UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

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

INTRODUCTION

The Fond du Lac Band does not claim that its members hunted or fished on the land that the U.S. Forest Service transferred to PolyMet four years ago. Instead, the Band claims that it has standing to sue because its 1854 treaty with the United States gives it "sovereign and proprietary" interests in that land. But that treaty grants the Band's members "the right to hunt and fish" on property open to the public, nothing more. If the Band's members were not exercising that right on the property transferred to PolyMet, they were not harmed, and neither was the Band.

The Band counters that the treaty implicitly protects natural resources, and that the Forest Service would protect those resources in ways PolyMet will not. But even if the Band were right about the treaty's broader meaning, it points to no concrete, particularized, or imminent harms to natural resources from a title transfer. And while PolyMet's mine would arguably harm the Band, the mine was authorized by other agencies' independent permitting decisions, not by the land exchange. The Band is challenging those decisions in other cases.

This case, meanwhile, was filed too late. The Band does not deny that PolyMet sold a portion of the land it received or that fire burned some of the land PolyMet gave to the Forest Service. Those facts alone make the land exchange impossible to undo. If the Band were truly concerned about harms from the land exchange, it would have sued before. Now, the time for it to seek equitable relief has passed.

ARGUMENT

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

The Band agrees that the Court should apply the standing test in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).[1] Its paraphrase of that test, however, omits two important points. First, an injury in fact must be both "concrete and particularized" and "actual or imminent." *Id*. at 560. Second, the "causal connection" between the injury and the conduct must be "fairly traceable to the challenged action of the defendant." *Id*. (brackets and ellipsis omitted). These points are central to the Band's lack of standing.

A. The Band's treaty rights were not affected by the transfer of title to PolyMet.

PolyMet's opening memorandum showed that the Band suffered no injury in fact because it did not sufficiently allege that any of its members hunted or fished on the land PolyMet now owns.[2] In response, the Band admits that it "does not seek to establish standing based on injuries to its members."[3] Its injuries, the Band says instead, are to "its sovereign and proprietary interests regarding the 1854 Treaty."[4] But those alleged injuries are not enough to ground this suit.

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[1] FdL Mem. at 6.
[2] PolyMet Mem. at 7-9.
[3] FdL Mem. at 8.
[4] FdL Mem. at 8.

1. The loss of unused usufructuary rights is not an injury in fact.

Beyond acknowledging that it does not claim standing "based on injuries to its members," the Band makes no effort to argue that any of its members visited the property PolyMet now owns, or that they had plans to do so.[5] It tries to pass this concession off as a non-event, arguing instead that the Band itself is harmed by the loss of a property right.[6] But recall the language of the treaty: "[S]uch 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." *United States v. Gotchnik*, 222 F.3d 506, 508 (8th Cir. 2000) (quoting 1854 treaty, art. 11) (alteration in *Gotchnik*). That language, the only possible source of the Band's claimed property right, does not support standing.

The 1854 treaty ceded tribal ownership to the United States and reserved to the tribe a usufruct—a right to "use and enjoy the fruits of another's property . . . ." *Black's Law Dictionary* 1857 (11th ed. 2019); *see Sturgeon v. Frost*, 139 S.Ct. 1066, 1079 (2019) (describing usufructuary rights as rights "to use" what a party "does not own"). A usufruct is not a comprehensive property right. By its nature, it involves use. In that way, a usufruct is no different from any other right to use or visit public lands. So standing still requires "establishing the specific plan of an individual member to enjoy the forest . . . ." *Ouachita Watch League v. U.S. Forest Serv.*, 858 F.3d 539, 543 (8th Cir. 2017).

[5] *See* FdL Mem. at 8.
[6] FdL Mem. at 10.

Here, the Band concedes that the land exchange did not deprive its members of land they used to hunt and fish. At that basic level, no harm is done.

2. Because the Band is not sovereign over the ceded territory, the land exchange does not affect its sovereignty.

Lacking harm to members who seek to exercise their treaty rights, the Band suggests that it can sue in its "governmental capacity to protect [its] sovereign interests."[7] PolyMet does not dispute that when a tribe's sovereign interests are threatened, it has standing. But the Band fails to show how its sovereignty is threatened by the land exchange.

The 1854 treaty ended the Band's jurisdiction over "all the lands heretofore owned by them," except their reservation. 10 Stat. 1109, art. 1. That cession included the land that PolyMet now owns.[8] So the Band cannot argue that it lost any sovereign jurisdiction when PolyMet took title. Nor is there any threat here to "tribal self-government," as there was when a state tried to tax personal property owned by tribal members living on a reservation, *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 468-69 & n.7 (1976), or interfered with tribal law enforcement, *Mille Lacs Band of Ojibwe v. County of Mille Lacs*, 508 F. Supp. 3d 486, 506-07 (D. Minn. 2020). The tribe had no governmental authority over the land transferred to PolyMet.

Instead of a threat to self-government, the Band claims it has a "duty, in its sovereign governmental capacity, to protect, preserve, and enforce the

[7] FdL Mem. at 8.
[8] FdL Mem. at 4-5.

rights and resources" related to the 1854 treaty.[9] As far as PolyMet is aware, no court has ever found standing based on this sort of duty, and the Band cites none. But even if such a duty existed, it would not support standing unless the Band could also show a threat to its treaty "rights and resources." And, as just established, the Band admits that its suit is not protecting anyone's "rights" to hunt and fish. That leaves just one more argument for standing: injury to treaty "resources."

3. Transfer of title to PolyMet does not threaten any resources protected by the 1854 treaty.

The Band's argument for an injury based on harm to treaty resources has two parts. First, the Band argues that the 1854 treaty implicitly protects not just its members' right to hunt and fish, but also the resources themselves.[10] Second, the Band argues that PolyMet's mere ownership of the land qualifies as an injury in fact to treaty-protected resources.[11] Neither of these arguments is right.

The Band premises its treaty resources standing argument on the idea that the 1854 treaty protects more than the "right to hunt and fish." The treaty, the Band says, also obliges the United States "to protect the resources necessary to sustain the rights."[12] It is true that courts interpreting other trea-

[9] FdL Mem. at 11-12.
[10] *See* FdL Mem. at 10-15.
[11] *See* FdL Mem. at 15-21.
[12] FdL Mem. at 14.

ties have found that a promise to protect usufructuary rights implied a promise of sufficient resources. *See United States v. Washington*, 853 F.3d 946, 964-65 (9th Cir. 2017). And the Eighth Circuit has suggested that treaties with the Chippewa should be read similarly. *See Mille Lacs Band of Chippewa Indians v. Minn.*, 124 F.3d 904, 930-31 (8th Cir. 1997). But the Band points to no case holding that the mere transfer of title implicates treaty-protected resources. In fact, when the Eighth Circuit was asked to equitably apportion treaty resources under an 1837 Chippewa treaty, it declined, reasoning that those resources were not "in ecological danger." *Id*. at 931. So even if the 1854 treaty might also be read to protect treaty resources from such "ecological danger," it does not suggest that the Band has standing based solely on a title change.

Assuming that the treaty does protect natural resources on the Band's behalf, the Band still must show that those resources are harmed by the land exchange. It tries. "[A] private landowner like PolyMet," the Band reasons, "has no federal legal or trust responsibility to manage the land in accordance with the Band's Treaty rights."[13] Relying on the Superior National Forest Plan, the Band claims that the land transferred to PolyMet had been "subject to several substantive limits regarding the Band's treaty rights . . . ."[14] But the parts of the plan it cites are mostly "goals," "objectives," and "guidelines," not requirements. *See* Superior National Forest Plan at 1-7, 1-8 (stating that goals

[13] FdL Mem. at 15 (citing Superior National Forest Land and Res. Mgmt. Plan (July 2004), available at https://www.fs.usda.gov/detail/superior/landmanagement/planning/?cid=fsm91_049716).
[14] FdL Mem. at 18.

are "not absolutes," that "objectives are not 'targets,'" and that guidelines "may be followed"). Such abstractions are no basis for an injury that is "concrete and particularized" and "actual or imminent." *Lujan*, 504 U.S. at 560; *see TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2204-07 (2021) (discussing the concrete injury requirement).

The only concrete harm to natural resources that the Band alleges is from PolyMet's exploratory drilling.[15] But even before the land exchange, the Forest Plan allowed "[e]xploration and development of mineral and mineral material resources" on Forest-owned land. Superior National Forest Plan at 2-9. Indeed, the plan did not even require a permit for the kind of "nondestructive exploration" that PolyMet has done. *Id*. Thus, the transfer of title alone did not harm the Band.

B. The effects of PolyMet's project are not fairly traceable to the land exchange.

Of course, the Band does not limit its standing argument to harm from the transfer of title. It also claims that the mine PolyMet plans to build on the land is a separate harm for standing purposes because it will destroy wetlands and pollute downstream waters.[16] And it is at least true that the mine will fill wetlands.[17] The problem for the Band is that any harms from the mine are not "fairly traceable" to the land exchange.

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[15] FdL Mem. at 18.

[16] *See* FdL Mem. at 21-23.

[17] PolyMet knows that it cannot dispute the Band's factual claims at this stage, but it notes that the NorthMet project will clean up pollution at a brownfield site. *See* Final Environmental Impact Statement at ES-35 (describing how the

The Band sees this problem and responds. It acknowledges the holdings in *Lujan* and *Balogh v. Lombardi* that standing does not exist when an injury is "the result of the independent action of some third party not before the court." 816 F.3d 536, 543 (8th Cir. 2016) (quoting *Lujan*, 504 U.S. at 560) (brackets omitted). But it cites the Eighth Circuit's decision in *Sierra Club v. U.S. Army Corps of Engineers*, 446 F.3d 808 (8th Cir. 2006), which it says found standing despite the permitted project's uncertain future.[18]

A careful reading of *Sierra Club* reveals three reasons that it does not apply here. First, *Sierra Club* does not address the "fairly traceable" requirement; it deals instead with whether injury was "actual or imminent." 446 F.3d at 816. Second, *Sierra Club* holds that "[i]njury under NEPA occurs when an agency fails to comply with that statute"—an argument the Band also adopts.[19] But that holding does not survive the U.S. Supreme Court's ruling that "deprivation of a procedural right without some concrete interest that is affected by the deprivation . . . is insufficient to create Article III standing." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). Third, granting that the "project's future" was "uncertain" and that the government had to take

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project will, among other things, "significantly decrease sulfate concentrations") (available at https://www.dnr.state.mn.us/input/environmentalreview/polymet/feis-toc.html).

[18] FdL Mem. at 26.

[19] FdL Mem. at 26.

"additional actions" to make it happen, those additional actions were "ministerial" agreements, not full-fledged permitting processes like the ones here. *Sierra Club*, 446 F.3d at 812, 814.[20]

The Eighth Circuit's decision in *Sierra Club v. Kimbell*, 623 F.3d 549 (8th Cir. 2010) does not help the Band either. As in the first *Sierra Club* case, the issue was injury-in-fact, not traceability. *Id*. at 556. More importantly, the Court found standing because that the alleged injury would "occur with" the agency action, not "at some future time after further analysis and action by the agency." *Id*. at 557. Here, by contrast, any harm from PolyMet's mine did require "further analysis and action"—indeed, further analysis and action by three different agencies.[21] That *Kimbell* needed to make such a distinction supports PolyMet's argument for dismissal.

The scope of the EIS likewise offers no help to the Band. It is true that the EIS for the land exchange also studied the effects of PolyMet's proposed mine. But that does not mean, as the Band suggests, that the mine's effects are fairly traceable to the land exchange.[22] An EIS must review a project's direct, indirect, and cumulative impacts. *See Ark. Wildlife Fed'n v. U.S. Army Corps of Engr's*, 431 F.3d 1096, 1101 (8th Cir. 2005). That says nothing about

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[20] The same is true for the various out-of-circuit cases the Band cites—the decision being challenged was the last major agency decision before the harm. *See TOMAC v. Norton*, 193 F.Supp.2d 182, 188 (D.D.C. 2002) (finding an injury fairly traceable because taking land into trust gave the casino operator power to "compel" gaming negotiations); *Bd. of Comm'rs of Cherokee Cnty. v. Jewel*, 956 F.Supp.2d 116, 125-26 (D.D.C.) (same).

[21] *See* ECF 38, Johnson Decl., Ex. A (Land Exchange ROD) at 1.

[22] *See* FdL Mem. at 30-32.

causation for purposes of standing—especially when, as here, the EIS studied both the land exchange and the separate mine permitting decisions.

The Band does not dispute the facts. The Forest Service's land exchange decision did "not authorize PolyMet's mining proposal to occur."[23] Instead, "[o]ther governmental entities [had] the responsibility and authority" to permit the mine, "primarily the State of Minnesota and the U.S. Army Corps of Engineers."[24] Those agencies did eventually grant PolyMet's permits, but only after two more years of careful review.[25] Because those permitting decisions were "the independent action of some third party not before the court," *Balogh*, 816 F.3d at 543, they are not fairly traceable to the land exchange.

Since the Band's alleged injuries from the mine are not fairly traceable to the land exchange, the Band cannot use those injuries to claim standing. *See id*. Which is just what the Court found in *WaterLegacy v. USDA Forest Service*, 2019 WL 4757663, at *5 (D. Minn. Sept. 30, 2019). The Band's footnoted effort to distinguish that case—involving the same land exchange and the same proposed mine—is futile. Contrary to the Band's claim, traceability has nothing to do with to "organizational standing."[26] The Court in *WaterLegacy* rightly held that any alleged harms to the environment from the proposed mine cannot be traced to the land exchange. A new plaintiff does not change that.

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[23] ECF 38, Johnson Decl., Ex. A (Land Exchange ROD) at 1.
[24] ECF 38, Johnson Decl., Ex. A (Land Exchange ROD) at 1.
[25] *See* ECF 1, Compl. ¶ 49 (stating that the Corps permit issued in March 2019).
[26] FdL Mem. at 33 n.10.

II. Equity precludes reversal of the land exchange.

Even if the Band had standing to sue, the equitable relief it seeks—reversal of the land exchange four years after it was completed—is no longer available. As a result, the doctrine of laches bars the Band's claim.

The Band argues that PolyMet "cannot invoke" laches because this case was filed within the statutory six-year timeframe that applies to Administrative Procedure Act claims.[27] In support of that argument, the Band cites the U.S. Supreme Court's decision in *SCA Hygiene Products v. First Quality Baby Products, LLC*, 137 S.Ct. 954 (2017). There, the Supreme Court said that laches "cannot be invoked to bar legal relief" if a complaint is filed within the statute of limitations. *Id.*, 137 S.Ct. at 959 (quoting *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 679 (2014)). But the Band is not seeking legal relief. It wants equitable relief: a declaration that the land exchange is "void" and an order setting aside the associated "real estate transactions."[28] That request presents a different question.

In *Petrella*, the Supreme Court rejected laches as "a doctrine that would further limit the timeliness" of a claim already subject to a statute of limitations. 572 U.S. at 685. But it still recognized that "the consequences of a delay in commencing suit may be of sufficient magnitude to warrant, at the very outset of the litigation, curtailment of the relief equitably awardable." *Id*. The

[27] FdL Mem. at 35.

[28] ECF 1, Compl. ¶ 5; *see* FdL Mem. at 2 ("The Band seeks to set the Land Exchange aside and return the land to the Forest Service's ownership.").

Band's delay here is "of sufficient magnitude" to rule out the equitable relief it seeks.

The Band admits that it filed this suit four years after PolyMet and the Forest Service exchanged titles and five years after the Forest Service's decision. It calls this a "mere lapse of time."[29] During that time, however, things changed. PolyMet not only completed the federal and state permitting processes for its mine, it fended off four other lawsuits challenging the land exchange. The Band knew about all of that, but never sued the Forest Service. What the Band claims not to have known, until now, is that PolyMet also sold 759 acres of the land it received from the Forest Service.[30] And whether the Band knew it or not, it acknowledges that a wildfire burned acreage that the Forest Service received from PolyMet.[31] Those facts preclude an equitable reversal of the land exchange.

The D.C. Circuit's decision in *Daingerfield Island Protective Society v. Lujan*, 920 F.2d 32 (D.C. Cir. 1990) is not to the contrary. There, because no development had occurred on either parcel involved, a reversal of the exchange was still conceivable. *See id*. at 40; *compare id*. n.9 (finding it was not "obvious" that the land would be "returned"). Reversing the land exchange here, by contrast, is no longer possible—at least not in a way that puts the parties back in the places they occupied before.

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[29] FdL Mem. at 40.
[30] FdL Mem. at 46.
[31] FdL Mem. at 45. Because these facts are undisputed, there is no need for this motion to be transformed into one for summary judgment.

The Band did not set the wildfire that damaged some of the land exchange property. It did not know that PolyMet sold some of the land exchange property. But it knew those things could happen. After the first four land exchange lawsuits were dismissed, PolyMet (and nature) carried on with their business. That was among the foreseeable "consequences of a delay in commencing suit." *Petrella*, 572 U.S. at 685. To avoid those consequences, the Band could have sued years ago. Instead, it asks for the impossible: unwinding a land exchange when the properties involved have changed. If this was part of the Band's litigation strategy, it backfired.[32] And even if it were not strategic, the Band's delay was unreasonable under these extraordinary circumstances.

CONCLUSION

The Band's complaint should be dismissed.

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[32] The Band does not deny that it "decided to file suit based on how other litigation was proceeding" and claims that such a decision "would not be unreasonable." FdL Mem. at 40-41.

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