


ENVIRONMENTAL LAW
GROUP

WILLIAM P. HEFNER
DIRECT DIAL: 612-623-2362
E-MAIL: WHEFNER@ENVIROLAWGROUP.COM

FILED
Court Administrator

JUL 12 2011
By  Deputy

July 12, 2011

VIA HAND DELIVERY AND EMAIL

The Honorable Kathleen Gearin
Chief Judge, Second Judicial District
15 Kellogg Boulevard West
St. Paul, MN 55102

Re: *In Re: Temporary Funding of Core Functions of the Executive Branch of the State of Minnesota*, Court File No. 62-CV-11-5203: Petition of PolyMet Mining, Inc.-- Letter Brief Following July 11, 2011 Hearing

Dear Chief Judge Gearin:

At the close of the July 11, 2011, hearing on its Petition in the above-entitled matter, you asked Petitioner PolyMet Mining, Inc. ("PolyMet"), to provide you with a letter brief addressing the following question: Does the special revenue fund into which PolyMet pays money pursuant to Minn. Stat. §§ 84.026 and 116D.045 and the Income Contract executed under both statutes meet the definition of 'statutory appropriation' under Minn. Stat. § 16A.011, subd. 14a? In short, it does not. Minn. Stat. § 16A.011, subd. 14a states in relevant part:

A statutory appropriation is one which *sets apart a specified or unspecified and open amount of public money or funds of the state general fund* for expenditure for a purpose and makes the amount, or a part of it, available for use continuously for a period of time beyond the end of the second fiscal year after the session of the legislature at which the appropriation is made.

(Emphasis added).

The special revenue fund¹ that is the subject of PolyMet's Petition is not a "statutory appropriation" because it does not contain any "public money or funds of the state general fund." Rather, it is funded entirely by payments made by PolyMet pursuant

¹ Minn. Stat. § 116D.045, subd. 3, references placement of this money into a "special account." Minn. Stat. § 84.026, subd. 1 references placement of this same money into a "special revenue fund." For the purpose of simplicity, this letter will use the latter term to refer to both.

to Minn. Stat. §§ 84.026 and 116D.045, Minn. R. 4410.6000 – 6500 and the Income Contract between PolyMet and the Minnesota Department of Natural Resources (“DNR”), as amended. *See* Affidavit of Bradley C. Moore in Support of Petition of PolyMet Mining, Inc. (“Moore Aff.”), Exhibit C.

The PolyMet Environmental Impact Statement (“EIS”) special revenue fund, however, does meet the definition of “appropriation” under Minn. Stat. § 16A.011, subd. 4, i.e., “an authorization by law to expend or encumber an amount in the treasury.” The fund satisfies this definition in two respects. Minn. Stat. § 116D.045, subd. 3, states, “Money received by a state agency [for the costs of preparing and distributing an EIS] must be credited to a special account *and is appropriated to the agency to cover the assessed costs incurred.*” (Emphasis added). Minn. Stat. § 84.026, subd. 1, states, “[F]unds generated in a contractual agreement made pursuant to this section shall be deposited in the special revenue fund *and are appropriated to the [DNR] for purposes of providing the services specified in the contracts.*” (Emphasis added). These statutes therefore authorize DNR “by law” to “expend” the money PolyMet pays into the special revenue fund, which is dedicated solely to paying the costs associated with the preparation and distribution of PolyMet’s EIS.

The fund’s satisfaction of the “appropriation” definition under Minn. Stat. Ch. 16A is particularly significant in light of the Constitutional provision upon which this entire matter rests. Article XI, section 1, of the Minnesota Constitution states, “No money shall be paid out of the treasury of this state *except in pursuance of an appropriation by law.*” (Emphasis added). The Constitution does not require there to be a “statutory appropriation” before money can be paid out of the treasury; it simply requires “an appropriation by law.” The Legislature has appropriated the money PolyMet pays into this fund “by law” to DNR under both Minn. Stat. §§ 84.026 and 116D.045. PolyMet believes Minn. Const. art. XI, § 1 and Minn. Stat. §§ 16A.011, subd. 4, 84.026 and 116D.045, taken together, allow the Court to order the Commissioner of the Department of Management and Budget to grant DNR access to this fund to continue the PolyMet EIS-related work DNR is statutorily and contractually obligated to complete. *See also* Minn. Stat. § 85A.04, subd. 4 (“All receipts and interest from the operation of zoo concessions, memberships, and donations *must be deposited in a special account in the special revenue fund and are appropriated to the board.*”). (Emphases added).

The process by which this special revenue fund is funded by PolyMet and used by DNR further underscores how these funds stand apart by necessity from traditional types of annual or biennial appropriations. Minn. Stat. § 116D.045 and the rules promulgated under it govern how EIS-related costs are determined, assessed and paid. Like all money paid to a state entity, PolyMet’s payments to DNR for costs associated with the former’s EIS are deposited into the state treasury, albeit into a segregated “special revenue fund.” *Compare* Minn. Stat. § 85A.04, subd. 4 (“All receipts and interest from the operation of zoo concessions, memberships, and donations must be deposited in a special account in

the special revenue fund.”). Although PolyMet paid the money and DNR deposited it with the treasury, Article XI, § 1 of the Minnesota Constitution still requires “an appropriation by law” before DNR can access those funds to pay the costs of its PolyMet EIS-related work. The Legislature made this “appropriation by law” when it stated under both Minn. Stat. §§ 84.026 and 116D.045 that money paid under such funds “are appropriated” to the state agency (DNR) for the purpose of completing a project’s EIS.

The preparation and distribution of an EIS is an ongoing process that could not function in its intended manner if DNR needed the Legislature to take some additional action beyond the appropriation of these funds “by law” before DNR could access the fund’s money to pay for its work on PolyMet’s EIS. To avoid such inefficiencies, the Legislature in both statutes created what amounts to an “automatic” or “continuing appropriation” that allows DNR access to these funds -- as needed and without additional action by the Legislature -- to pay for its work on PolyMet’s EIS. To that extent, these funds are similar to the special revenue funds under Minn. Stat. § 85A.04, subd. 1, which the Court found “do not appear . . . to require a decision by the legislature before they can be appropriated.” *In Re: Temporary Funding of Core Functions of the Executive Branch of the State of Minnesota*, Court File No. 62-CV-11-5203, Order Regarding Minnesota Zoological Garden, Memorandum.

Finally, PolyMet wishes to address two additional points raised by the Court at the hearing. The first is the notion that PolyMet “reimburses” the DNR for work the latter does on the former’s EIS. This suggests DNR first undertakes and incurs the cost of its EIS-related work, then seeks payment from PolyMet for those costs. The EIS assessment and funding process itself precludes this from happening. Minn. R. 4410.6500, subp. 1.B., requires a project proposer to pay the RGU, in cash, at least one-half of the estimated cost of preparing and distributing an EIS within ten days of execution of the cost agreement between the parties. *See also* Moore Aff., Ex. C, “Payment” provision in 2006 Income Contract (requiring PolyMet to make an initial payment of \$879,449 (one-half of estimated costs) within ten days of execution). An RGU cannot proceed with the EIS’s preparation until it receives this payment. *Id.* Thereafter, the project proposer continues to fund its EIS’s special revenue fund on a schedule agreed upon by the two parties. *Id.*, subp. 1.C. PolyMet from the start has paid and continues to pay in advance for all the costs DNR has incurred in preparing and distributing PolyMet’s EIS, which means DNR has never used general fund money to pay for this work and has never incurred costs that were not already funded by PolyMet.

Secondly, the Court asked DNR Assistant Commissioner Mary McConnell if staff who would be involved in working on PolyMet’s EIS constituted DNR “employees,” to which Assistant Commissioner McConnell indicated, “Yes.” Staff members who would be recalled if PolyMet’s Petition is approved are indisputably DNR employees. It is important to keep in mind, however, when these staff members are working on PolyMet’s EIS, the entirety of their salaries, including fringe benefits, are paid for by PolyMet via

The Honorable Kathleen Gearin
July 12, 2011
Page 4

the special revenue fund. *See* Minn. R. 4410.4200, subp. 1.A. *See also* Moore Aff., Ex. C, Attachment A to Amendment #11. In effect, these employees are functioning as contractors providing the services DNR committed to under the Income Contract, services PolyMet contracted for and are paying for in their entirety. *Cf.* Minn. Stat. § 85A.01, subd. 3 (stating the director, officers and employees of the Minnesota Zoological Garden are “state employees” under Minn. Stat. § 352.01, subd. 2A).

Please let me know if we may provide the Court with any additional information.

Respectfully submitted,



William P. Hefner

c: Brad Moore, Polymet Mining, Inc.
Office of the Governor (by mail)
Commissioner James Schowalter (by mail)
Commissioner Paul Aasen (by mail)
Commissioner Tom Landwehr (by mail)
Minnesota Attorney General Lori Swanson (by mail)

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

Case Type: Civil

Case No. 62-CV-11-5203

In Re: Temporary Funding of
Core Functions of the
Executive Branch of the
State of Minnesota

**AFFIDAVIT OF SERVICE
VIA U.S. MAIL**

The undersigned, William P. Hefner, being duly sworn, states that on the 12th day of July, 2011, he served the following:

1. Letter Brief Following July 11, 2011 Hearing

by placing a copy in the United States mail, postage prepaid, addressed to the following:

James Schowalter, Commissioner
Minnesota Management & Budget
400 Centennial Office Building
658 Cedar Street
St. Paul, MN 55155

Paul Aasen, Commissioner
Minnesota Pollution Control Agency
520 Lafayette Road North
St. Paul, MN 55155-4194

Tom Landwehr, Commissioner
Minnesota Department of Natural
Resources
500 Lafayette Road North
St. Paul, MN 55155-4040

Office of Minnesota Attorney General
Lori Swanson
1400 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101

Office of the Governor
130 State Capitol
75 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155



William P. Hefner (#258349)

Sworn and subscribed before me
This 12th day of July, 2011



Notary Public

