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## Court in PolyMet Mining Case Partially Grants Motion to Dismiss Claims Under the ESA

**Legal Update**

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A District of Minnesota Court recently issued an opinion granting and denying portions of a motion to dismiss stemming from a proposed mining project. *Center for Biological Diversity et al. v. Haaland et al.*, D. Minn. (Feb. 1, 2023) Slip Copy2023, WL 1451581. PolyMet Mining, Inc. (“PolyMet”) proposes to build an open-pit copper-nickel mine in northeastern Minnesota. Pursuant to the Endangered Species Act (16 U.S.C. § 1531 et seq.), the United States Fish and Wildlife Service (“FWS”) conducted a study and issued a biological opinion (“Opinion”) discussing whether the proposed action was “likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.” FWS examined three species—the Canada lynx, the gray wolf, and the northern long-eared bat—and concluded that the mine would not jeopardize their continued existence, nor would the mine adversely modify critical habitat.

Plaintiffs, a group of environmental advocacy organizations, challenged the FWS’s Opinion and alleged subsequent permitting approvals violated the ESA. First, plaintiffs alleged that the FWS failed to reinitiate consultation of endangered species under the ESA. Reinitiation is required under four scenarios, two of which Plaintiffs contended applied here—that new information revealed effects of the mine that were not previously considered, and that the proposed mine was subsequently modified in a manner that would cause an effect that was not originally considered. Plaintiffs alleged three types of “new information” arose: (1) disease devastated the population of northern long-eared bats in the area; (2) the extent and magnitude of other mining activity in northeastern Minnesota has significantly increased; and (3) the Forest Service gained a better understanding of the potential adverse impacts of a copper mine in the region.

Regarding Plaintiffs’ first contention, PolyMet responded that the population decrease of the northern long-eared bat was due to disease and not an effect of the operation of the mine. The court recognized that this was true; however, the specific bat population was now much lower than when the Opinion was initially prepared. The Opinion, therefore, used inapplicable population statistics and was insufficient in this regard. The court denied the motion to dismiss on this claim.

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The court rejected Plaintiffs' second claim requesting reinitiation due to an increase of mining activity in northeastern Minnesota. The court held that it was difficult to understand how the "new information" of two companies exploring the area revealed that the impact of the mine on listed species may affect species in a manner not previously considered by FWS in its Opinion. The court dismissed this aspect of Plaintiffs' ESA claim.

Regarding Plaintiffs' third contention, the court determined that Plaintiffs failed to identify any alleged new scientific developments, nor explain how they revealed anything about the mine that was not previously considered. The court determined that these allegations were too conclusory.

Finally, Plaintiffs contended that a change in PolyMet's wetland mitigation plan should also trigger reinitiation. The Opinion indicated that the wetland mitigation plan played no role in FWS's conclusion that the mine would not jeopardize the listed species. The court found the Opinion adequately discussed and examined the wetland mitigation plan, and since FWS did not rely on the plan in issuing its opinion, the alleged changes were insufficient to trigger reinitiation under the ESA.