UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Fond du Lac Band of Lake Superior Chippewa, Plaintiff, v. Constance Cummins, et al., Defendants, and Poly Met Mining, Inc., Intervenor Defendant.	Case No. 22-cv-170 (PJS/LIB) **MEMORANDUM OF LAW IN SUPPORT OF POLY MET MINING, INC.'S MOTION TO DISMISS**

INTRODUCTION

The Fond du Lac Band of Lake Superior Chippewa is suing to reverse a land exchange that was approved more than five years ago. The parties to that exchange, Poly Met Mining, Inc. and the U.S. Forest Service, have held title to the exchanged lands for nearly four years.

This is not the first time someone has sued over this land exchange—or even the second, third, or fourth time. Four different suits filed in 2017 were each dismissed for lack of standing when none of the plaintiffs could show that they used the land being transferred to PolyMet. The Band has the same problem. Its complaint makes no concrete claim that any of its members ever visited the property now owned by PolyMet. Absent such use of the land, the Band cannot say that it is harmed by the title transfer. The Band's separate claims of harm from PolyMet's mine are irrelevant because any harm from the mine is not fairly traceable to the land exchange.

But standing is not the Band's only problem. The land exchange decision is over five years old, and PolyMet and the public have been using the exchanged lands for almost four years. As a participant in the land exchange process and an active PolyMet opponent, the Band knows this. Yet it sat on its rights while it pursued other lawsuits, filing this case only when those other cases wound down. Neither equity nor common sense can condone such tactics.

Because the Band lacks standing, and because its unreasonable delay bars equitable relief, its complaint should be dismissed with prejudice.

BACKGROUND

When PolyMet proposed its NorthMet copper-nickel mine in 2005, Tesla was still years away from launching its first all-electric vehicle.[1] Apple had yet to sell its first iPhone.[2] And the United States' wind power capacity was a tenth of what it is today.[3] Now, the ever-growing green economy—including electric cars, mobile phones, and wind turbines—demands more of the copper, nickel, and other precious metals that PolyMet will produce.[4]

A. The NorthMet mine and environmental review

The NorthMet mine will sit in St. Louis County, on the eastern end of the Mesabi Iron Range, just south of the active Northshore taconite mine.[5] One advantage of this site is its existing infrastructure, including an old processing plant that PolyMet will reuse and a rail line that already links the plant

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[1] *See* Tesla, About Tesla, available at https://www.tesla.com/about (Model S launched in 2008).

[2] *See* Pierce, David & Goode, Lauren, *The WIRED Guide to the iPhone*, (Dec. 7, 2018) available at https://www.wired.com/story/guide-iphone/ (iPhone was announced in 2007).

[3] *See* Office of Energy Efficiency and Renewable Energy, U.S. Installed and Potential Wind Power Capacity and Generation, available at https://windexchange.energy.gov/maps-data/321.

[4] *See* Valckx, Nico, et al., *Metals Demand from Energy Transition May Top Current Supply*, Int'l Monetary Fund Blogs (Dec. 8, 2021), available at https://blogs.imf.org/2021/12/08/metals-demand-from-energy-transition-may-top-current-global-supply/.

[5] NorthMet Project Final Environmental Impact Statement at 1-5, available at https://www.dnr.state.mn.us/input/environmentalreview/polymet/feis-toc.html.

to the mine site.[6] Those facilities will help PolyMet mine and process 32,000 tons of ore each day, generating copper, nickel, cobalt, and platinum group elements.[7] When the project ends, PolyMet will ensure that the site is reclaimed.[8]

PolyMet's plan for the NorthMet mine underwent the most extensive environmental review in Minnesota history. That review ended with a 2015 Final Environmental Impact Statement jointly published by the Minnesota Department of Natural Resources, the U.S. Army Corps of Engineers, and the U.S. Forest Service.[9] Throughout, the Band served as a cooperating agency.[10]

The Department of Natural Resources found that the EIS was adequate for permitting under Minnesota law.[11] Its adequacy decision went unchallenged. With an adequate EIS in hand, PolyMet sought agency approvals.

B. The Forest Service land exchange

The path from an EIS to agency decisions was long. Each agency took the information in the EIS, supplemented it with input from PolyMet and the public, and made an independent decision based on governing law. The Forest Service was the first agency to reach the end of this path.

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[6] FEIS ES-12.
[7] FEIS 1-5.
[8] FEIS 1-5.
[9] FEIS ES-3.
[10] FEIS 1-10.
[11] Minn. Dep't of Nat. Res., Record of Decision (Mar. 3, 2016), available at https://files.dnr.state.mn.us/input/environmentalreview/polymet/polymet-eis-rod-030316-final.pdf. *See* Minn. Stat. § 116D.04, subd. 2b(3).

In a November 2015 draft record of decision, the Forest Service proposed transferring to PolyMet surface ownership of 6,650 acres at the site of the NorthMet mine (where PolyMet already controlled the mineral rights).[12] In return, the United States would receive 6,690 acres in four tracts within the Superior National Forest.[13] After more than a year of addressing objections to its draft decision, the Forest Service approved the land exchange in January 2017.[14]

The Forest Service's approval of the land exchange, did not "authorize PolyMet's mining proposal . . . ."[15] Rather, the Forest Service explained, "[o]ther governmental entities have the responsibility and authority to make decisions related to permitting the mining project, primarily the State of Minnesota and the U.S. Army Corps of Engineers."[16]

C. The 2017 land exchange lawsuits

Several of PolyMet's non-tribal opponents sued the Forest Service shortly after the land exchange decision.[17] Their four separate complaints were coordinated—several plaintiffs appeared in multiple cases—but not consolidated. Recognizing that these were actually challenges to the mine,

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[12] Decl. of Jay C. Johnson, Ex. A, Land Exchange Record of Decision at 7, 44-45.
[13] Johnson Decl., Ex. A (Land Exchange ROD) at 8-9. Because the land the United States received was appraised at a higher value than the land PolyMet received, the United States paid PolyMet to make up the difference. *Id.* at 8.
[14] Johnson Decl., Ex. A (Land Exchange ROD) at 1.
[15] Johnson Decl., Ex. A (Land Exchange ROD) at 1.
[16] Johnson Decl., Ex. A (Land Exchange ROD) at 1 (cross-reference omitted).
[17] *See* D. Minn. Case Nos. 17-cv-276, 17-cv-905, 17-cv-909, and 17-cv-914.

not the land exchange, PolyMet moved to dismiss for lack of standing. After an extended stay, the Court dismissed all four suits.[18] In June 2018, while the cases were stayed, PolyMet took title.[19]

D. PolyMet's mining permits and opponents' lawsuits

As the land exchange was being litigated, PolyMet was working its way through labyrinthine permitting processes at the Minnesota Department of Natural Resources, the Minnesota Pollution Control Agency, and the U.S. Army Corps of Engineers. In November 2018, three years after the Final EIS, PolyMet got its permit to mine and dam safety permits from MDNR. The next month, it received an air permit and a water pollution discharge permit from MPCA. Finally, in March 2019, the Corps issued a Clean Water Act section 404 permit for the NorthMet mine.

Each time PolyMet received a permit, a wave of litigation followed. The Fond du Lac Band has been active in those cases, filing separate state court challenges to PolyMet's permit to mine,[20] dam safety permits,[21] air permit,[22] and water discharge permit,[23] as well as a federal court challenge to the Corps of Engineers' section 404 permit.[24] Counting the cases filed by other parties,

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[18] *See WaterLegacy v. USDA Forest Serv.*, Nos. 17-cv-276, 17-cv-905, 17-cv-909, 17-cv-914, 2019 WL 4757663 (D. Minn. Sept. 30, 2019).
[19] Decl. of Kevin Pylka ¶ 3.
[20] Johnson Decl. ¶ 3c; *see* Case No. A18-1959 (Minn.).
[21] Johnson Decl. ¶ 3d; *see* Case No. A18-1960 (Minn.).
[22] Johnson Decl. ¶ 3f; *see* Case No. A19-134 (Minn.).
[23] Johnson Decl. ¶ 3e; *see* Case No. A19-124 (Minn. Ct. App.).
[24] Johnson Decl. ¶ 3g; *see* Case No. 19-cv-2489 (D. Minn.).

PolyMet's project has been challenged nearly two dozen times in state and federal court.[25]

E. The Band's new land exchange lawsuit

This case comes more than five years after the Forest Service approved the land exchange, more than three years after PolyMet took title, and more than two years after the four original land exchange lawsuits were dismissed. In all that time, including in its complaint here, the Band has never identified any member who used PolyMet's land. That silence is consistent with the Forest Service's land exchange decision, which noted that the property transferred to PolyMet "is mostly surrounded by private land, lacks public overland access and experiences little if any current recreation, hunting or gathering use."[26]

[25] Johnson Decl. ¶ 3.
[26] Johnson Decl., Ex. A (Land Exchange ROD) at 17; *see id.* at 13, 20.

ARGUMENT

I. The Band lacks standing to challenge the land exchange.

The doctrine of standing derives from "the Constitution's central mechanism of separation of powers." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559 (1992). That mechanism manifests in Article III by limiting federal courts' jurisdiction to "Cases" and "Controversies," thus giving them "no charter to review and revise legislative and executive action" except when necessary "to redress or prevent actual or imminently threatened injury." *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009). As a result, federal court plaintiffs must show (1) an injury in fact that is (2) fairly traceable to the conduct at issue and (3) would be redressed by a favorable judicial decision. *Sierra Club v. Robertson*, 28 F.3d 753, 758 (8th Cir. 1994). These standing requirements "prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). Here, the Band is challenging an executive branch agency's decision to conduct a land exchange with PolyMet. But because that exchange did not injure the Band, it lacks standing to sue.

A. The Band's members have suffered no injury because they did not use the land transferred to PolyMet.

Standing is an essential jurisdictional fact that plaintiffs bear "the burden of establishing." *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007). When a party moves to dismiss for lack of standing under

Rule 12(b)(1), as PolyMet is doing, a court may "accept as true all factual allegations in the complaint, giving no effect to conclusory allegations of law." *Id.* But if the issue involves evidence outside the pleadings, "the trial court is free to weigh [that] evidence" to be sure it has "power to hear the case." *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990) (quoting *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)). When that happens, the nonmoving party does not benefit from a presumption that its evidence is true. *Id.* at 729-30.

Plaintiffs claiming standing from environmental harm must show that they (1) "use the affected area" and (2) "are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)). The Band cannot make the first of these showings. Its complaint seeks the return to federal ownership of land that PolyMet has owned since June 2018. That land, as the Forest Service's decision explained, "is mostly surrounded by private land, lacks public overland access and experiences little if any current recreation, hunting or gathering use."[27] Because no recreation, hunting, or gathering was happening on the property when it was public land, the Band was not harmed when PolyMet took title.

The Band's complaint tries to solve its standing problem by baldly asserting that "members of the Minnesota Chippewa Tribe use the Federal Land

[27] Johnson Decl., Ex. A (Land Exchange ROD) at 17; *see id.* at 13, 20.

for hunting, fishing, and gathering of maple sugar, berries, and birch bark."[28] In addition, the Band points to language in a 2012 survey that says one historic trail on the property "had the feeling of a well-used portage trail and overland route" and that another trail "showed evidence of recent use."[29] Neither of these claims shows the kind of harm that would support standing.

To have standing, a plaintiff must show "particular harm" to someone with "a specific and concrete plan" to enjoy the area in question. *Ouachita Watch League v. U.S. Forest Serv.*, 858 F.3d 539, 542 (8th Cir. 2017) (citation and internal quotation marks omitted). "When the plaintiff is a group, this plan must belong to an identified group member, not merely to the group at large." *Id.* at 542-43 (citation omitted). So when a group like the Band alleges that unnamed members of an even larger group (the Chippewa Tribe) used the land that now belongs to PolyMet, or that a trail on that property shows unspecific evidence of use, it does not satisfy the "particular harm" requirement. Having failed to name an individual member who genuinely used the land, the Band lacks standing to challenge the land exchange.

B. The alleged injuries from PolyMet's mine are not fairly traceable to the land exchange.

Beyond its vague claims to have used the land transferred to PolyMet, the Band alleges that PolyMet's mine will harm the downstream environment, including within the Band's reservation.[30] Such alleged mining harms do not

[28] ECF 1, Compl. ¶ 85.
[29] ECF 1, Compl. ¶ 57.
[30] *See* ECF 1, Compl. ¶¶ 9, 40-49.

meet the second part of the standing test because they are not "fairly traceable" to the land exchange.

To qualify as "fairly traceable," an injury cannot result from "the independent action of some third party not before the court." *Balogh v. Lombardi*, 816 F.3d 536, 543 (8th Cir. 2016) (brackets omitted) (quoting *Lujan*, 504 U.S. at 560). Here, the Forest Service's Record of Decision affirms that "[a] final decision on the land exchange will not authorize PolyMet's mining proposal to occur."[31] Rather, "[o]ther governmental entities [had] the responsibility and authority" to permit the mine.[32] Those other governmental entities took their jobs seriously—PolyMet did not receive its final permit until March 2019, more than two years after the land exchange decision.[33] During that time, PolyMet's project was independently evaluated by the Minnesota Department of Natural Resources, the Minnesota Pollution Control Agency, and the U.S. Army Corps of Engineers. Each of those agencies had authority to permit an aspect of PolyMet's mine.

The Band claims that "those permits could not be issued unless PolyMet had the right to use the Federal Land."[34] But that merely alleges that the land exchange is a necessary condition of the permits. The Band never claims that the land exchange influenced the other agencies' decisions on the merits of PolyMet's permits. Indeed, those agencies conducted independent

[31] Johnson Decl., Ex. A (Land Exchange ROD) at 1.
[32] Johnson Decl., Ex. A (Land Exchange ROD) at 1.
[33] ECF 1, Compl. ¶ 49.
[34] ECF 1, Compl. ¶ 49.

permitting processes that broke any causal link between the Forest Service's land exchange decision and the mine's alleged harms. *See Balogh*, 816 F.3d at 543. The mine's alleged harms are thus not fairly traceable to the land exchange, and they cannot support the Band's standing.[35]

C. The 1854 Treaty of LaPointe does not create standing.

Separate from its claims of environmental harm, the Band's complaint includes a more abstract injury claim. This injury centers on the Band's rights under the 1854 Treaty of LaPointe.[36] The Band argues that it has "a treaty right to use the land" transferred to PolyMet "for hunting, fishing, and gathering"—a right that, according to the Band, the land exchange will "impair, limit, or abrogate."[37]

Under Article 11 of the 1854 treaty, "such of [the Chippewa Indians] as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President."[38] *United States v. Gotchnik*,

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[35] *See WaterLegacy v. USDA Forest Serv.*, Nos. 17-cv-276, 17-cv-905, 17-cv-909, 17-cv-914, 2019 WL 4757663, at *5 (D. Minn. Sept. 30, 2019) (dismissing the four 2017 challenges to the land exchange for lack of standing and holding that "[t]o the extent [the plaintiff] asserted that it has standing based on the intended use of the property for an open-pit copper-nickel mine," it did not present "an injury that is fairly traceable to the [Forest Service's] challenged behavior") (citation and internal quotation marks omitted).

[36] ECF 1, Compl. ¶ 3.

[37] ECF 1, Compl. ¶¶ 3, 9, 17.

[38] Article 11 of the treaty states in full:

> All annuity payments to the Chippewas of Lake Superior, shall hereafter be made at L'Anse, La Pointe, Grand Portage, and on the St. Louis River, and the Indians shall not be required to remove from the homes hereby set apart for them. And such of

222 F.3d 506, 508 (8th Cir. 2000) (quoting 1854 treaty, art. 11) (alteration in *Gotchnik*). The Band's view, it seems, is that this language endows it with an interest in who owns the land.[39] But that view is inconsistent with the treaty.

It is true that when land passes from public to private hands, it is no longer available under the treaty for hunting and fishing. *See Mille Lacs Band of Chippewa Indians v. State of Minnesota*, 124 F.3d 904, 933-34 (8th Cir. 1997) (affirming that "Band members may exercise their rights only on public lands and private lands open to public hunting, fishing, and gathering"). But the question for standing purposes is whether that change harms anyone. Under article 11 of the 1854 Treaty, hunting and fishing rights can be exercised only by a specific subset of the Chippewa Indians—the individuals who "reside in" the ceded territory. 10 Stat. 1109; *see Gotchnik*, 222 F.3d at 508. Since no individuals who exercised that right on the land now owned by PolyMet have come forward to complain, the Band cannot claim to have been harmed.

For similar reasons, the Band's claim that it regulates the exercise of treaty rights and manages treaty resources does not support standing.[40] The Band argues that the land exchange has affected its jurisdiction.[41] But the 1854

> them as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President.

10 Stat. 1109.

[39] *See* ECF 1, Compl. ¶ 9.

[40] ECF 1, Compl. ¶¶ 9, 80.

[41] ECF 1, Compl. ¶ 9.

treaty does not say that the Band retains jurisdiction over the ceded territory—just the opposite. 10 Stat. 1109, art. 1 ("The Chippewas of Lake Superior hereby cede to the United States all the lands heretofore owned by them . . . ."). Any responsibilities the Band has within the ceded territory depend on its jurisdiction over individual Band members who exercise hunting and fishing rights. *See Gotchnik*, 222 F.3d at 508 (noting the Band's "authority to regulate [its] members' use of the ceded lands"). Because those members were not using the land transferred to PolyMet, the change in ownership causes the Band no injury.

II. The Band waited too long to challenge the land exchange.

A. The doctrine of laches bars the Band's requested relief.

Even if the Band could show that it suffered an injury-in-fact fairly traceable to the land exchange, it took too long to seek redress. As a result, the doctrine of laches supports discretionary dismissal of the Band's claims. *See Brown-Mitchell v. Kansas City Power & Light Co.*, 267 F.3d 825, 827 (8th Cir. 2001) (holding that application of laches is reviewed for abuse of discretion).[42]

[42] PolyMet makes this argument for dismissal under Rule 12(b)(6). That rule allows the Court to consider materials embraced by the complaint and matters of public record. *Untiedt's Vegetable Farm, Inc. v. S. Impact, LLC*, 493 F. Supp. 3d 764, 767 (D. Minn. 2020) (citing *Zean v. Fairview Health Servs.*, 858 F.3d 520, 526 (8th Cir. 2017)). If necessary, PolyMet asks that the motion be converted to one for summary judgment. *See* Fed. R. Civ. P. 12(d).

The Forest Service approved the land exchange two presidents ago, on January 9, 2017.[43] Titles were transferred in June 2018.[44] Since then, both PolyMet and the Forest Service have enjoyed unchallenged ownership of their new property.

These facts supporting PolyMet's laches argument are simple and well-known; the doctrine of laches itself, less so. In general, laches is an "equitable defense" against "unreasonable, prejudicial delay in commencing suit." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 667 (2014). Laches does not "bar legal relief" when Congress has "enacted" a statute of limitations. *Id.* at 679. But "[i]n extraordinary circumstances," laches may "warrant, at the very outset of the litigation, curtailment of" equitable relief. *Id.* at 685; *see Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 809 (8th Cir. 1979) (holding that district court did not abuse its discretion "in balancing the equities and finding that laches requires the dismissal of this suit"). The circumstances here are extraordinary.

B. The Band unreasonably and inexcusably delayed suing.

The Forest Service began considering the potential effects of the land exchange in 2010, when it became a co-lead agency in the ongoing environmental review of PolyMet's proposed mine.[45] The Band was already a "cooperating agency" in that environmental review.[46] As such, the Band "provided

[43] Johnson Decl., Ex. A (Land Exchange ROD) at 1.
[44] Pylka Decl. ¶ 3
[45] ECF 1, Compl. ¶ 65.
[46] ECF 1, Compl. ¶ 66.

comments, analyses, recommendations, and proposals at each stage of the environmental review . . . ."[47]

After years of study, the agencies published a Final Environmental Impact Statement for the land exchange and the proposed mine.[48] Around the same time, the Forest Service published a draft decision approving the land exchange.[49] The Band objected to that draft decision,[50] but the Forest Service overruled those objections and approved the land exchange.[51]

Four sets of plaintiffs sued to stop the land exchange in early 2017.[52] The Band did not participate. In June 2018, while that litigation was pending, PolyMet and the Forest Service exchanged titles.[53] The Band did not object. But the Band did sue in state court when PolyMet received a permit to mine and dam safety permits.[54] The Band also sued in state court when PolyMet received an air permit and a water discharge permit.[55] And when PolyMet received a Clean Water Act permit from the Corps of Engineers, the Band sued in federal court.[56] Still, the Band never challenged the land exchange.

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[47] ECF 1, Compl. ¶ 66.
[48] ECF 1, Compl. ¶ 68.
[49] ECF 1, Compl. ¶ 68.
[50] ECF 1, Compl. ¶ 68.
[51] ECF 1, Compl. ¶ 53.
[52] *See* Case Nos. 17-cv-276, 17-cv-905, 17-cv-909, 17-cv-914 (D. Minn.).
[53] *See* PolyMet completes 6,700-acre land exchange with U.S. Forest Service, available at https://polymetmining.com/investors/news/polymet-completes-6700-acre-land-exchange-with-u-s-forest-service/.
[54] *See* Case Nos. A18-1959, A18-1960 (Minn.).
[55] *See* Case Nos. A19-124, A19-134 (Minn.).
[56] *See* Case No. 19-cv-2489 (D. Minn.).

The Band chose to delay this suit against the land exchange—even though it knew others were suing, and even though it filed five other suits against PolyMet's project. The Band waited to bring this suit until the Minnesota Court of Appeals ruled against nearly every aspect of the Band's challenge to PolyMet's water discharge permits.[57] This delay, in PolyMet's view, is a strategic effort to prolong litigation. Because such a delay is unreasonable and inexcusable, the Band satisfies the first part of the laches test. *See Brown-Mitchell*, 267 F.3d at 827.

C. The Band's delay prejudiced PolyMet and the public.

The second and final part of the laches test is "prejudice to the defendant from the delay." *Id.* In one sense, PolyMet is harmed by unjustifiably extended litigation. But the fact that the land exchange involved transferring real property interests creates far more prejudice to PolyMet, as well as to the Forest Service and the public.

To start, PolyMet has already sold 759 acres—more than 10%—of the property it acquired in the land exchange.[58] It has no way of getting that land back. PolyMet has also done more drilling on its property, both to better understand the extent of its mineral resources and to conduct testing necessary

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[57] *See Matter of Denial of Contested Case Hearing Requests*, Case Nos. A19-0112, A19-0118, A19-0124, A20-1271, A20-1380, A20-1385, 2022 WL 200338 (Minn. Ct. App. Jan. 24, 2022).

[58] Pylka Decl. ¶ 6; Johnson Decl. Ex. B (recorded deed transferring title). Public records, including land deeds, may be considered on a motion to dismiss as long as their authenticity is not challenged. *See Dunn v. Bank of Am. N.A.*, 844 F.3d 1002, 1005–06 (8th Cir. 2017).

to build its mine.[59] These changes to the property could affect its value if the land exchange were somehow undone.

The Band may say that PolyMet should have known not to rely on the land exchange until it could be sure no one else would sue. But under the circumstances—four challenges dismissed, no new ones filed for years—PolyMet acted reasonably. Unless faced with a contrary court order, property owners can use or dispose of their property as they see fit. *See Irvine v. Helvering*, 99 F.2d 265, 268 (8th Cir. 1938); *Bausman v. Kelley*, 36 N.W. 333, 337 (1888) (explaining, in the context of real estate transactions, that "equity discourages stale claims" because of "the intervening of equities in favor of innocent persons"). If it wanted to stop PolyMet from using or selling its property, the Band bore the burden.

Separately, it appears some of the property PolyMet transferred to the Forest Service was damaged in the fall 2021 Greenwood fire.[60] The fire burned across 41 square miles, including all or part of the Wolf Lands 2 and 4 tracts.[61] Maps of the fire show that about 160 acres transferred from PolyMet to the Forest Service were within moderate or high soil burn areas.[62] The damage to that acreage will have lowered the tracts' value, adding to the list of reasons that reversing the land exchange would be inequitable.

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[59] Pylka Decl. ¶¶ 4, 5.
[60] Pylka Decl. ¶ 7.
[61] Pylka Decl. ¶¶ 7-8; Johnson Decl., Ex. A (Land Exchange ROD) at 9, Table 1.
[62] Pylka Decl. ¶ 9.

Nor is PolyMet the only party prejudiced. The Forest Service has now owned almost 6,700 new acres in the Superior National Forest for close to four years. Other than the tracts that burned last fall, that acreage is open to the public, which has been enjoying it in a way it could not enjoy the land that was transferred to PolyMet.[63] Returning the land to PolyMet's ownership would deprive the public of those recreational areas. That too is prejudice.

It is true that the Band's suit was filed within the general six-year statute of limitations that applies by default to Administrative Procedure Act claims. *See Izaak Walton League of Am. v. Kimbell*, 558 F.3d 751, 758-59 (8th Cir. 2009). But the Eighth Circuit has said that laches may still bar cases involving such a general limitations period. *See Gunderson v. BNSF Ry. Co.*, 850 F.3d 962, 972 (8th Cir. 2017). In any event, the Supreme Court has said that, "[i]n extraordinary circumstances," a party's delay in suing may have "consequences . . . of sufficient magnitude to warrant, at the very outset of the litigation, curtailment of the relief equitably awardable." *Petrella*, 572 U.S. at 685; *see Carlson T.V. v. City of Marble*, 612 F. Supp. 669, 672 (D. Minn. 1985) (applying laches where plaintiff waited two years to bring lawsuit).

The consequences of vacating this land exchange would be profound. PolyMet and the Forest Service would have to reverse—if it is even possible—both their own real property transfers and a subsequent real property transfer from PolyMet to a third party. The public would lose access to land in the Superior National Forest that it has been enjoying since 2018. PolyMet would

[63] Pylka Decl. ¶ 10.

receive back property damaged by fire. And years more litigation would ensue. All because the Band chose to delay its suit for more than five years, despite other parties challenging the same land exchange and despite the Band itself filing five other lawsuits against PolyMet's project. Those circumstances are extraordinary enough to stop this case before it starts.

CONCLUSION

The Band's complaint should be dismissed.

Dated: May 16, 2022

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