and pollutants into the surrounding region.

III. THE LAND EXCHANGE

A. The PolyMet Land Exchange

1. Background of the Land Exchange

   One of the most controversial components of the mine—and the primary focus of this article—is the land exchange (or, “land transfer”) between PolyMet and the National Forest Service. Though this is one of the many controversies of the project, the mine arguably could not operate without the successful land transfer. This transfer of land was approved in June of 2018 and involved PolyMet trading roughly 6,900 acres of private forest from the Superior National Forest in exchange for 6,500 acres of land at the proposed PolyMet mine site. The NorthMet Deposit is located on National Forest System (NFS) lands within the Superior National Forest. The private owner held the mineral rights to the lands when the federal government bought the land for National Forest use pursuant to the Weeks Act (16 U.S.C. § 515). Prior to the land transfer, PolyMet controlled the subsurface mineral rights to the

30. Id.
31. Id.
33. Id.
35. See id. at ES-4.
governmental land.\textsuperscript{36} However, the National Forest Service owned the surface rights.\textsuperscript{37} The point of the transfer was to unify the surface and subsurface rights in one owner—PolyMet—who now has exclusive rights over the land and its resources.\textsuperscript{38}

Prior to the transfer, the USFS contended that the mineral estate only gave PolyMet the right to surface mine NFS land to access the minerals.\textsuperscript{39} To circumvent that issue, PolyMet proposed the exchange in order to retain full and uninhibited surface mining rights.\textsuperscript{40} By definition, the land exchange is a “discretionary, voluntary real estate transaction” between PolyMet and the U.S. Forest Services, so nothing can compel either party to initiate or accept the transfer.\textsuperscript{41} As a result of the transaction, the land transferred to the government would become part of the Superior National Forest.\textsuperscript{42}

Though land transfers are discretionary, there are legal requirements. In order for it to be approved, the Forest Supervisor must determine that the exchange would serve the public interest. Further, the exchange must be consistent with the direction and goals of the forest land management plan.\textsuperscript{43}

2. The Land Transfer Environmental Impact Statement

The land exchange created a new circumstance for the mine proposal, thus triggering the need for additional environmental review and preparation of Environmental Impact Statements (EIS).\textsuperscript{44} In other words, though the exchange is part of the proposed PolyMet Mine operation, for purposes of environmental review, it is essentially treated as a separate proposal with its own risks and legal processes.\textsuperscript{45} As part of the administrative process, a Notice of

\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{38} Conor O’Brien, National Forest Land Exchange For Pit Mine is a Raw Deal, Conservationists Say, 37 No. 19 WESTLAW J. ENVTL. 13, at *1 (Apr. 12, 2017).
\textsuperscript{39} MINNESOTA DNR, supra note 34.
\textsuperscript{40} Id.
\textsuperscript{41} Id. at 1–15.
\textsuperscript{42} Id. at ES-3.
\textsuperscript{43} Id. at 1–16.
\textsuperscript{44} Id.
\textsuperscript{45} See id.
Intent to prepare a supplemental draft EIS was published in the Federal Register, which named the United States Army Corps of Engineers (USACE) and the United States Forest Service (USFS) as the federal agencies to oversee the process and the Minnesota Department of Natural Resources (DNR) as the lead state agency. What followed was a forty-five-day public scoping comment period on the land exchange. This allowed the public to submit comments on the proposed land transfer, which the lead agencies could ostensibly use to: determine significant issues; outline potential alternatives to the land transfer; determine the scope and analysis of the proposal; and refine the analysis, if need be. This is a crucial step in the administrative process, as it allows the public to weigh in and express their concerns, reservations, and other miscellaneous thoughts and opinions on the project. Comments range from experts or those directly affected by the projects to disinterested parties and typically cover a wide variety of issues and concerns, depending on the scope and complexity of the project.

The Minnesota DNR determined that the Final EIS for the PolyMet Mine and Land Exchange was sufficient. Specifically, the Minnesota DNR held that the EIS adequately addressed potential environmental impacts, adequately presented alternatives to the action, presented environmental mitigation methods, and adequately addressed the economic, employment, and sociological factors involved with the land exchange. It was noted in the EIS that certain issues were considered but eliminated from further consideration. Among the discarded issues were the mining-related effects of the land exchange because they apparently “would be discussed as part of the mining action.” Additionally, the issues of corporate profits resulting from the land exchange, land value disclosures, and adequacy of scoping material were issues omitted from the Final EIS consideration, though reasons for the omission

46. Id. at 3–147.
47. Id. at 2–7.
48. Id at 2–8.
49. See generally id.
50. Id.
51. Id.
52. Id. at 2–8.
53. Id.
were not provided.\textsuperscript{54} The Final EIS states, very generally, that the land exchange would result in a net increase in federal lands, public waters, wetlands, vegetation, wildlife and habitat, and aquatic species.\textsuperscript{55} Further, it projected a positive impact on the economy through increased forestry opportunity, additional employment, as well as a net increase in recreational opportunities.\textsuperscript{56} And, per the statutory requirements for EISs, alternatives for this particular land exchange were discussed and dismissed upon the conclusion that the alternatives would have the same effects as the proposed land exchange.\textsuperscript{57} Environmental Impact Statements must provide alternatives to the proposed project.\textsuperscript{58} Generally, if alternatives can achieve the same goal with less harm to the environment, then the proposal should be invalidated.\textsuperscript{59}

The EIS also discussed mitigation measures for potentially adverse environmental, economic, employment, or sociological effects from the land exchange.\textsuperscript{60} The Minnesota DNR, USACE, and the USFS denied several environmental groups’ requests for a supplemental EIS, citing that such action was not required under the Minnesota Environmental Policy Act.\textsuperscript{61} Per the code of federal regulations, a supplemental EIS can be ordered whenever the lead agency determines that changes in the proposed project would result in significant environmental impacts that were not previously evaluated in the original EIS or new information, or that circumstances would result in significant environmental impacts not discussed or evaluated in the original EIS.\textsuperscript{62}

\textbf{B. The Administrative Process and Law Governing Land Exchanges}

There are several levels of statutes and regulations at play on both the state and federal level. The National Environmental Policy

\begin{itemize}
  \item \textsuperscript{54} Id.
  \item \textsuperscript{55} Id. 50–52.
  \item \textsuperscript{56} Id. at 52.
  \item \textsuperscript{57} Id. at 53.
  \item \textsuperscript{58} Id.
  \item \textsuperscript{59} Id.
  \item \textsuperscript{60} Id. at 53.
  \item \textsuperscript{61} Id.
  \item \textsuperscript{62} Supplemental Environmental Impact Statements, 23 C.F.R. § 771.130 (2018).
\end{itemize}
Act (NEPA), 42 U.S.C. §4321, imposes certain requirements for land transfers. The statute requires that the lead agency or agencies must take a “hard look” at the environmental consequences of the land exchange. NEPA also requires that the land exchange be in the public interest and that the party proposing the exchange consider reasonable alternatives. Similarly, the Federal Land Policy and Management Act (FLPMA) requires that the public interest be well-served through the land exchange. Part of the “public interest” component is a requirement, through both NEPA and the Weeks Act, that the government receive land that is of equal or greater value than the land it exchanges. The exchange also must not conflict with the management objectives of adjacent federal lands.

1. The Administrative Process

A truncated and rudimentary explanation of the administrative process is necessary to understand the legal backdrop of the PolyMet land exchange. Both NEPA and the state statutes and regulations modeled after NEPA impose requirements for the administrative process to be conducted by the lead agencies involved. A proposed federal action may be categorically excluded from requiring a detailed environmental analysis if the action does not have a significant impact on the environment individually or cumulatively. If the agency determines that a categorical exclusion does not apply, the agency must prepare an Environmental Assessment (EA), the purpose of which is to determine whether or not a proposed federal action may cause significant environmental impacts. From here, the agency determines whether the proposal has the potential for significant environmental impacts and, if so, an Environmental Impact

64. Id.
65. Id.
67. Id.; see also Weeks Act.
68. Weeks Act, §§ 515, 516.
70. Id.; see also Major Federal Action, 40 C.F.R. § 1508.18 (2018).
Statement will be required.\textsuperscript{72} This decision should be based on the Environmental Assessment Worksheet (EAW) and the public comments received on the EAW.\textsuperscript{73} The federal and state requirements for an EIS create a significantly higher standard for environmental review than the EA.\textsuperscript{74} A draft of the EIS is published for public review which allows for comments, which agencies must then consider and respond to in the final EIS.\textsuperscript{75} The EIS must, among other requirements, discuss the environment of the area to be affected, prepare a range of alternatives that could accomplish the purpose of the action, and delineate the direct and indirect environmental consequences of the proposed project.\textsuperscript{76} Based on the findings of the EIS, the agency ultimately decides whether the project is allowed, denied, or needs additional information or review through a supplemental EIS.\textsuperscript{77}

2. Case Law Interpretation of the “Hard Look” Requirement

In determining the legality and viability of the PolyMet land exchange, a crucial inquiry is how courts decide whether a land exchange has fulfilled the statutory requirements of being in the “public interest” and whether the agency has taken a “hard look” at the environmental consequences of the land exchange. What gauge have they used in determining whether there has been proper valuation? Have courts dodged the issue by deferring to the respective agencies? How scrupulously must the agency look into environmental consequences and to what extent do courts defer to the agencies? Through several cases, courts have attempted to determine what a “hard look” entails or at least provide more clarity to the vague requirement.

The Eighth Circuit does not provide thorough guidance on this issue; however, there are several relevant Ninth Circuit cases involving land transfers. In \textit{Blue Mountain Biodiversity Project v.}
Blackwood, the court held that the USFS failed to take the required hard look at the implications of a timber logging project. After a pervasive wildfire in the Umatilla National Forest Region in Oregon, the USFS granted contracts for logging operations to recover timber in the affected areas. The logging operations required use and reconstruction of miles of roads and, in response, an environmental group challenged the project for not completing an EIS as required by NEPA. The USFS completed an Environmental Assessment (EA) and subsequently rendered a “Finding of No Significant Impact” assessment which, per statute, did not trigger a requirement for an EIS. The court ruled that only providing a cursory glance at environmental implications, along with general statements about possible effects of the project, were insufficient in fulfilling the “hard-look” requirement. The court elaborated that more is needed to pass the threshold of a “hard look.” The Ninth Circuit emphasized that courts must defer to agency decisions that are fully informed and well considered, as agencies ostensibly have the requisite expertise to make these determinations. However, this case emphasizes that courts should not hesitate to invalidate agency actions that are arbitrary and capricious.

Essentially, the investigations into the environmental implications need to be thorough and tailored to the specific issue at hand, as opposed to regurgitating boilerplate issues that tend to emerge in these circumstances. Despite the Ninth Circuit’s ruling, they still applied a standard of review that is highly deferential to

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78. Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208 (9th Cir. 1998).
80. Blackwood, 161 F.3d at 1210.
81. Id.
82. Id.
83. Id.
84. Id.
85. Id.
86. Webb v. Lujan, 960 F.2d 89, 91 (9th Cir. 1992).
the lead agencies. Under the arbitrary and capricious standard, a court must determine whether an administrative decision was based on a consideration of the relevant factors and whether there has been a clear error of judgement. The agency must demonstrate a rational connection between the facts and the choices made, which roughly translates to requiring the agency to show its work in how it came to its decision.

The court in Blackwood reasoned that, without an accurate picture of the environmental consequences of the land exchange, the agency could not have determined if the public interest would have been well-served through the exchange. So, in failing to take a hard look at the environmental consequences, the agency also failed to show that the public interest prong was fulfilled. Thus, the court showed that the “hard look” and “public interest” prongs are not completely independent requirements and that there is, in fact, a nexus between the requirements. If one is not met, it may be an indication that the other was not fulfilled.

The Ninth Circuit ruled similarly in Ctr. for Biological Diversity v. Department of Interior, which involved a land exchange between Asarco, operator of a mine, and the Bureau of Land Management (BLM). The agreement involved a conveyance of thirty-one parcels of public lands to the BLM in exchange for eighteen parcels of private land, the former of which contained ecologically sensitive areas near an area of critical environmental concern. The Environmental Protection Agency (EPA) deemed the draft of the EIS insufficient in considering all reasonable alternatives and that the impacts of the foreseeable activities were not adequately addressed. In discussing foreseeable uses of the lands, the final EIS stated that the uses would be the same for all alternatives because Asarco reserved most of the mining rights to the lands. In relying on this assumption for foreseeable uses, the

88. Id.
89. Id.
90. Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208 (9th Cir. 1998).
91. Id.
92. Id.
93. 581 F.3d 1063 (9th Cir. 2009).
final EIS included only a broad analysis of the environmental consequences of the operation with no discussion on the effects of the potential alternative uses. In concluding that the BLM erred in approving the proposed exchange, the court stated that NEPA imposes procedures that require agencies to take a “hard look” at environmental consequences and that the EIS is the linchpin of these procedures. It further explained that the EIS ensures that the agency will consider detailed information regarding significant environmental impacts and that the information will be available to the public. The majority reasoned that BLM and Asarco failed to include an analysis of all existing reasonable alternatives, which is “the heart of the environmental impact statement.”

3. Valuation

As discussed, the land transferred to the government must equal or exceed the value of the land transferred to the non-government party. Further, the Secretary of Agriculture must obtain the “market value” of the land. Not surprisingly, what constitutes the “market value” has been the subject of debate because the precise definition has significant implications for both the public and entity proposing the land transfer. The Federal Land Policy and Management Act further stipulates that the market value requires that the government value the land at its highest and best use. The Ninth Circuit has interpreted the “highest and best use” analysis to require the government to take the reasonably probable use of public lands which, for the PolyMet Land Transfer, would require factoring in surface mining. In Desert Citizens Against Pollution v. Bisson, the Ninth Circuit ruled that the BLM’s decision to

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94. Glazier, supra note 79, at 977.
95. Id.
96. Id. at 981.
97. Dep’t of Interior, 581 F.3d at 1071 (quoting Or. Natural Desert Ass’n v. Bureau of Land Mgmt., 531 F.3d 1114, 1121 (9th Cir. 2008) (internal quotations omitted).
98. 36 C.F.R. § 254.3 (2019).
100. Id.
102. 231 F.3d 1172 (9th Cir. 2000).
exchange public lands under FLPMA was arbitrary and capricious because it failed to consider market demand to use selected lands for landfill purposes even though the agency knew that the land would likely be used for landfill purposes.\textsuperscript{103} Market evaluation must consider development trends in the area such as demand for the property, the proximity of the property to property with comparable uses, the history of economic development in the area, specifically plans for development of the parcel, the use of the land during the exchange, and potential future use of the land.\textsuperscript{104} The error led to a substantial under-valuation, where the value of the property as a landfill was $46,000 per acre as opposed to $350 per acre in the land exchange agreement.\textsuperscript{105} An earlier Ninth Circuit ruling held that the highest and best use is not acquired through the past history or present use of the lands but is acquired through the reasonable future probability in light of the history of the region in general.\textsuperscript{106}

In \textit{Mt. St. Helens Mining & Recovery Ltd. P'ship v. United States},\textsuperscript{107} the Ninth Circuit rejected the “potential value” analysis, ruling that the independent appraiser’s valuation based on the mineral interests’ value as of the date of the appraisal was sufficient.\textsuperscript{108} This method of valuation ostensibly would exceed the value of the land transferred by the government and, therefore, in considering the public interest, would yield either more land, or land of greater value being transferred to the government for public use. In citing statute, the court explained that market value is

\begin{quote}
the most probable price in cash, or terms equivalent to cash, which lands or interest in lands should bring in a competitive and open market under all conditions requisite to a fair sale, where the buyer and seller each acts prudently and knowledgably, and the price is not affected by undue influence.\textsuperscript{109}
\end{quote}

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\textsuperscript{103} Id. at 1178.
\textsuperscript{104} Id. at 1182 (citing 26 Am.Jur.2d Eminent Domain § 300 (1996)).
\textsuperscript{105} Id.
\textsuperscript{106} Benning, 330 F.2d 527 at 531.
\textsuperscript{107} 384 F.3d 721 (9th Cir. 2004).
\textsuperscript{108} Id.
\textsuperscript{109} Id. at 729 (quoting Definitions, 36 C.F.R. § 254.2 (2019)).
\end{flushright}
The court also concluded that the Forest Service did not err in relying on an independent appraiser’s valuation of the lands in making its offer.\footnote{Id. at 730.}

\textit{C. Pending Lawsuits Challenging the Land Exchange}

There are currently several pending lawsuits against PolyMet and the National Forest Service. To date, four suits have been filed in federal court and all challenge the legality of the land exchange.\footnote{John Myers, Fourth lawsuit filed against PolyMet land exchange, \textsc{TWINCITIES PIONEER PRESS} (Mar. 28, 2017, 4:49 PM), https://www.twincities.com/2017/03/28/fourth-lawsuit-filed-against-polymet-land-exchange/ [https://perma.cc/9XPN-RTFK].} Environmental groups have alleged that the Forest Service failed to fulfill its duty to the public’s financial interest by not procuring a fair market value for the part of the Superior National Forest transferred to PolyMet to be mined.\footnote{Ron Meador, Lawsuit against PolyMet land exchange raises potent issue of taxpayers’ rights, \textsc{MINNPOST} (Feb. 7, 2017), https://www.minnpost.com/earth-journal/2017/02/lawsuit-against-polymet-land-exchange-raises-potent-issue-taxpayers-rights/ [https://perma.cc/3FDH-XWJL].} The groups contend that this error or oversight is due to improper valuation of the land to be mined, where the Forest Service appraised its value as land used for timber harvest.\footnote{Id.} The groups challenge this valuation, claiming that the land was not appraised at its “highest and best use,” as the law requires.\footnote{Id.} Further, the groups have alleged that the information regarding the financial aspect of the land exchange has been hidden from the public in a process that is supposed to be transparent.\footnote{Id.}

To further convolute the process, a federal bill was introduced that directly related to the PolyMet mine and land exchange, though it ultimately failed to pass.\footnote{Marshall Helmberger, Congress shouldn’t short-circuit environmentalists’ legal challenge to PolyMet land exchange, \textsc{MINNPOST} (June 15, 2018), https://www.minnpost.com/community-voices/2018/06/congress-shouldnt-short-circuit-environmentalists-legal-challenge-polymet-l/ [https://perma.cc/YQR9-3LLM].} If the bill succeeded, it would bar environmental groups the right to challenge the proposed land...

\footnotesize{110. Id. at 730.  
113. Id.  
114. Id.  
115. Id.  
exchange in federal courts. Democratic United States Senator Tina Smith offered the proposal through an amendment to a defense policy bill. The amendment would force the completion of the land swap and thus bypass the four lawsuits filed by environmental groups. The bill has been condemned by environmental groups as a political move to pander to Iron Rangers in order to increase re-election odds. Opponents also claim that the bill will deny the groups access to the courts to challenge the legality of the exchanges. Proponents of the bill argue that it would not affect the permitting process. Environmental groups responded that this fact is irrelevant because it still deprives groups of their constitutional rights to challenge what they perceive as illegitimate land exchanges in court. Further, they contend that the question of whether the public has been shorted in the exchange is often determined through the fact-finding process in federal courts. By attaching it to an unrelated, must-pass defense bill, the amendment would bypass public hearings and arguably strip the public of its right to challenge the proposals and to have courts evaluate the process. In March of 2018, a federal judge issued an order staying the four lawsuits while Congress considered the bill that would push the land transfer through. Though the bills gained momentum and appeared to have support in both congressional chambers, the U.S. Senate-House conference committee later dropped the amendment pertaining to the land exchange.

117. Id.
118. Id.
120. Id.
121. Id.
122. Id.
123. Id.
124. Id.
125. Id.
127. Jimmy Lovrien, PolyMet amendment dropped from bill, DULUTH NEWS TRIBUNE (July 24, 2018, 8:18 PM),
IV. ANALYSIS

A. Whether the Lead Agencies Took the Requisite Hard Look at the Environmental Consequences

One of the key questions is whether, in light of the deferential standard of review, the federal and state agencies took a “hard look” at the environmental consequences and reasonable alternatives of the PolyMet land exchange. As the foregoing discusses, courts have expanded on the foundational statutes and created more specific requirements for the public interest prong, imposing a duty upon agencies to conduct more than just a cursory investigation into environmental impacts. This ostensibly imposes an additional level of oversight and attempts to establish more accountability for the state and federal agencies conducting the EISs and issuing permits.

The primary process for assuring viability of the land exchange is the EIS conducted by the lead agencies. The EIS for the PolyMet land transfer was very detailed in stating the positive impacts in acquiring the land through the transfer. Additionally, the section of the EIS that discussed contingency mitigation was very comprehensive. It offered a wide range of options that could be undertaken should the project fail to stay within compliance of its permits. However, although the EIS provided a broad range of mitigation measures, some of the sections pertaining to the bigger risks—such as the old tailings basin PolyMet plans to use or the runoff into the Lake Superior Basin—were alarmingly brief. The EIS offers potential solutions to a wide variety of risks without elaborating how substantial and consequential the risks really are. There is a strong argument, per the Ninth Circuit precedent, that though a comprehensive list of potential issues was given, the EIS failed to take a “hard look” at the environmental impacts. A hard

129. MINN. DEP’T OF NAT. RES., supra note 34, at 1–15.
130. Id.
131. Id.
132. Id.
133. Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1210 (9th Cir. 1998).
look requires not only an *expansive* look at the environmental risks, but a *detailed* look that explains its conclusions and rationale. The Minnesota DNR certified in its conclusions of the Final EIS that the information presented in the document adequately addressed the issues identified in the Final Scope and that it adequately analyzed significant environmental impacts.\(^{134}\) However, the document does not go into detail about the potential environmental impacts; it merely states a long list of hypothetical issues and offers brief mitigation processes. What little impacts are discussed are narrow in scope and fail to take into account the scale and longevity of potential environmental issues.\(^{135}\) If the potential issues and mitigation proposals were discussed or evaluated in greater detail, then these evaluations would be clear and accessible to the public. However, given the information available to the public through the Final EIS and the guidance provided by case law, there is a strong argument that the lead agencies did not take the requisite hard look at the environmental impacts. Even if the investigation into the environmental risks and accompanying mitigation measures were in actuality more thorough, the agencies needed to show their work.

**B. Valuation**

1. Valuation Under the “Highest and Best Use Standard”

The Secretary of Agriculture determined that the valuation of the lands met the requirements of NEPA and the Weeks Act in that the lands transferred to the government exceeded the value of the land retained by PolyMet.\(^{136}\) Appraisals of the land were apparently prepared in accordance with the Uniform Appraisal Standards for Federal Land Acquisitions, which determined that the non-federal lands exceeded the value of the federal land by approximately $425,000.\(^{137}\) The Secretary of Agriculture must obtain the “market value” of the land and the Federal Land Policy and Management Act further elaborates that the market value requires that the

\(^{134}\) MINN. DEP’T OF NAT. RES., *supra* note 34, at 1–15.

\(^{135}\) *Id.*


\(^{137}\) *Id.* at § 5.
government value the land at its highest and best use.\textsuperscript{138} As a brief recap on the case law surrounding the “market value” of land exchanges, the Ninth Circuit has interpreted the “highest and best use” analysis to require the government to take the reasonably probable use of public lands which, for the PolyMet land transfer, would entail factoring in surface mining.\textsuperscript{139} The Ninth Circuit had previously rejected the “potential value” analysis, ruling that the independent appraiser’s valuation based on the mineral interests’ value as of the date of the appraisal was sufficient.\textsuperscript{140} The court contended that this method would lead to a value that would exceed the value of the land transferred by the government and, therefore, in considering the public interest, would yield either more land, or land of greater value being transferred to the government for public use.\textsuperscript{141}

Case law on land transfers illustrates that there is lack of a clear rule or equation to determine what the fair market value of land is. Even for courts that have applied the same or similar tests, the decisions appear to lack consistency in the definition and application of the valuation technique. Further, many appear to overtly deviate from previously established standards or create new valuation methods in an effort to tailor the test to the circumstances. Temporarily setting this issue aside, there is still a strong argument that the land exchanged for the PolyMet mine was substantially undervalued. As discussed, the Ninth Circuit in \textit{Bisson} took somewhat of a holistic approach in outlining factors for determining the highest and best use of land.\textsuperscript{142} Though a crucial factor is the intended use of the land, agencies must also consider the current use, development trends, demand for the property, and history of economic development.\textsuperscript{143} In theory, this interpretation of the highest and best use test would be the most favorable for the company pursuing the exchange because the (often lucrative)

\begin{itemize}
\item \textsuperscript{139} United States v. Benning, 330 F.2d 527, 531 (9th Cir. 1964).
\item \textsuperscript{140} Mt. St. Helens Mining & Recovery Ltd. P’ship v. United States, 384 F.3d 721, 729 (9th Cir. 2004).
\item \textsuperscript{141} \textit{Id}.
\item \textsuperscript{142} Desert Citizens Against Pollution v. Bisson, 231 F.3d 1172 (9th Cir. 2000).
\item \textsuperscript{143} \textit{Id}.
\end{itemize}
intended use is not the sole factor; agencies may consider other factors that can, theoretically, lower the price per acre. Even in applying the comprehensive Bisson factors, the land transferred to PolyMet likely has a substantially higher market value than the prevailing $550 per acre appraisal. 144 This price apparently resulted from valuing the land as if the highest use was for logging. 145 If true, this valuation appears to blatantly violate the “highest and best used” standard established by the Ninth Circuit. 146 It fails to take into account the mining history of the region and, moreover, ignores the intended use of the land for surface mining, which will yield substantially more profit and value than if the land were used for timber. Even if logging was not a factor in valuation, $550 per acre is miniscule when considering the lucrative yield per acre of a surface mining operation.

As discussed, the Ninth Circuit applied a slightly different test in a subsequent case, Mt. St. Helens Mining & Recovery Ltd. P’ship v. United States. 147 There, the court held that the Department of Agriculture and Forest Service should not use the undefinable “potential value” of the land but, instead, should use the market value of the mineral interests. 148 Applying this valuation method to the PolyMet land transfer would still yield a value significantly higher than the current appraisal. In Helens, the court elaborated that “market value” is defined as “the most probable price in cash, or terms equivalent to cash, which lands or interest in lands should bring in a competitive and open market under all conditions requisite to a fair sale . . . .” 149 The court affirmed the appraiser’s valuation, which was based on the mineral interest value on the date of the appraisal as opposed to the date of acquisition, which would

144. Id.
145. Jay Newcomb & Marc Fink, In Response: PolyMet Land Swap a Bad Deal for Duluth, all of Minnesota, DULUTH NEWS TRIBUNE (Apr. 30, 2018), https://www.duluthnewstribune.com/opinion/columns/4439140-response-polymet-land-swap-bad-deal-duluth-all-minnesota [https://perma.cc/ZSS9-JHLM] (stating that valuing the land as if the highest use was for timber resulted in a ripoff to Minnesotans and that other mining companies in northern Minnesota paid more than seven times as much to surface mining rights).
146. See Bisson, 231 F.3d at 1179.
148. Id.
149. Id.
yield a substantially higher value. 150 Again, the current valuation of the federal land being transferred to PolyMet completely ignores the fact that the land will be utilized for mining, thus deviating from not only the test in Helens, but all Ninth Circuit decision concerning land exchanges. 151 In attempting to glean some semblance of a rule for valuation, it is clear that the intended use of mining must be a factor. How much of a factor mining plays and what other facts and circumstances are considered in valuation apparently depends on the precise fact pattern at hand and which case you reference. However, regardless of whether valuation hinges on past, current, or future use, mining must be considered in valuing the lands to be exchanged. Doing otherwise would and did result in a significant undervaluation of land and, thus, an inequitable outcome for the public. Similar to Bisson, employing the appropriate valuation and factoring in the lucrative operation of mining would result in substantially more land or land with higher value for the public use. 152

2. Evaluating the Standards for Determining Market Value of Land

As clearly illustrated by case law, the current standards for land exchange valuation requiring the Secretary to employ the “highest and best use” of the land to determine the market value are vague and yield seemingly arbitrary and inconsistent results between cases. Requiring the “highest and best use” to determine the market value is elusive, affords the Secretary of Agriculture excessive discretion, and enhances the risk—as exhibited by the PolyMet land exchange—that the land will be undervalued and that the government and public will receive an inequitable deal. There needs to be a clearer standard for valuation. To reduce inconsistent valuations and increase predictability and transparency, one potential solution would be to incorporate the ruling in Nat’l Parks & Conservation Ass’n v. Bureau of Land Mg 155 requiring that valuation be based on the “reasonably probable use” of the land into law through a federal statute or regulation. 154 In theory, this

150. Id.
151. Id.
152. See Bisson, 231 F.3d at 1179.
153. 606 F.3d 1058 (9th Cir. 2010).
154. Id. at 1067.
diminishes the risk of fringe arguments and purely political interpretations of valuation. Had the Secretary applied the more appropriate “reasonably probable use” standard of valuation, the value of the land transferred to the government would likely have been statutorily inadequate and PolyMet would need to compensate the government accordingly.

There are also arguments that the “potential value” of the land employed in several cases is too vague and elusive. Valuing the land based on projected mineral value can be very speculative and creates the risk that the non-governmental party will receive an inequitable result if the land does not have the financial yield that is predicted. The “reasonably probable use” standard does create this uncertainty. However, the interests of the entity proposing the exchange—PolyMet—need to be weighed against those of the public. The “reasonably probable use” does favor the public in eliminating—or at least reducing—the risk that the government and public receive an unfair deal. This is not inconsistent with the foundational principles of the statutes and regulations concerning land exchanges—which are, primarily, to assure that land exchanges are in the public interest and are not inconsistent with land management practices.

The flaws of the “highest and best use standard” are evidenced in the PolyMet land exchange, where PolyMet paid a mere $550 per acre of land received from the NFS. There is no issue with acknowledging that PolyMet has a valid interest in retaining a healthy profit margin. However, $550 per acre is a fraction of the revenue PolyMet is likely to yield from each acre from the open-pit mine. Proponents of how the transfer was valued may argue that there is nothing wrong with a company making a healthy profit from its operations. I would counter that the issue is not in the benefit to the company, but in the tradeoff absorbed by the public. Though there is no illegality or immorality in PolyMet earning a large profit margin, such significant margins in comparison to the land

155. Id.

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valuation indicate that the public should have received a better deal in the exchange. Such disparity should not be at the expense of the public. The principle behind land exchanges is to allow mutually beneficial transactions that benefits the public and does not jeopardize the environment.158 Here, the public interest was compromised by the government not receiving a fair value in land.

Alternatively, there is an argument that the definition(s) and application of “market value” is necessarily vague due to the complex and fact-specific nature of land exchanges. Accordingly, agencies and courts need wiggle room to tailor the standard to the unique circumstances presented to them. This, unfortunately, can result in the appearance of having several rules or drastic deviations from the rule. These arguments can hold water, especially in light of how the circumstances surrounding land exchanges can vary drastically. However, the need for flexibility does not preclude the creation of a clearer, more ascertainable standard for valuing land exchanges.

A workable solution would be to incorporate the factors set forth in Bisson into legislation or regulations.159 This would bring harmony between the competing needs for flexibility and having an identifiable rule that provides guidance and some semblance of consistency for courts. Codifying the Bisson factors would allow courts the ability to factor in unique or bizarre circumstances without being hamstrung by the other overly restrictive market value rules employed in various cases.160 Theoretically, this would increase predictability in the administrative process when conducting or evaluating the prospect of land exchanges. Additionally, it should reduce the risk of agencies abusing discretion with valuing land and increase judicial economy by reducing the amount of valuation challenges in court. Legislating the Bisson factors should also counter the risk of over-valuation inherent to the “reasonably probable use” standard in Nat’l Parks & Conservation Ass’n v. Bureau of Land Mg by allowing courts to consider a variety of factors.161

159. Desert Citizens Against Pollution v. Bisson, 231 F.3d 1172 (9th Cir. 2000).
160. Id.
161. Id.
The question then turns to how we would incorporate and solidify the Bisson factors: should it be accomplished through statutory or regulatory codes? Both options would have their benefits, tradeoffs, and risks. Legislating the Bisson factors could arguably restrict the lead agencies’ discretion and inhibit their ability to employ their expertise. There is also an argument that creating such factors should not be accomplished through the political process, but through the administrative process, where agencies are better-equipped to make such decisions. Conversely, legislation could provide the necessary foundation and guidance for agencies to properly value land transfers. To that end, regulatory codes arguably would not have the universal application of legislation and could, theoretically, be subject to whimsical changes and deviations from the set rule. Additionally, even with the constraint of narrower legislation, agencies will always have a healthy degree of discretion through the auspice of *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*[^162] A compromise would be to incorporate the Bisson factors into both legislation and regulations. The legislative code should be narrower than the existing laws on valuation but broad enough to allow agencies the discretion needed to employ their expertise and tailor the rule to the precise circumstances at hand. Ultimately, which path would result in the Bisson factors being seen through to ensure proper land valuation is left to conjecture and would depend on a myriad of factors.

One could argue that legislating the Bisson factors encourages judicial activism by making a judicial rule into legislation or regulation.[^163] To the contrary, making such a law would promote judicial restraint in future challenges by outlining clear guidelines for agencies and restricting courts’ abilities to deviate from the rule or add additional factors for consideration—which currently appears to be the status quo for land transfers. Establishing the broad Bisson factors in conjunction with the highly deferential standard of review should, in effect, limit the court’s discretion by creating a definable rule and by officially broadening the factors that can be considered by lead agencies when conducting valuation of land exchanges.

[^163]: Bisson, 231 F.3d at 1179.
As briefly mentioned, when evaluating the legality and propriety of the PolyMet land exchange, it is imperative to also consider statutory intent, especially in the context of valuation. The statutes outlining procedures and requirements for land exchanges were not created to be instruments of profit for companies or devices to bypass administrative procedures.\textsuperscript{164} Conversely, they were also not created to inhibit companies’ success in the free market.\textsuperscript{165} The overarching purpose of the land exchange statute is to allow and promote sustainable land exchanges that ultimately benefit the public.\textsuperscript{166} Therefore, by considering the underlying intent where there is a question of whether land was undervalued, the agency should employ the method of valuation that tends to favor the public. The PolyMet land exchange appears to do the opposite by grossly undervaluing each acre transferred to the government.\textsuperscript{167} As discussed, in applying the various vague valuation methods established through case law, it is apparent that the lead agencies, for purposes of valuation, should have considered the past and future use of the land for mining. The intent of the statutes reinforces this. The public would be better served by a valuation method that considers the more lucrative operation of mining. This would assure that more land—or at least land of higher value—would be transferred to the government for public use.

Another observation that may only be technical in nature is that the Final EIS did not mention the required manner of land valuation for the lands in the transfer.\textsuperscript{168} In fact, it only mentioned valuation in passing.\textsuperscript{169} This is not to allege that the lead agencies did not consider valuation, as it is clear that valuation was a key component of the process. However, the valuation process—or at least conclusions—should be readily available for the public to view, especially when such outcomes may materially impact the public. The regulatory process for issuing permits is intended to involve and inform the public, especially in light of the fact that decisions

\textsuperscript{165}. Id.
\textsuperscript{166}. Id.
\textsuperscript{167}. See generally Bisson, 231 F.3d 1172.
\textsuperscript{168}. Final Environmental Impact Statement (FEIS), NorthMet Mining Project and Land Exchange, MN DNR, at 1–15.
\textsuperscript{169}. Id.
are being made by unelected officials. Mere conclusory statements on the value of the transfer inadequately informed the public of how the agencies made their decision—a decision that could have resounding implications for the public. The EIS—or supporting documents—should clearly explain the method of valuation and how it was applied to the current circumstances. Providing this information in the Final EIS not only avoids a disservice to the public but, for practical reasons, provides additional guidance to courts when evaluating the land transfer valuation methods used. Ambiguity and lack of transparency breed disputes.

C. Assessing the Failed Land Transfer Bill

Fortunately, the bill that was intended to streamline the land transfer was ultimately not passed. However, it is crucial to discuss the legal and policy underpinnings—and more importantly, the implications—of the bill to provide future guidance should similar legislation be introduced. In the case of the PolyMet land transfer, the bill likely would not have interfered with the public commenting process nor would it omit any other key aspect of the permitting process. The land exchange still requires an Environmental Impact Statement, permits, and continued oversight by the lead agencies to assure that the operation is compliant. However, a key check on the administrative process is allowing challenges in court. When challenges arise, the judiciary assures that the administrative process was followed, that the lead agencies acted within their authority, and that they did so without clear errors. To assure independence and give ample deference to agencies, courts have imposed highly deferential standards of review on administrative actions, which are typically only overturned where there is a clear abuse of discretion.

In short, the bill, if successful, could jeopardize the ability of courts to determine if agencies have actually taken a hard look at the environmental consequences and whether the proposed land


171. See generally NEPA.

exchange is in the public’s best interest. The land exchange has been approved; therefore, we cannot rely on the administrative process to correct any issues with regard to the “hard look” or “public interest.” This bill clearly undermines the foundational doctrine of checks and balances. With such a complicated and sensitive proposal that may impact the livelihoods of thousands, there needs to be an outlet to evaluate and invalidate, if warranted, the permitting process. The bill appeared to be a political move to circumvent judicial oversight and the rule of law. There is logic and precedent behind affording the lead agencies deference so they can perform their duties without unnecessary inhibitions. However, as stated, this is provided through the highly deferential standard of review, not by eviscerating a fundamental pillar of checks and balances. In theory, agencies will still be monitoring the operation to make sure it is in the public interest and that it is consistent with management policies. PolyMet will also still need to abide by its permits. However, this does little to reverse an inequitable land exchange, especially if operations have already started. Any attempt to omit, inhibit, or expedite the opportunity for a judicial challenge should ignite suspicion of a fundamental issue with the process. If anything, those who feel that the land exchange was valued appropriately should welcome a judicial challenge as an opportunity to clarify and validate the process.

V. CONCLUSION

As mentioned, the foregoing discussion does not presume to have the answer to the many complex questions surrounding the PolyMet mine or the land exchange. As a policy matter, there is the argument that such a project—if properly regulated—can positively impact the public through adding employment and revitalizing the economy of a struggling region. However, to gain regional support and momentum, the economic and temporal scope of these benefits tends to be over-inflated, which can overshadow significant environmental risks. Dwelling on promising, but speculative economic projections can lead to overlooking important environmental truths. As with any proposal with significant environmental impacts, the benefits must be scrupulously balanced against the harms, especially when the harms have the potential to dwarf and far outlive the potential benefits.
From a legal perspective, there is a strong argument that the lead agencies deviated from the proper standard in both valuing the land exchange and taking the “hard look” at the environmental implications. Through the Final EIS, the lead agencies provided a very comprehensive list of potential risks along with possible remedial measures.  

However, what the EIS provided in breadth it severely lacked in depth. The EIS merely provided a cursory glance at the potential issues and remedies as opposed to a detailed, situation-tailored analysis of the environmental risks. At the very least, some of the bigger issues, such as the tailings basin and the potential risk of runoff into Lake Superior Basin, deserved a more in-depth analysis and one that was more readily available to the public. The conclusion of the EIS appears to mirror the cursory investigation and conclusions of the agencies in Blackwood that were deemed insufficient by the Ninth Circuit. Ultimately, there is a very strong argument that the lead agencies deviated from the “hard look” standard when evaluating the PolyMet land exchange.

Though there lacks a concrete valuation method, the PolyMet land exchanged was likely undervalued in a way that disfavors the public. Regardless of the specific method or language employed through the various court cases, the lead agencies should have factored in the past and future use of the land for mining, which undoubtedly would have yielded a higher value per acre. To reduce the risk of the foregoing errors and to hold lead agencies accountable, it would be in the public interest to codify into statute or regulation the common law standard used in Bisson for determining valuation. Doing so would provide a clearer standard for agencies and courts and would diminish the risk of arbitrary results and stretching common-law arguments to further political goals. Additionally, clearer standards of valuation and environmental analysis would provide more transparency of the administrative process to the public.

Lastly, there is a strong policy and legal argument that the failed federal bill targeting the PolyMet land exchange was inappropriate, would undermine the doctrine of checks and balances and would ultimately exact a severe injustice to the public and those wishing

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174. Id at 4–189.
175. Blackwood, 161 F.3d at 1214.
176. Bisson, 231 F.3d at 1181.
to evaluate the administrative process. Admittedly, there is value in efficiency and streamlining permitting procedures, especially when such procedures are expensed to the taxpayer. However, this factor should not overpower the fundamental interest of having a judicial check on the administrative process. As case law has proven, the courts are a vital step in the administrative process in evaluating whether agencies conducted the necessary fact-finding and followed the proper standards. The standard of review is still incredibly deferential to agencies.\textsuperscript{177} The public is entitled to utilize a neutral branch to check or even correct what they see as improper procedure, especially when crucial public and environmental interests are at stake, such as with the PolyMet land exchange.

Despite temporary setbacks and legal challenges, the odds are in favor of the PolyMet mine becoming operational, even if the mining rights and facilities are sold off. The legality and viability of the land transfer is not only important for the PolyMet mine but for other potential projects. This operation, if successful, will likely serve as a blueprint and precedent for future endeavors that have their own unique circumstances and risks. Therefore, this enterprise needs to be conducted the right way because the scope of the mine’s influence may far exceed the Midwest. Above all, it is crucial to look beyond the legal and economic considerations because the PolyMet mine and land exchange, if not properly regulated, could have serious implications for the environment and the public.