

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PHILIP C. BELLFY, et al.,)	
Plaintiffs,)	
)	No. 1:15-cv-282
-v-)	
)	HONORABLE PAUL L. MALONEY
KEITH CREAGH,)	
Defendant.)	
_____)	

OPINION AND ORDER DENYING TEMPORARY RESTRAINING ORDER

This matter is before the Court on Plaintiffs’ motion for a temporary restraining order or preliminary injunction. (ECF No. 7). In this action, Plaintiffs seek to prevent “Defendant, or other State of Michigan officers, employees, agencies, subdivisions, successors, or assigns” from approving the sale of land in the Upper Peninsula over which Plaintiffs assert usufructuary, occupancy, and/or treaty rights. Plaintiffs assert that the sale of the land would impair their rights under the 1836 Treaty of Washington and as recognized in a 2007 Consent Decree. *See* ECF No. 1799 in *United States v. Michigan*, No. 2:73-cv-26 (W.D. Mich. Nov. 2, 2007).

Plaintiffs filed an ex parte motion for temporary restraining order on March 17, 2015 (ECF No. 2), which was denied on procedural grounds for failing to fulfill the requirements of Fed. R. Civ. P. 65(b)(1). Plaintiffs filed a nearly identical motion titled “Motion for Temporary Restraining Order Verified Complaint for Declaratory and Injunctive Relief” on April 13, 2015 (ECF No. 7), which merely added a four-paragraph affidavit from Philip Bellfy. Although the Court is not convinced that Plaintiffs have cured the defects that led to the dismissal of their original motion, Defendant Creagh filed a response to the amended motion (ECF No. 8), demonstrating that he has received notice of

the TRO motion and making the ex parte requirements irrelevant.

For the reasons discussed herein, the motion for a temporary restraining order will be **DENIED**.

I. BACKGROUND

Pursuant to the 1836 Treaty of Washington and as recognized in a 2007 Consent Decree, members of the Ottawa and Chippewa tribes have certain usufructuary rights in land within the area covered by the treaty. The Consent Decree explains that the tribes can exercise these rights in public land, private land that is required by law to be open to the public, and other private land only with the landowner's written permission. (ECF No. 8-2 at PgID # 81-85.) The treaty grants the tribes "the right of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement." (ECF No. 8-1, PgID # 65.)

The Michigan Department of Natural Resources owns a portion of public land and intends to sell it to Graymont LLC, a subsidiary of a limestone mining and processing company. The parties do not dispute that the land at issue lies entirely within the area ceded by the 1836 Treaty. Graymont submitted a Land Transaction Application in support of the sale to the DNR, which triggered an extensive review process and a number of amendments to the application. On March 19, 2015, the Defendant, Director of the DNR Keith Creagh, announced his approval of the Land Transaction Application. Under the approved deal, Graymont will buy the surface and mineral rights to 2,614 acres. The public will continue to have access to the surface of the land unless it is being actively used for mining or a processing plant. Graymont will exchange other land in the Upper Peninsula, which will be open to the public, for 830 of those acres. Additionally, Graymont will acquire subsurface mineral rights to 7,026 acres for an underground mine, while the DNR will retain the

surface rights for this area minus 400 acres used for mining access and operations. Almost \$2 million of the purchase price will be designated to purchase more public land, and the DNR has a buyback option when Graymont ceases limestone mining. Defendant writes that “in the near future, DNR and Graymont will execute the LTA, and the various land transfers will occur later in a series of closings.”

Plaintiffs are concerned that the sale of this land or rights to it will affect their rights to use the land, specifically because it would be privately owned and thus the owner could close the area to the Plaintiffs. Plaintiffs bring this motion on behalf of themselves and all Tribal members who have rights to use the land. Plaintiffs do not describe if or how they use the land involved in the transaction.

Plaintiffs request that the Court enjoin Defendant from approving the Graymont Land Transaction Application, but the LTA has already been approved by Defendant, so this motion could be declared moot. However, the Court, evaluating the submissions from these pro se Plaintiffs less stringently than formal pleadings drafted by lawyers, *see Haines v. Kerner*, 404 U.S. 519, 520 (1972), will construe the TRO to request an injunction of the execution of the LTA and the land transfers. The record does not contain the timeframe or any specific date on which the execution or transfers will occur.

II. LEGAL FRAMEWORK

Decisions regarding a temporary restraining order are within the discretion of a district court. *See Ohio Republican Party v. Brunner*, 543 F.3d 357, 361 (6th Cir. 2008) (“The district court’s decision to grant a temporary restraining order, when appealable, is reviewed by this court for abuse of discretion.”) (quoting *Ne. Ohio Coal. for Homeless and Serv. Emps. Int’l Union, Local 1199 v.*

Blackwell, 467 F.3d 999, 1009 (6th Cir. 2006)). The court must consider each of four factors: (1) whether the moving party demonstrates a strong likelihood of success on the merits; (2) whether the moving party would suffer irreparable injury without the order; (3) whether the order would cause substantial harm to others; and (4) whether the public interest would be served by the order. *Ohio Republican Party*, 543 F.3d at 361 (quoting *Ne. Ohio Coalition*). The four factors are not prerequisites that must be met, but are interrelated concerns that must be balanced together. *See Ne. Ohio Coalition*, 467 F.3d at 1009.

III. ANALYSIS

Plaintiffs argue that they are likely to prevail on the merits because (1) the DNR Director does not have the right to “abrogate Plaintiffs’ usufructuary, occupancy, and Treaty rights” due to the Supremacy Clause, and (2) Plaintiffs have the right to a meaningful notice and opportunity to be heard before their rights are abrogated under the due process clause of the Fourteenth Amendment. Next, they argue that they will suffer irreparable injury because (1) the approval of the LTA would be “next to impossible” to reverse, (2) Defendant may approve more land transfers in the area covered by the Treaty, and (3) denial of the TRO would result in a long and adversarial process to resolve the dispute. Addressing the third prong, Plaintiffs argue that an injunction will simply maintain the status quo and thus will not harm any other parties. Finally, Plaintiffs argue that a TRO is in the public interest because tens of thousands of Native Americans would be denied their rights in the land and because Defendant has not shown that the mining activity will not impair or destroy the natural resources of the area.

In response, Defendant argues that none of the four factors weigh in the Plaintiffs’ favor. First, Defendant asserts that neither the Treaty nor the Consent Decree forbid Michigan from selling

public land to private parties and the specifics of the deal ensure that Plaintiffs' usufructuary rights would not be harmed; most of the land will remain open to the public or will be exchanged for different land that will become public land, and Plaintiffs do not allege that they even use this land. Next, Defendant argues that Plaintiffs have not demonstrated that they will be harmed because of the land transaction. Third, Defendant argues that an injunction would cause substantial harm to the State of Michigan's interests in the development of mineral resources and revenue to support public recreation, Graymont's investment in this project, and the surrounding areas that would benefit economically from the project. Finally, Defendant argues that the injunction would be contrary to the public interest because the state's policy is to encourage the mining industry in Michigan and members of the surrounding communities will benefit from long-term economic development.

Plaintiffs have not established that immediate and irreparable injury, loss, or damage will result to them before a hearing can be held on this matter. Nothing in the record establishes when the LTA will be executed or when the land transfers will occur, and the approval of the LTA has already occurred. Further, it is unknown when the mining company will close access to any of the land, especially since it has not yet been transferred to the company. Further, the named Plaintiffs have not asserted that they have or plan to exercise their rights to use the land, so it appears that there will be no damage to Plaintiffs if some of the land is closed to the public. Also, there is no indication that the mine will irreversibly alter the land before the lawsuit progresses; the transfer of title alone is not irreparable harm because the Court could reverse the sale. After reviewing the Treaty and Consent Decree, the Court also finds persuasive Defendant's argument that Plaintiffs are unlikely to succeed on the merits. Because these two factors are dispositive, the Court need not address the other two factors. *In re DeLorean Motor Co.*, 755 F.2d 1223, 1228 (6th Cir. 2000).

IV. CONCLUSION

For the reasons stated above, Plaintiffs' motion for a temporary restraining order (ECF No. 5) is **DENIED**.

ORDER

Plaintiffs' motion for a temporary restraining order (ECF No. 7) is **DENIED**.

A hearing for a preliminary injunction will occur on **Wednesday, April 29, 2015 at 3:00 p.m.** at 174 Federal Building, 410 W. Michigan Ave., Kalamazoo, MI 49007, at which time Defendant shall show cause, if any, why Plaintiffs' request for a preliminary injunction should not be granted.

IT IS SO ORDERED.

Date: April 16, 2015

/s/ Paul L. Maloney
Paul L. Maloney
Chief United States District Judge