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 POLYMET MINING, INC., Intervenor Defendant.	Case No. 22-cv-00170 (PJS/LIB) **FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA'S MEMORANDUM OF LAW IN OPPOSITION TO POLYMET MINING, INC.'S MOTION TO DISMISS**

Plaintiff Fond du Lac Band of Lake Superior Chippewa ("Band") respectfully submits this memorandum of law in opposition to intervenor-defendant PolyMet Mining, Inc.'s ("PolyMet") motion to dismiss. The Band respectfully requests the Court deny PolyMet's motion for the reasons that follow.

INTRODUCTION

This action concerns the U.S. Forest Service's transfer to PolyMet of 6,650 acres of public land ("Federal Land") within territory the Band ceded ("Ceded Territory") to the United States under the 1854 Treaty of LaPointe, 10 Stat. 1109 (Sept. 30, 1854) ("1854 Treaty") and which reserved the Band's

rights to continue to hunt, fish, and gather therein. The Federal Land contains pristine wetlands, critical habitat for moose, Ojibwe trails that date back over a century, and sits at the headwaters of the St. Louis River watershed seventy miles upstream of the Band's Reservation. The Band challenges the Forest Service's unlawful and arbitrary decision to transfer the Federal Land so that PolyMet can destroy the land and resources to build an open pit mine called the NorthMet Mining Project ("Project"). The Band seeks to set the Land Exchange aside and return the land to the Forest Service's ownership.

PolyMet intervened as a defendant and attempts to bar the Band from seeking relief against the Forest Service by asserting the Band does not have standing to bring these claims. However, the Band has standing in its governmental capacity to remedy several injuries to its sovereign and proprietary interests regarding the Federal Land. PolyMet also asserts the affirmative defense of laches. The Court should reject PolyMet's laches defense, because the Band filed this suit within the six-year statute of limitations for claims under the Administrative Procedure Act ("APA") and PolyMet cannot claim any prejudice. PolyMet has not been permitted to start construction on the Project because the company's permits have been stayed, suspended, or vacated.

In light of promises the United States made to the Band over 150 years ago, the Band certainly is entitled to have this Court decide whether the Forest

Service's decision to dispose of public land subject to the 1854 Treaty and of critical importance to the Band was lawful.

BACKGROUND

A. The Band's Treaty Rights

The Band is a party to several treaties that the Chippewa entered into with the United States, including the treaties of 1837 and 1854. *See, e.g., United States v. Bresette,* 761 F. Supp. 658, 660 (D. Minn. 1991) (noting that it was not in dispute that the Band is a successor in interest to treaties of 1837, 1842, and 1854); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 861 F. Supp. 784, 795 (D. Minn. 1994) (discussing presence of Fond du Lac Chippewa chiefs at 1837 treaty negotiations).[1] In the early 1800s, "Chippewa Indians occupied much of present day Minnesota and Wisconsin." *United States v. Brown*, 777 F.3d 1025, 1027 (8th Cir. 2015). Hunting, fishing, and gathering "were not much less necessary to the existence of the Indians than the atmosphere they breathed." *Id.* (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)). "Throughout their territory the Chippewa fished, hunted, trapped, gathered wild rice, and tapped maple trees for sugar." *Id.*

> The Chippewa in the ceded territory were hunters and gatherers. Their hunting activities included fishing and fowling in addition to traditional notions of hunting. The Chippewa harvested virtually

[1] This Court in *Bresette* explained that the factual history of the Band's treaty rights under the 1837, 1842, and 1854 treaties has been set forth in several cases and are appliable to the 1854 Treaty. 761 F. Supp. at 660 & n.1.

> everything on the landscape. They had some use or uses for all the flora and fauna in their environment, whether for food, clothing, shelter, religious, commercial or other purposes. The Chippewa relied on hunting and gathering for their subsistence.

Bresette, 761 F. Supp. at 662 (quotation omitted).

These activities were so integral to the Chippewa that in ceding vast amounts of their aboriginal territory in northeastern and central Minnesota (i.e., the Ceded Territory) in Article 11 of the 1854 Treaty, the Band reserved the right to hunt, fish, and gather in the Ceded Territory. Dkt. 1 ¶ 17; *see also Bresette*, 761 F. Supp. at 661-62 (adopting the Seventh Circuit's interpretation that the 1854 Treaty reserved "full usufructuary rights" to hunt, fish, and gather) (citing *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 348 (7th Cir. 1983) ("Minnesota bands were granted usufructuary rights on the ceded land pursuant to Article 11" of the 1854 Treaty)). "As a result of this provision, the Chippewas residing in Minnesota obtained treaty-recognized usufructuary rights on non-reservation lands." *Voigt*, 700 F.2d at 363. Treaty usufructuary rights are rights to use land for traditional activities of hunting, fishing, and gathering and do not require that the tribe have title to the land. *Id.* at 352.

These treaty rights "are valuable property rights protected by the Constitution." *Mille Lacs Band of Chippewa Indians v. Minnesota*, 853 F. Supp. 1118, 1125 (D. Minn. 1994). It is clear that the Band retains these

usufructuary rights under Article 11 of the 1854 Treaty throughout the Ceded Territory as they have been affirmed by this Court. Dkt. 1 ¶ 18; *see also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 186-87 (1999) (referencing this Court's March 1996 order recognizing the Band's usufructuary rights).

B. The Land Exchange

The Federal Land at issue consists of a large contiguous tract of 6,650 acres within the Band's Ceded Territory and the Superior National Forest. Dkt. 1 ¶ 54. The United States acquired the Federal Land in 1935 pursuant to the Weeks Act, 16 U.S.C. § 515, for the purpose of protecting the headwaters of the St. Louis River. Dkt. 1 ¶ 2. The Forest Service managed the Federal Land as part of the Superior National Forest and pursuant to its treaty and trust responsibility obligations to the Band, until the Forest Service transferred the Federal Land to PolyMet through the Land Exchange. *Id.* ¶ 50. The Forest Service made the decision to approve the Land Exchange on January 9, 2017. *Id.* ¶ 53. In exchange for the Federal Land, the Forest Service received four tracts of unremarkable private land scattered throughout the Superior National Forest, *id.* ¶ 60, including one tract that "has been used as an unauthorized dump site and contains hazardous materials," *id.* ¶ 61.

The purpose of the Land Exchange is to allow PolyMet to construct and operate an open pit mine on the Federal Land. *Id.* ¶ 51; *see also* Dkt. 38-1 at

6, Forest Service Record of Decision, NorthMet Project Land Exchange (Jan. 2017) ("ROD")).[2] Under federal ownership the Federal Land was public land that furthers the purposes of the Weeks Act, subject to the 1854 Treaty, and protected cultural resources. Dkt. 1 ¶ 54.

STANDARD OF REVIEW

To establish standing under Article III of the U.S. Constitution, a plaintiff needs to show (1) an injury in fact, (2) a causal connection between the alleged injury and the challenged action of the defendant, and (3) a likelihood that the injury will be redressed by a favorable decision of the court. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) ("*Lujan*"). A plaintiff needs to allege an injury in fact to a "judicially cognizable interest." *ABF Freight Sys., Inc. v. Int'l Bhd. of Teamsters*, 645 F.3d 954, 959 (8th Cir. 2011). A plaintiff's judicially cognizable interest "is distinct from its potential causes of action," and a plaintiff "need not prove an unlawful action to have standing . . . ." *Am. Farm Bureau Fed'n v. U.S. EPA*, 836 F.3d 963, 968 (8th Cir. 2016).

[2] The Band's Complaint relies on and incorporates several public documents cited in this response, including the Forest Service's ROD, the Final Environmental Impact Statement, and Superior National Forest Management Plan which this Court can consider. *See, e.g., Mattes v. ABC Plastics, Inc.*, 323 F.3d 695, 698 (8th Cir. 2003) ("[C]ourt may consider the complaint and documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading."); *Stahl v. U.S. Dep't of Agric.*, 327 F.3d 697, 701 (8th Cir. 2003) (finding public records referenced in the complaint are not matters outside the pleadings and can be considered by the district court on a motion to dismiss).

"At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561 (second alteration in original) (internal quotation marks and citation omitted).

ARGUMENT

I. The Band Has Standing to Protect Its Sovereign and Proprietary Interests.

PolyMet erroneously contends the Band is a "group" that must show "'particular harm' to someone with 'a specific and concrete plan' to enjoy the area in question." Dkt. 36 at 9 (quoting *Ouachita Watch League v. U.S. Forest Serv.*, 858 F.3d 539, 542 (8th Cir. 2017)). This is based on a recognition that "an organization whose members are injured may represent those members in a proceeding for judicial review." *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972); *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009) (An organization "can assert the standing of their members."). PolyMet's reliance on a theory of organizational standing is irrelevant. The Band is much more than a "group."

The Band is a federally-recognized Indian tribe and seeks to remedy injuries to its sovereign and proprietary interests. Dkt. 1 ¶ 9; *see also id.* ¶ 18 (discussing treaty usufructuary rights). Long ago Chief Justice Marshall

established that Indian tribes are domestic dependent nations with unique sovereign and proprietary interests. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 2 (1831). The Supreme Court has since firmly rejected any notion that Indian tribes are merely "private, voluntary organizations." *United States v. Mazurie*, 419 U.S. 544, 557 (1975). Accordingly, the Supreme Court has recognized that Indian tribes may sue in their governmental capacity to protect their sovereign interests. *See Moe v. Confederated Salish & Kootenai Tribes of the Flathead Rsrv.*, 425 U.S. 463, 468 n.7 (1976); *see also Mille Lacs Band of Ojibwe v. Cnty. of Mille Lacs,* 508 F. Supp. 3d 486, 506-07 (D. Minn. 2020) ("[C]ourts have long recognized that tribes have legally protected rights in their sovereignty and . . . that infringement of those rights confers standing."); *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 463 (2d Cir. 2013) ("[T]ribes, like states, are afforded 'special solicitude in our standing analysis.'") (quoting *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007)).

The Band does not seek to establish standing based on injuries to its members. Rather, the Band asserts a judicially cognizable interest based on injuries to its sovereign and proprietary interests regarding the 1854 Treaty. *E.g.*, Dkt. 1 ¶ 9. PolyMet does not address or challenge the Band's sovereign and proprietary interests, nor the Band's alleged injuries to those interests

from the Forest Service's decision to transfer 6,650 acres of critically important public land to satisfy PolyMet's "desire" to construct an open pit mine.[3]

A. The Band's Sovereign and Proprietary Interests.

A plaintiff needs to show an injury in fact to a "judicially cognizable interest." *ABF Freight Sys.*, 645 F.3d at 959. PolyMet misunderstands the Band's treaty rights, which were reserved and secured through the 1854 Treaty between the United States and the Band—two sovereign nations. *Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979) (A treaty between the United States and an Indian tribe is "essentially a contract between two sovereign nations."). PolyMet claims the Band has not been injured because "hunting and fishing rights can be exercised only by a specific subset of the Chippewa Indians" and no individual who exercised the right on the Federal Land has "come forward to complain." Dkt. 36 at 13. This contention follows from PolyMet's mistaken view that the Band is a "group," which must demonstrate standing with injuries to its members who "use the affected area." *Id.* at 9. PolyMet is simply wrong.

[3] Thus, the Court must accept as true the Band's factual allegations that support its standing arguments here. *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993) ("all of the factual allegations concerning jurisdiction are presumed to be true"); *see also Martin v. ReliaStar Life Ins. Co.*, 710 F. Supp. 2d 875, 888 (D. Minn. 2010) (Rule 12(b)(1) motion presented a facial attack because "Defendants do not contest the validity of the [complaint's] factual allegations").

It is true that individual Band members exercise the treaty rights. But the treaty rights are *held by the tribe itself* and not by individual Band members. *See, e.g.*, *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307 (1902); *Settler v. Lameer*, 507 F.2d 231, 237 (9th Cir. 1974) (reserved fishing rights "are communal rights of the Tribe, even though the individual members benefit from those rights"). The Band's treaty rights do "not belong to individual tribal members," because they are "the communal property of the tribes which signed the treaty and their modern political successors." *United States v. Michigan*, 471 F. Supp. 192, 271 (W.D. Mich. 1979); *see also Grey v. United States*, 21 Cl. Ct. 285, 299 (1990).

The Band's rights to hunt, fish, and gather have existed since time immemorial as an inherent and crucial component of its identity as a sovereign nation. *Brown*, 777 F.3d at 1027; *Bresette*, 761 F. Supp. at 662. The Band secured these rights in the 1854 Treaty and the rights continue to exist today as recognized and affirmed by this Court. Dkt. 1 ¶ 18; *Mille Lacs*, 526 U.S. at 186-87. The 1854 Treaty was "not a grant of rights to the" Band, but rather "a grant of right from" the Band and a "reservation of those not granted." *Winans*, 198 U.S. at 381. And these treaty rights are protected by the U.S. Constitution. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). Accordingly, the Band has judicially cognizable interests in protecting the resources that are necessary to fulfill the purposes of the treaty rights, such as fish, moose, wild

rice, and the natural resources on which those things depend. Dkt. 1 ¶¶ 44-46, 56, 74.

The resources within the Ceded Territory were a central concern around the time of the 1854 Treaty. The Chippewa repeatedly told federal negotiators in 1837 "that they needed to hunt, fish, and gather on the lands to survive." *Mille Lacs Band of Chippewa Indians v. Minnesota*, 861 F. Supp. 784, 827 (D. Minn. 1994). An adequate supply of the resources was "not much less necessary to the existence of the Indians than the atmosphere they breathed." *Brown*, 777 F.3d at 1027 (quoting *Winans*, 198 U.S. at 381).

These resources are not any less important to the Band today. The Band "actively manages, studies, and surveys treaty resources in the Ceded Territory." Dkt 1. ¶ 80. The Band has a critical need to protect the resources due to "legacy pollution from mining and existing conditions that impair subsistence fishing, extensive losses of land and resources that support the exercise of treaty rights, and the destruction of critical cultural resources." Dkt. 1 ¶ 131. The Band's interests do not depend on whether a Band member is currently "using the land transferred to PolyMet." Dkt. 36 at 14. Rather, the Band seeks to "maintain Treaty resources now and for future generations." Dkt. 1 ¶ 80.

It is the Band's duty, in its sovereign governmental capacity, to protect, preserve, and enforce the rights and resources upon which the treaty rights

depend now and for future generations. Dkt. 1 ¶¶ 9, 80. After all, the Band's treaty rights can only be exercised if there are resources that can be harvested. The resources are critical because the Band's treaty rights themselves are not lost by non-use. *See, e.g.*, *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1272 (9th Cir. 2017) (reserved rights "are not lost through non-use"). These treaty rights can only be lost through a lawful abrogation by Congress or the President, which has not happened. *See Mille Lacs*, 526 U.S. at 193-95.

Federal caselaw acknowledges that tribes, like the Band, have judicially cognizable interests in protecting the resources subject to treaty rights. *See, e.g.*, *Fishing Vessel*, 443 U.S. at 686-87 (allocating fish resources subject to a tribe's treaty right); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 952 F. Supp. 1362, 1374-75 (D. Minn. 1997) (resolving dispute over harvestable surpluses of fish resources).

Courts also recognize a tribe's interests for natural resources to simply be maintained and protected in one location because the resources support the exercise of treaty rights in a different location. For example, the court in *Parravano* recognized that fish important to a tribe "do not live out their existence on the reservation." *Parravano v. Babbitt*, 861 F. Supp. 914, 924 (N.D. Cal. 1994). The court recognized that the fish migrate outside of tribal fishing areas, and the tribe had an interest in activities occurring outside those

locations in order to permit a "sufficient return of the fishery resources to tribal fishing areas so that these tribes may have a meaningful opportunity to harvest their share of the resources." *Id.* *See also Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 763 F.2d 1032, 1035 (9th Cir. 1985) (ordering irrigation system to maintain water flows to support fish habitat for tribe's fishing right).

The same is true for critical moose habitat that provides thermal cover for moose on the Federal Land. Dkt. 1 ¶ 74. The Band has an interest in these resources *not* being used by individuals. It is irrelevant whether Band members hunt the moose on the Federal Land. Rather, the significance here is for there to be habitat on the Federal Land because it is necessary to sustain an appreciable moose population so that they can be hunted throughout the Ceded Territory.

The Band also has an interest in preserving public land in the Ceded Territory. As discussed below, the loss of this public land directly implicates the Band's interests in protecting and preserving its treaty rights within the Ceded Territory. Dkt. 1 ¶ 9. This is especially true for public land owned by the United States, such as the Federal Land at issue here.

The United States and its agencies have specific duties to the Band regarding the treaty rights. The United States has "charged itself with moral obligations of the highest responsibility and trust" in "carrying out its treaty

obligations with the Indian tribes." *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). In Article 11 of the 1854 Treaty, the United States promised the Band it would continue to have usufructuary rights in the Ceded Territory. This promise includes an obligation of the United States to protect the resources necessary to sustain the rights. *See, e.g.*, *United States v. Washington*, 853 F.3d 946, 964-65 (9th Cir. 2017) (finding an inferred promise by the United States to secure fish resources because otherwise the fishing right "would be worthless without harvestable fish") (citing *Winters v. United States*, 207 U.S. 564 (1908)); *Klamath Tribes v. United States,* No. 96-381, 1996 WL 924509, at *8 (D. Or. Oct. 2, 1996) ("[T]he federal government has a substantive duty to protect 'to the fullest extent possible' the Tribes' treaty rights, and the resources on which those rights depend.") (citation omitted).

Unlike a private landowner, the Forest Service has a duty to consider and protect the Band's treaty rights, which, as discussed below, the agency acknowledges. Dkt. 1 ¶ 21. The Forest Service also cannot limit or otherwise impair the Band's treaty rights absent express Congressional authorization. *Mille Lacs*, 526 U.S. at 202. These obligations impose substantive limitations on the use of federal land, which the Band, as a signatory to the 1854 Treaty, has an interest in preserving and enforcing. Dkt. 1 ¶ 21.

Thus, any contention by PolyMet that looks for a Band member's recent use of the Federal Land is misplaced and ignores the Band's sovereign and

proprietary interests in protecting and preserving its treaty rights. PolyMet provides no authority for the proposition that a tribe with treaty rights only has an interest if an individual tribal member was "using the land transferred to PolyMet." Dkt. 36 at 14. PolyMet ignores the Band's interests regarding its treaty rights that form the basis of the Band's injuries here. The Band has also identified specific treaty resources located on the Federal Land, including 2,000 acres of coniferous bogs, critical habitat for moose, and Ojibwe trails. *See* Dkt. 1 ¶¶ 56, 74, 57. The Band has interests in protecting these resources now and for future generations.

For these reasons, this Court should find that the Band has judicially cognizable interests sufficient to bring its action challenging the Land Exchange.

B. The Band Suffered an Injury in Fact by the Change in Ownership of the Federal Land.

The Band has suffered an injury in fact by the change in ownership of the Federal Land. The Band alleges it was injured by the Land Exchange "because the lands are no longer owned and managed by the Forest Service and, unlike the Forest Service, a private landowner like PolyMet has no federal legal or trust responsibility to manage the land in accordance with the Band's Treaty rights." Dkt. 1 ¶ 9; *see also id.* ¶¶ 12, 21. PolyMet does not, and cannot, dispute this allegation. This is a sufficient injury in fact, caused by the Land

Exchange, and redressable by this Court vacating and setting aside "the Forest Sevice's transfer of the Federal Land to PolyMet." Dkt. 1 at 57.

The Forest Service's treaty and trust responsibility obligations are inferred from the 1854 Treaty. *See Blue Legs v. U.S. Bureau of Indian Affs.*, 867 F.2d 1094, 1100 (8th Cir. 1989) (existence of a trust duty is "inferred from the provisions of a . . . treaty"). Indeed, to the Chippewa, hunting, fishing, and gathering was "not much less necessary to the existence of the Indians than the atmosphere they breathed." *Brown*, 777 F.3d at 1027 (quoting *Winans*, 198 U.S. at 381). These activities were so integral that in the 1854 Treaty the Band reserved the right to hunt, fish, and gather in the Ceded Territory. Dkt. 1 ¶ 17.

As a party to the 1854 Treaty, the Forest Service has a duty to protect land and resources in the Ceded Territory. In *Washington* for example, the Ninth Circuit found an inferred promise by the United States in a treaty to secure fish resources because the fishing right "would be worthless without harvestable fish." 853 F.3d at 964-65 (citing *Winters*, 207 U.S. 564). *See also Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999) ("[T]he United States, as a trustee for the Tribes, has a responsibility to protect their rights and resources.").

The Forest Service acknowledges its obligations to the Band in the Forest Plan for the Superior National Forest. Dkt. 1 ¶ 21. The Forest Service

adopts forest plans for the National Forest System to "sustain the multiple use of its renewable resources in *perpetuity* while maintaining the long-term health and productivity of the land." 36 C.F.R. § 219.1(b) (emphasis added). The Forest Plan governed the management and use of the Federal Land as part of the Superior National Forest. Dkt. 1 ¶ 21. The Forest Plan's *first* governing principle is that "numerous treaties and trust responsibilities," including the 1854 Treaty, govern "the use and protection of forest resources that may be of Tribal interest or covered under Tribal reserved rights." *Id.* ¶ 21; *see* Forest Plan at 1-9.[4]

Under the Forest Plan, one of the Federal Land's goals was to "[c]ontribute to efforts to sustain the American Indian way of life, cultural integrity, social cohesion, and economic well-being." Forest Plan at 2-5. A desired condition of the Federal Land was to facilitate "the exercise of the right to hunt, fish and gather as retained by Ojibwe" under the 1854 Treaty. *Id.* at 2-37. An objective for the Federal Land was to permit and plan for "the continued free personal use" of forest products "by band members within the sustainable limits of the resources." *Id.* at 2-38.

The Forest Plan provides standards that are "required limits to activities" on the Federal Land. *Id.* at 1-8. For example, one standard requires

[4] *Available at*: https://www.fs.usda.gov/detail/superior/landmanagement/planning/?cid=fsm91_049716.

cooperative programs to restore and maintain "native plant communities and wildlife species" on the Federal Land if "tribal interest is indicated." *Id.* at 2-38. The Forest Plan also provides guidelines that limits the Forest Service's "management actions." *Id.* at 1-8. One guideline requires the Forest Service to consider plant and animal species "of traditional use . . . when desired and sought after by tribal members." *Id.* at 2-38.

Accordingly, the Federal Land was subject to several substantive limits regarding the Band's treaty rights under the Forest Service's ownership. These limits applied regardless of recent use by Band members of the Federal Land and reflect the Forest Service's obligations to the Band with respect to the management and use of the Federal Land. These limits were removed by the Land Exchange because the Federal Land is no longer owned by the Forest Service or subject to the Forest Plan. Dkt. 1 ¶ 9. PolyMet is under no legal duty to the Band. PolyMet generally manages and uses the land as the company sees fit. This change in ownership is an injury to the Band that is both actual and imminent. *Cf. South Dakota v. U.S. Dep't of Interior*, 665 F.3d 986, 990 (8th Cir. 2012) (change in jurisdictional authority over parcel of land was sufficient injury to confer standing).

This injury is shown by PolyMet's actions thus far as owner of the Federal Land. PolyMet says it has "done more drilling on its property" to "conduct testing necessary to build its mine." Dkt. 36 at 17-18. PolyMet also

says it transferred 759 acres of the Federal Land to another mining company. *Id.* at 17. This simply shows the injury to the Band by the change of ownership from the Forest Service to PolyMet. As noted above, the Forest Service's obligations to the Band would have provided limits on these activities or prohibited them altogether. PolyMet was not obligated to take the Band's treaty rights or any interests of the Band into account in conducting its "drilling" and transferring land to another mining company.

Additionally, the Band has alleged specific resources of importance to the Band and its treaty rights that have been lost from federal ownership. The Federal Land contains 2,000 acres of coniferous bogs, which are a unique source of treaty resources such as cranberries, soft-leaved blueberries, sweet flag, and other plants the Band considers to be medicines. Dkt. 1 ¶ 56. These specific coniferous bog wetlands are unique because they are in a large unbroken tract. *Id.* They are also effectively irreplaceable because the restoration of coniferous bogs is a very difficult and long process with extremely low success rates. *Id.* The Band is injured by this permanent loss of treaty resources to private ownership.

The Federal Land contains approximately 2,785 acres of habitat that provides thermal cover to moose. *Id.* ¶ 74. This habitat is critical to prevent heat stress and increased mortality of the remaining moose population in the Ceded Territory. *Id.* A substantial moose population is located in the Project

area. *Id.* The Band's interest is to maintain this specific moose habitat and for it to not be used by individuals. *Id.* The purpose of this moose habitat is to "slow population declines and maintain and recover moose in appreciable numbers in the Ceded Territory." *Id.* As noted above, courts recognize that reserved rights may protect against the use of resources in one location so that the animals and fish can be harvested in a different location. *E.g., Kittitas*, 763 F.2d at 1035. The Forest Plan also directs that cooperative programs "will be established" with affected Tribes, such as the Band, to maintain "plant communities." Forest Plan at 2-38.

The Federal Land also contains segments of at least two Ojibwe trails that have deep cultural and spiritual significance to the Band. Dkt. 1 ¶ 57. These trails were protected both by federal preservation laws, like the National Historic Preservation Act, and the Forest Service's trust responsibility when the Federal Land was under federal ownership. *Id.*

It would be quite the impotent outcome of the 1854 Treaty if the Band was left without any recourse to challenge its federal trustee's incremental transfer of critically important public land and resources within the Ceded Territory, resulting in "a death by a thousand cuts" to the Band's treaty rights. *Pyramid Lake Paiute Tribe of Indians v. Nev., Dep't of Wildlife*, 724 F.3d 1181, 1188 & n.11 (9th Cir. 2013) (finding that the Tribe had standing to challenge incremental diversions of water that would impair its decreed water rights in

Pyramid Lake). The Band's treaty rights cannot be effectively abrogated in a "backhanded way." *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412 (1968).

The Land Exchange is but one more "large conversion of pristine and undisturbed public land to private use within the Ceded Territory on top of many other past conversions of federal land within the Ceded Territory and the Superior National Forest more specifically." Dkt. 1 ¶ 90. Due to the Forest Service's unique obligations to the Band, the Band has standing to challenge the Forest Service's decision to remove this land from federal ownership.

C. The Band Has Suffered an Injury in Fact by PolyMet's Intended Use of the Federal Land.

The change in ownership of the Federal Land is a sufficient injury for the reasons discussed above. Nevertheless, the Band is also injured because PolyMet's intended use of the Federal Land for an open pit mine will both destroy these resources and cause serious adverse effects to surrounding land in the Ceded Territory and downstream within the Reservation. Dkt. 1 ¶¶ 9, 40-48, 77-74, 76-77. The Band has procedural rights to protect its concrete interests that would be affected by PolyMet's intended use of the Federal Land for an open pit mine. *Lujan*, 504 U.S. at 572 n.7; *Massachusetts*, 549 U.S. at 518.

The Band has a procedural right to challenge the Land Exchange under the National Environmental Policy Act ("NEPA") and as part of the Forest Service's trust responsibility to consider environmental impacts and the Band's treaty rights and cultural resources in making its decision on the Land Exchange. 5 U.S.C. § 702; *see, e.g.,* Dkt. 1 ¶¶ 83-92 (discussing failure to evaluate the Band's treaty rights); *Seminole Nation*, 316 U.S. at 296-97; Dkt. 1 ¶¶ 20, 66, 111-12 (discussing NEPA inadequacies and the Band as a cooperating agency); *see also* 40 C.F.R. §§ 1501.6(a)(2) (2017) (cooperating agencies under NEPA), 1501.8(b).

These procedural rights protect the Band's concrete interests, including the Band's sovereign and proprietary interests. *See Massachusetts*, 549 U.S. at 517-18. The Band has an interest in the "Treaty and cultural resources that would be destroyed and irreversibly lost" through the Land Exchange and Project. Dkt. 1 ¶ 9. Further, the Band has an interest in "the destruction of pristine wetlands and other ecological function and services . . . provided by the Federal Lands." *Id.* The Band also regulates water quality downstream of the Project within the Reservation as a "State" under the Clean Water Act. *Id.* ¶ 76.

The Land Exchange and Project present very serious injuries to the Band's concrete interests. As noted above, PolyMet would destroy critical habitat for moose that would affect a moose population in the area that the

Band relies on to exercise its hunting rights. *Id.* ¶ 74. That would affect Band members who have been conducting moose hunts in the vicinity of the Federal Land for at least the last thirty years. *Id.* Further, the Forest Service acquired the Federal Land under the Weeks Act for the purpose of protecting the headwaters of the St. Louis River. *Id.* ¶ 2. The Land Exchange removed a large pristine wetland complex of approximately 3,028 acres and a five-mile stretch of the Partridge River from federal ownership. *Id.* ¶ 55. These resources function to regulate downstream water quality—including the Band's water quality—and hydrology in the St. Louis River watershed. *Id.*

PolyMet plans to destroy those pristine wetlands in the largest permitted destruction of wetlands in Minnesota's history. *Id.* ¶ 40. PolyMet would replace these wetlands with a large open pit mine at the headwaters of the St. Louis River. *Id.* ¶¶ 40, 55. PolyMet's mine would release significant amounts of mercury, methylmercury, and other pollutants into downstream waters, including the St. Louis River. *Id.* ¶ 41. PolyMet would also discharge millions of gallons of polluted wastewater per day into the headwaters of the Embarrass and Partridge Rivers, which would then flow into the St. Louis River. *Id.* ¶¶ 42, 47, 66, 77. This pollution would cause further degradation of water quality that supports the exercise of treaty rights in the Ceded Territory and within the Reservation, as well as very serious adverse health effects to the Band and its members who rely on these waters and resources for subsistence and to

maintain their cultural and religious traditions. *Id.* ¶¶ 43-44. The Forest Service *did not even evaluate* the Land Exchange and Project's effects on the Band, its downstream waters, and treaty resources. *Id.* ¶ 76.

As noted above, PolyMet would also destroy two Ojibwe trails that have deep significance to the Band. The Forest Service had the authority to protect these trails from destruction, *see* 36 C.F.R. § 254.3(h), but failed to even consider doing so. Dkt. ¶ 73. These trail segments would be destroyed and lost forever. *Id.* ¶¶ 57, 86. The Band and Ojibwe have been here long before PolyMet sought to develop its mine. *See id.* ¶ 57. The Band will be here long after PolyMet either gives up on this Project or destroys the land, takes its profits, and leaves it for Minnesota and the Band to clean up the mess.

1. Effects from PolyMet's intended use of the Federal Land are "fairly traceable" to the Forest Service.

PolyMet attempts to ignore the Land Exchange's purpose by arguing that the effects from the company's intended use of the Federal Land are not "fairly traceable" to the Land Exchange. Dkt. 36 at 10-11. PolyMet notes an injury "cannot result from the 'independent action of some third party not before the court.'" *Id.* at 11 (quoting *Balogh v. Lombardi*, 816 F.3d 536, 543 (8th Cir. 2016)). PolyMet points to other approvals that must take place before PolyMet can construct and operate the mine. *Id.* PolyMet argues that these other approvals "broke any causal link between the Forest Service's land

exchange decision and the mine's alleged harms." *Id.* at 12. PolyMet is simply wrong.[5]

PolyMet fails to explain how the Band's allegations regarding the Forest Service's arbitrary and unlawful decision-making are not "fairly traceable" to the agency that made the decision. The Supreme Court has held a defendant's action need not be the "very last step in the chain of causation" to cause cognizable injury. *Bennett v. Spear*, 520 U.S. 154, 169 (1997). If a plaintiff is "vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Massachusetts*, 549 U.S. at 518; *see also Lujan*, 504 U.S. at 572 n.7 (noting the Court's relaxed standing analysis for procedural injuries that are linked to "concrete interests affected").

Applying these principles, the Eighth Circuit in *Sierra Club v. U.S. Army Corps of Engineers*, 446 F.3d 808 (8th Cir. 2006) ("*Sierra Club*"), held a plaintiff

[5] PolyMet cites the Eighth Circuit's decision in *Lombardi*, 816 F.3d at 543. The court in *Lombardi* considered a pre-enforcement challenge to the constitutionality of a state statute. *Id.* *Lombardi* found the plaintiff's alleged injuries were not fairly traceable to a state agency's director because he did not have statutory authority to enforce the challenged statute. *Id.* Obviously, the plaintiff in *Lombardi* could not enjoin the enforcement of a statute by seeking relief against an official that did not enforce it. *Lombardi* is irrelevant here because the conduct complained of is the Forest Service's deficient decision, as discussed below.

suffered an injury in fact regarding effects from a proposed levee project. This was true even though the "project's future" was "uncertain and no construction work" could start until the Army Corps of Engineers ("Corps"), Federal Emergency Management Act ("FEMA"), State of Missouri, City of Jefferson, and Congress each took their respective action to authorize the project. *Id.* at 812, 816 (describing the approvals required before the levee project could be constructed).

The plaintiffs alleged the Corps violated NEPA by failing to take a hard look at the cumulative and indirect effects of the proposed levee project. *Id.* at 815. The district court had found the plaintiffs lacked standing because "no injury is certain to occur until the Corps and FEMA take additional steps to finalize the levee project." *Id.* at 816. The Eighth Circuit reversed, finding the "[i]njury under NEPA occurs when an agency fails to comply with that statute." *Id.* *Sierra Club* found the plaintiffs' injury was the "increased risk of environmental harm stemming from the agency's allegedly uninformed decision-making." *Id.*

Likewise, the Band alleges the Forest Service engaged in the same type of "uninformed decision-making" that led to the "increased risk of environmental harm" that *Sierra Club* found sufficient. *See, e.g.*, Dkt. 1 ¶¶ 109-35. There is nothing that requires this Court to close its eyes to PolyMet's intended use of the property. The Forest Service transferred the Federal Land

so that PolyMet could build an open pit mine. *Id.* ¶ 51. The Forest Service's decision clearly stated that "the Forest Service is not willing or able to authorize such private, surface mining operations on lands of the Superior National Forest." Dkt. 38-1 at 5. As a result, "[t]he purpose and need for the land exchange is to eliminate the conflict between PolyMet's desire to surface mine and the USFS ownership and management of NFS lands, by exchanging federal lands . . . ." *Id.* at 2. *See also* FEIS at ES-11.[6]

Here, the conduct complained of is the Forest Service's deficient decision-making with respect to evaluating the Land Exchange and Project's effects on both the Band's treaty rights and the environment. The Forest Service's decision-making is "fairly traceable" to the agency itself. As in *Sierra Club*, it does not matter for purposes of standing that other government entities need to take actions before PolyMet may construct the Project. The Circuit has held that, "[w]hen the federal government exchanges land, it must consider the environmental impact not only of the exchange itself, but also of the proposed use of the federal land once it passes into private hands." *Lockhart v. Kenops*, 927 F.2d 1028, 1033 (8th Cir. 1991). *See also infra* at 31-33 (discussing standing to challenge proposed use of land).

[6] *Available at*: https://files.dnr.state.mn.us/input/environmentalreview/polymet/feis/004_executive_summary.pdf.

The Forest Service also could not approve the Land Exchange unless it was determined to be in the public interest. 36 C.F.R. § 254.13(a). The Forest Service was required to consider several factors, including environmental considerations, to determine whether the Land Exchange "well serves the public interest." 36 C.F.R. § 254.3(b)(2).[7] The ROD *itself* states the Forest Service "considered the effects of both the mining project and the land exchange as documented in the FEIS in making this public interest determination." Dkt. 38-1 at 19. These effects include existing and planned use authorizations and protection of fish and wildlife habitats, cultural resources and watersheds. *Id.* The Band alleges several deficiencies with the Forest Service's evaluation of effects of both the Project and Land Exchange. Dkt. 1 ¶¶ 103-59. If the Forest Service had properly evaluated these effects, as the Band alleges, the Forest Service's weighing of the public interest factors could have come out the other way and there would be no Project. FEIS ES-4. The Band's injuries are thus "fairly traceable" to the Land Exchange. *Sierra Club*, 446 F.3d at 816.

[7] 36 C.F.R. § 254.3 is part of "the procedures for conducting exchanges of National Forest System lands," *id.* § 254.1(a), including implementation of the Weeks Act and FLPMA, *id.* The regulation was promulgated to ensure that "environmental values such as cultural resources are not overlooked in the determination of public interest." 59 Fed. Reg. 10,854, 10,855 (Mar. 8, 1994) (codified at 36 C.F.R. pt. 254).

The Eighth Circuit has also found standing for injuries caused by "aspects of the agency's action" that occurred at the time of the decision. *Sierra Club v. Kimbell*, 623 F.3d 549, 557 (8th Cir. 2010) ("*Kimbell*"). In *Kimbell*, the plaintiffs challenged the Forest Service's issuance of the Forest Plan for the Superior National Forest. *Id.* at 553. In adopting the Forest Plan, the Forest Service chose one alternative, among several others, to manage the Superior National Forest. *Id.* at 555. The plaintiffs alleged injuries from potential timber harvests that could occur in the future as a result of the Forest Service's decision to select the chosen alternative. *Id.* at 557. *Kimbell* found the plaintiffs adequately alleged "injuries that occur with the adoption of the forest plan" and not "merely harms that arise at some future time after further analysis and action by the agency." *Id.* The court in *Kimbell* found standing because the Forest Service might have made a different decision that would not interfere with the plaintiffs' interests if the Forest Service "properly evaluated the impacts of its decision." *Id.*

Similarly, the Band alleges the Forest Service improperly evaluated alternatives to the Land Exchange that would have avoided harms to the Band. Dkt. 1 ¶ 69. The Band alleges the Forest Service arbitrarily eliminated a No Action Alternative where "there would be no" Land Exchange or Project. *Id.* ¶ 70. The Band alleges the Forest Service's evaluation of the No Action Alternative was arbitrary, *id.*, and this resulted in a deficient and unlawful

decision to approve the Land Exchange. *See id.* ¶¶ 116-19, 150-51. Had the Forest Service properly evaluated the impacts of its decision, the Forest Service may have chosen an alternative to the Land Exchange, including the No Action Alternative. This is the same type of injury the Eighth Circuit found sufficient for standing in *Kimbell*.

In addition, multiple other federal courts have found standing for plaintiffs challenging a land acquisition with injuries based on the intended use of the land. For example, the court in *TOMAC v. Norton*, 193 F. Supp. 2d 182 (D.D.C. 2002), found the plaintiffs had constitutional standing to challenge the Secretary of Interior's acquisition of land so that an Indian tribe could operate a casino on that land. There, the plaintiffs asserted various injuries to the enjoyment of their own properties from "a 24-hour-a-day casino attracting 4.5 million customers per year." *Id.* at 187. The *TOMAC* court recognized the plaintiffs' injuries were "not directly from the challenged act of placing the land in trust, but rather from the intended use of the land." *Id.* at 188. Nevertheless, the court found the plaintiffs' injuries were fairly traceable to the Secretary's acquisition because it was a "necessary prerequisite" to the tribe operating a casino on the land. *Id.*

TOMAC also noted the casino's environmental review under NEPA was "focused specifically on the land's intended use as a casino and that the evaluation would be used both by the Bureau [of Indian Affairs] in determining

whether to take the land into trust and by the National Indian Gaming Commission in approving any gaming applications by the [tribe]." *Id.* at 188 n.2.[8] That is exactly the situation here. The Land Exchange was a prerequisite to PolyMet's obtaining individual permits for its proposed mining operations. The FEIS was used for the Land Exchange and for all subsequent mining permit approvals. The FEIS's purpose—and the Land Exchange—was to allow PolyMet to develop its mine. *See* FEIS at ES-11 (purpose of project and Land Exchange); ES-55-57 (use of FEIS in decision-making).

The court in *Board of Commissioners of Cherokee County v. Jewel*, 956 F. Supp. 2d 116 (D.D.C. 2013), reached the same conclusion. In *Jewel*, the plaintiff challenged a decision by the Secretary of Interior to take land interests into trust for a tribe, which later resulted in the tribe opening a casino on the land. *Id.* at 125. The plaintiff alleged injuries related to increased costs for road maintenance caused by the casino. *Id.* The Secretary argued the plaintiff lacked standing because there was no "causal link" between her acquisition of the land, which did not authorize the casino's construction and operation, and the plaintiff's injuries caused by the casino. *Id.*

[8] The D.C. Circuit affirmed, finding "no serious question" about standing that warranted further discussion. *TOMAC, Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852, 860 (D.C. Cir. 2006).

The court in *Jewel* found it was "perfectly clear" that the tribe was not "legally entitled to build and operate a casino" before the land acquisition. *Id.* at 127. Indeed, before the acquisition, the tribe "could not just build on land that it did not control." *Id.* The Secretary's acquisition "removed this roadblock, with the apparent knowledge that the tribe intended to construct a casino." *Id.* As such, the court found the plaintiff had standing because its injuries resulting from the use of the property were "fairly traceable" to the Secretary's decision to acquire the interests in land for the tribe. *Id.*[9] *Jewel* found the issue of causation "simple" because "the tribe had no legal rights to the land" until the Secretary's acquisition. *Id.*

The same is true here. PolyMet acknowledges the Land Exchange "is a necessary condition of the permits." Dkt. 36 at 11. The FEIS states that "[w]ithout this exchange . . . the surface mining operation desired by PolyMet would not take place." FEIS ES-4. As in *Jewel*, PolyMet "could not just build on land that it did not control." 956 F. Supp. 2d at 127. The Forest Service removed that legal obstacle by approving the Land Exchange with the express purpose of facilitating PolyMet's "desire" to construct an open pit mine. Dkt. 1

[9] In the related context of prudential standing, the Supreme Court in *Match-E-Be-Nash-She-Wish Band of Potawatomi Indians v. Patchak*, 567 U.S. 209, 227 (2012), found neighbors alleging injuries from a tribe's proposed casino had standing to challenge the land acquisition. *Jewell* concluded the Supreme Court in *Patchak* had "implicitly reached the same conclusion" for purposes of constitutional standing. 956 F. Supp. 2d at 126 n.3.

¶ 51. There would be no purpose for the permits without the Land Exchange because PolyMet could not construct or operate the Project without it. *See* Dkt. 38-1 at 5.

In short, PolyMet cannot engage in a land exchange with the Forest Service for the express purpose of constructing an open pit mine, and then prevent the Band from being heard on why the Forest Service's decision in furtherance of that purpose was flawed and unlawful. The Court need not put on blinders and ignore the entire purpose of the Land Exchange, which is the root cause of the Band's injuries and would redress the Band's injuries if undone.[10] The Band has standing to challenge the Land Exchange.

II. Laches Does Not Bar the Band's Claims.

PolyMet also takes a shot at preventing the Band from seeking relief through the equitable defense of laches. Dkt. 36 at 14-20. Laches is an affirmative defense and PolyMet has the burden of proof. *Whitfield v. Anheuser-Busch, Inc.*, 820 F.2d 243, 244 (8th Cir. 1987); Fed. R. Civ. P. 8(c). PolyMet must prove the Band "is guilty of (1) unreasonable and unexcused delay, (2) resulting in prejudice to the defendant." *Whitfield*, 820 F.2d at 244

[10] PolyMet's reliance on *WaterLegacy v. USDA Forest Service*, 2019 WL 4757663, at *5 (D. Minn. Sept. 30, 2019), is misplaced. Dkt. 36 at 12 n.35. That decision was based on organizational standing, which is not at issue here. The Band presents different facts and legal theories than those considered in *WaterLegacy*, and which necessitate a different result.

(citing *Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 804 (8th Cir. 1979)). PolyMet has failed to demonstrate that laches applies here.

As an initial matter, PolyMet moved to dismiss for laches under Rule 12(b)(6). Dkt. 36 at 14 n.42. PolyMet has presented matters outside the pleadings, including factual assertions by Kevin Pylka, PolyMet's environmental manager. Dkt. 37 ¶¶ 4-5, 7-10. PolyMet asks the Court to convert its Rule 12(b)(6) motion into one for summary judgment "if necessary." Dkt. 36 at 14 n.42; Fed. R. Civ. P. 12(d). Curiously, PolyMet has not asserted laches or any prejudice against other plaintiffs that filed suit to set aside the Land Exchange not long after the Band. *See* Compl. for Decl. & Injunctive Relief, *Ctr. for Biological Diversity, et al. v. Haaland,* No. 022-cv-00181-PJS-LIB, at 41-42 (D. Minn. filed Jan. 25, 2022) ("*CBD*"). This should preclude PolyMet from asserting laches because it cannot be that somehow one plaintiff caused the company prejudice, but other plaintiffs did not, when all plaintiffs seek the same relief in cases brought around the same time.

For the reasons discussed below, the Court should choose to ignore PolyMet's extra-pleading material and deny the motion because laches is unavailable for a claim filed with the applicable statute of limitations, and PolyMet has alleged facts irrelevant to the issue of laches. *See Stahl*, 327 F.3d at 701 (district court had discretion to find matters outside the pleadings irrelevant, ignore them, and not convert into summary judgment motion).

If the Court accepts the material beyond the pleadings, the Band respectfully requests notice of the motion's changed status. Fed. R. Civ. P. 12(d). The Band respectfully requests this notice to avail itself of the procedures under Rule 56, including seeking time to take discovery on the issue of prejudice. Fed. R. Civ. P. 56(d)(2). The "general rule" is that "summary judgment is proper only after the nonmovant has had adequate time for discovery." *Iverson v. Johnson Gas Appliance Co.*, 172 F.3d 524, 530 (8th Cir. 1999) (internal quotation marks and citations omitted). The Band has not had the opportunity to discover and submit materials to respond to PolyMet's self-serving statements regarding prejudice. Dkt. 37 ¶¶ 4-10.

A. Laches is Unavailable Because Congress Provided a Six-Year Statute of Limitations for Actions Against the United States.

As a matter of law, PolyMet cannot invoke laches because Congress provided a six-year statute of limitations for actions brought against the United States. 28 U.S.C. § 2401(a). Based on the six-year statute of limitations, the Band has until January 8, 2023 to file suit challenging the Land Exchange. The Band brought this suit almost year before that deadline. PolyMet concedes the Band filed suit within the six-year statute of limitations that apply to claims brought against the United States under the APA. Dkt. 36 at 19.

The Supreme Court has recently held in "broad terms" that laches cannot be invoked when Congress has enacted a statute of limitations. *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 137 S. Ct. 954, 960 (2017).[11] In *Hygiene Products*, the Court found important separation of powers principles rendered laches unavailable in the face of a statute of limitations enacted by Congress. *Id.* at 960-61. The Court noted that laches and statutes of limitations "serve a similar function." *Id.* at 960. As such, "[w]hen Congress enacts a statute of limitations, it speaks directly to the issue of timeliness and provides a rule for determining whether a claim is timely enough to permit relief." *Id.* A statute of limitations "reflects a congressional decision that the timeliness of covered claims is better judged on the basis of a generally hard and fast rule rather than the sort of case-specific judicial determination that occurs when a laches defense is asserted." *Id.* The Court found that "applying laches within a limitations period specified by Congress would give judges a 'legislation-overriding' role that is beyond the Judiciary's power." *Id.* (citation omitted).

[11] PolyMet cites the Eighth Circuit's decision in *Gunderson v. BNSF Ry. Co.*, 850 F.3d 962, 972 (8th Cir. 2017), Dkt. 36 at 19, which was decided before the Supreme Court's decision in *Hygiene Products*. In any event, the Eighth Circuit in *Gunderson* only noted that laches *may apply* where no federal statute of limitations clearly applied, but did not apply it. 850 F.3d at 972.

Similarly, Congress provided a six-year statute of limitations for "every civil action commenced against the United States." 28 U.S.C. § 2401(a). Courts apply this limitations period to claims brought under the APA because they are in fact brought against the United States. *See Izaak Walton League of Am., Inc. v. Kimbell*, 558 F.3d 751, 758-59 (8th Cir. 2009). Thus, the court in *Slockish v. Federal Highway Administration*, No. 3:08-cv-01169-YY, 2021 WL 683485, at *1 (D. Or. Feb. 21, 2021), applied *Hygiene Products* to hold that laches did not apply to the plaintiffs' APA claims. The court noted the "Supreme Court has held that the doctrine of laches does not bar a suit filed within an applicable federal statute of limitations." *Id.* *Slockish* noted the concern in *Hygiene Products* that laches would give courts a "legislation-overriding role that is beyond the Judiciary's power." 2021 WL 683485, at *1 (quoting *Hygiene Products*, 137 S. Ct. at 960).

The Court should apply *Hygiene Products* to hold that laches is unavailable to claims brought under the APA and within the six-year statute of limitations. Congress has spoken on the timeliness of claims brought by plaintiffs against the federal government. 28 U.S.C. § 2401(a). The Band filed this suit comfortably within the time period Congress judged as appropriate. Accordingly, the Court should deny PolyMet's motion to dismiss for laches.

B. Even If Laches Were Available, PolyMet Has Not Shown Laches Applies.

Even if laches were available, PolyMet faces a heavy burden because laches is disfavored in environmental cases. *Minn. Pub. Int. Rsch. Grp. v. Butz*, 498 F.2d 1314, 1324 (8th Cir. 1974). This is because laches would allow the Forest Service to escape compliance with the law and the environmental issues, which go beyond the parties of this case, would not be addressed. *Id.* As noted above, PolyMet must prove the Band engaged in "unreasonable and unexcused delay" that caused "prejudice" to PolyMet. *Whitfield*, 820 F.2d at 244. There must be a "causal nexus" between the Band's delay and the prejudice to PolyMet. *Hurst*, 586 F.2d at 1200.

PolyMet overstates its case by claiming it would be "profound" to undo the Land Exchange and asserting the circumstances are "extraordinary." Dkt. 36 at 19, 20. In reality, very little has changed since the Forest Service transferred the Federal Land to PolyMet. The only thing extraordinary about these circumstances is that five years later, PolyMet has been unable to start construction because courts have found serious problems with different aspects of the Project. Dkt. 1 ¶ 49. This action seeks to protect the Band's rights and interests and have a court take a similar hard look at the decision that put this all into motion.

1. The Band Did Not Unreasonably Delay in Bringing This Suit.

In evaluating a plaintiff's delay in bringing suit, there is a presumption that "the action is not barred if brought within the statute of limitations." *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 169 n.3 (8th Cir. 1995), *overruled on other grounds by Rowe v. Hussmann Corp.*, 381 F.3d 775 (8th Cir. 2004). The Court should presume the Band's delay was reasonable because this action was brought within the APA's six-year statute of limitations. Further, PolyMet has not carried its burden to prove the Band's delay was unreasonable. PolyMet's contentions boil down to a claim that the Band's delay was unreasonable due to the mere passage of time. *See Hurst*, 586 F.2d at 1200 n.3 (rejecting the argument that the "lapse of five years alone is sufficient grounds to grant its motion") (quoting *Holmberg v. Armbrecht*, 327 U.S. 392 (1945)). The Band did not sit idly back and wait.

As PolyMet points out, the Band has been actively litigating to protect its interests against the Project. Dkt. 36 at 16-17. On January 24, 2022, the Band filed this action to challenge the Land Exchange. At that time, the permits PolyMet needs to construct and operate the mine were vacated, stayed or suspended. Dkt. 1 ¶ 49. That is still the case today. Until PolyMet filed its motion asserting laches, the Band was not aware of any other activities or transactions regarding the Federal Land since title was transferred.

In the face of on-going litigation and a statute of limitations that has yet to run, PolyMet cannot reasonably suggest that any of the underlying approvals for its Project were somehow insulated from challenge by the Band (or anyone else). And PolyMet itself acknowledges that the Land Exchange has been the subject of litigation by environmental groups, Dkt. 36 at 16. Although that Land Exchange litigation was initially dismissed without prejudice, *WaterLegacy*, 2019 WL 4757663 (dismissed Sept. 30, 2019), PolyMet is again subject to litigation challenging the Land Exchange by some of the same environmental groups. *CBD,* No. 22-cv-181 (D. Minn.).

The mere lapse of time does not support laches. Indeed, "laches doesn't require a plaintiff to 'sue soon, or forever hold [their] peace.'" *Steves & Sons, Inc. v. JELD-WEN, Inc.,* 988 F.3d 690, 718 (4th Cir. 2021) (citing *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 682 (2014)) (alteration in original). And PolyMet ignores that the Band is a sovereign government entity with many responsibilities and obligations.

The fact that the Band did not file its suit until this year is not extraordinary when no mining activities have been allowed to occur due to the Band's successful litigation. This suit was brought a year before the statute of limitation expired. And the Band was unaware until now that PolyMet disposed of any land it acquired through the Land Exchange. Even if PolyMet's speculation was correct that the Band decided to file suit based on how other

litigation was proceeding (Dkt. 36 at 17), it would not be unreasonable for the Band to consider weighing when to bring suit based on those other legal actions in these circumstances. *See, e.g., Petrella*, 572 U.S. at 682-83 (finding in a copyright infringement nothing untoward about waiting and seeing whether the infringer's exploitation undercuts the value of the copyright before bringing suit). PolyMet has simply not provided any basis for finding that the Band unreasonably delayed in bringing this action.

2. PolyMet Has Not Been Prejudiced.

To prevail on its laches defense, PolyMet must also prove it has been prejudiced and that such prejudice was *caused* by the Band's delay in bringing suit. Thus, the Eighth Circuit in *Hurst* found it was unnecessary to address the plaintiff's delay because the defendant failed to show destruction of an administrative record was caused by plaintiff's delay in filing suit. 586 F.2d at 1200. *Hurst* found no "causal nexus" because the defendant destroyed the administrative record due to a record retention requirement, not the plaintiff's delay. *Id.* Moreover, PolyMet cannot claim just *anything* as prejudice under the doctrine of laches. *Whitfield*, 820 F.2d at 245 ("Not all prejudice to a defendant will be recognized as supporting a defense of laches."). Nevertheless, PolyMet cobbles together a hodgepodge of alleged harms that have no causal connection to the Band's filing suit. As noted above, the Court

may accordingly disregard these irrelevant matters outside the pleadings and deny PolyMet's motion. *Stahl*, 327 F.3d at 701.

In *Daingerfield Island Protective Society v. Lujan*, 920 F.2d 32 (D.C. Cir. 1990), the D.C. Circuit considered a developer's laches defense to a land exchange with the National Park Service. In *Daingerfield*, the developer "hoped" that the project would one day channel traffic to a commercial building he planned to build. *Id.* at 33. But the developer's hopes remained unfulfilled when the plaintiffs filed suit sixteen years after the land exchange because "no construction" had started on the project. *Id.* In considering laches, the court in *Daingerfield* synthesized federal court decisions on laches in this context. *Id.* at 38-39. After reviewing these authorities, the court identified two factors that "have been accorded heavier weight." *Id.* at 38.

The first factor is "the percentage of estimated total expenditures disbursed at the time of suit." *Id.* PolyMet offers no evidence on the amount of money it has expended on its construction of the Project in relation to the "estimated total expenditures." As such, this factor weighs heavily against PolyMet's alleged prejudice.

The second factor synthesized in *Daingerfield* is a "crucial one" and turns on "the degree to which construction is complete." *Id.* at 39. Indeed, the courts applying laches in environmental cases have done so because the project has already been constructed. For example, in *Citizens & Landowners Against the*

Miles City/New Underwood Powerline v. U.S. Department of Energy, the Eighth Circuit noted laches "is not favored in environmental cases," but found the prejudice "substantial," because the "powerline is now complete and in operation." 683 F.2d 1171, 1175, 1177 (8th Cir. 1982).

But here, PolyMet has not even started construction on the Project because the permits issued to PolyMet are either vacated, stayed or suspended. Dkt. 1 ¶ 49. PolyMet stands in the same position as the developer in *Daingerfield*, who could only "hope" that the project would one day be constructed. PolyMet is no closer to constructing the Project than the day the Forest Service transferred the land. Since then, it has remained illegal for PolyMet to start construction on the Project and PolyMet has nothing to show it would have embarked on a different course of action had the Band filed suit earlier. Accordingly, the Court should disregard PolyMet's alleged harms because the company has failed to show evidence for any of the relevant factors in the environmental context.

Nevertheless, PolyMet alleges prejudice from (1) "ground disturbing activities" the company conducted over three years ago when other lawsuits against the Land Exchange were pending; (2) a wildfire caused by lightning in 2021; (3) a questionable land transfer to a different mining company that contradicts assertions made to the Forest Service; and (4) a conclusory assertion that some "people" use land the Forest Service acquired for "hunting

and recreational activities." These allegations of prejudice all fail on their own terms because they have no "causal nexus" to the Band's filing of this suit.

a. PolyMet's "ground-disturbing activities."

PolyMet alleges prejudice because the company has "done more drilling on its property" and this could "affect its value if the land exchange were somehow undone." Dkt. 36 at 17-18. PolyMet provides no actual evidence other than a statement in its brief that this drilling "could affect" the property's value. *Id.* This unsupported statement is plainly deficient to carry PolyMet's burden to show prejudice. More importantly, the Band alleges the Federal Land's principal value relates to pristine wetlands. Dkt. 1 ¶ 98. Because PolyMet's 404 permit is suspended, it would be illegal for PolyMet to have done anything to affect these wetlands. *See* 33 U.S.C. § 1311(a).

Further, PolyMet claims these "ground-disturbing activities" took place "during the summer of 2018" and the "winter of 2018-2019." Dkt. 37 ¶¶ 4, 5. The prior lawsuits challenging the Land Exchange were pending during this timeframe. *See WaterLegacy*, 2019 WL 4757663 (ordering dismissal on September 30, 2019). Regardless of whatever prejudice may exist, PolyMet cannot show a "causal nexus" between the Band's delay and the "ground-disturbing activities." *See Hurst*, 586 F.2d at 1200. PolyMet cannot credibly claim it would have chosen not to conduct "ground-disturbing activities" on the Federal Land if the Band had filed suit while the other suits were pending.

b. The 2021 Greenwood wildfire.

PolyMet also alleges prejudice because "some of the property PolyMet transferred to the Forest Service was damaged in the fall 2021 Greenwood fire." Dkt. 36 at 18. PolyMet asserts this damage "add[s] to the list of reasons that reversing the land exchange would be inequitable." *Id.* PolyMet cannot claim this damage as prejudice for purposes of laches, because the company utterly fails to show a "causal nexus" between when the Band filed suit and a wildfire. *Hurst*, 586 F.2d at 1200. It appears the Greenwood wildlife was caused by lightning and not by the Band's decision on when to file suit. *See* Derrick Bryson Taylor, A Wildfire in Minnesota Is Behaving like a 'Freight Train,' A Fire Official Said, New York Times (updated Aug. 24, 2021), https://www.nytimes.com/2021/08/24/us/greenwood-fire-minnesota.html.

A raging wildfire also does not obey property ownership. Officials described the Greenwood wildfire as a "freight train" that "feed[s] off itself" "[o]nce it starts rolling." *Id.* A raging wildfire would have damaged the land regardless of whether PolyMet or the Forest Service owned the property. Further, the land was likely better off under the Forest Service's ownership, given the governmental resources at the agency's disposal to protect land under federal ownership. PolyMet cannot claim damage to the land caused by a wildfire as prejudice for purposes of laches.

c. PolyMet's transfer of 759 acres to Northshore Mining Company.

PolyMet also alleges prejudice because the company "transferred" 759 acres of the Federal Land to Northshore Mining Company in April 2021. Dkt. 37 ¶ 6. This "transfer" only raises more questions than it answers. PolyMet presented the Court with only the limited warranty deed for this "transfer." Dkt. 38-1 at 55-60 (Ex. B). The deed provides the "total consideration for this transfer is less than $3,000." *Id.* at 56. PolyMet does not provide any evidence that it engaged in this "transfer" in reliance on the absence of a suit challenging the Land Exchange. PolyMet baldly asserts in its brief that the company "acted reasonably" and "has no way of getting that land back." Dkt. 36 at 17-18. PolyMet has provided no evidence to show any of this is true. Moreover, until PolyMet filed its motion, the Band was not aware of the transfer.

PolyMet's transfer of the land to Northshore also raises serious questions about the Forest Service's decision. The Band alleges the Forest Service improperly eliminated an alternative to the Land Exchange that "would have conveyed only the federal land . . . that would actually be used for the [Project]." Dkt. 1 ¶ 69. The Forest Service arbitrarily eliminated this alternative from consideration because PolyMet claimed it "needs more land to comply with air quality requirements that otherwise would not be met at the boundary of the Mine Site." *Id.* It is unclear why the Forest Service transferred more land

than PolyMet needed for the Project, if PolyMet was just going to turn around and transfer 759 acres to a different mining company. This does not say much about the quality of the Forest Service's decision-making, and it also raises issues of material fact regarding PolyMet's representations to the Forest Service about the purpose and need for the Land Exchange. PolyMet cannot seek the assistance of equity if it misled the Forest Service by insisting on land that was not needed for the Project. *See Precision Instrument Mfg. Co. v. Auto. Maintenance Machinery Co.*, 324 U.S. 806, 814 (1945) ("[H]e who comes into equity must come with clean hands.").

d. Use of the Hay Lake Tract by some "people."

Finally, PolyMet claims prejudice to the "public." Dkt. 36 at 19. PolyMet does not have standing to assert prejudice on behalf of some unidentified "people." Dkt. 37 ¶ 10. PolyMet only offers the self-serving statements of its environmental manager, Kevin Pylka. *Id.* Mr. Pykla tells the Court that he "understand[s] from personal conversations" that "people regularly use the large area known as the Hay Lake parcel for hunting and other recreational activities." *Id.* This self-serving statement should be afforded no weight. Mr. Pykla does not identify with whom he had these "personal conversations." *Id.* Mr. Pykla also does not identify any of these "people" that "regularly use" the "Hay Lake parcel." *Id.*

More importantly, the court in *Daingerfield* considered this issue and found it irrelevant to laches. 920 F.2d at 40. *Daingerfield* found such an inquiry would result in the Court "writing its own [environmental impact statement]" and essentially ruling on the merits of the dispute. *Id.* Indeed, the Band contends the public interest is better served by protecting the values of the Federal Land. Dkt. 1 ¶¶ 54-59, 93. But laches is a doctrine that prevents courts from reaching the merits of a case. Similarly, this Court should disregard this issue as not relevant and find that laches simply does not apply here.

CONCLUSION

For these reasons, the Band respectfully requests this Court deny PolyMet's motion to dismiss.

Respectfully submitted this 20th day of June 2022.

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