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September 5, 2021

*VIA ECF*

The Honorable Wilhelmina M. Wright
United States District Court
316 N. Robert Street
St. Paul, MN 55101

**Re:** ***Minnesota Dept. of Natural Resources, et al. v. White Earth Band of Ojibwe, et al.***
**U.S.D. Minn. Court File No. 21-CV-1869 (WMW/LIB)**

Dear Judge Wright:

Pursuant to Local Rule 7.1(j), the Department of Natural Resources requests leave to file a motion to reconsider your September 3, 2020 Order (Docket No. 20) dismissing Judge David DeGroat as a defendant and denying DNR's motion for a preliminary injunction. "Compelling circumstances" merit reconsideration for at least two reasons.

First, the Court dismissed Judge DeGroat *sua sponte*, with no argument from him that he is immune from suit in this matter, and with no briefing specific to this issue from DNR.

Second, under controlling Eight Circuit precedent, Judge DeGroat is a proper defendant in this matter and does not enjoy sovereign immunity from DNR's claims, even when sued in his official capacity. In dismissing Judge DeGroat, the Court interpreted *Fort Yates Public School District #4 v. Murphy*, 786 F.3d 662 (8th Cir. 2015) as requiring Judge DeGroat's dismissal. However, in *Fort Yates* the plaintiff sued the tribal *court*, not the tribal *judge* in an official capacity. For that reason, *Fort Yates* is inapposite here. The Eighth Circuit expressly allows *Ex Parte Young* suits to proceed against tribal judges sued in their official capacities, as long as only prospective relief is sought. *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1131 (8th Cir. 2019); *see also Fond du Lac Band of Chippewa Indians v. Carlson*, 68 F.3d 253, 255 (8th Cir. 1995)

The Eighth Circuit's 2019 *Kodiak* decision is directly applicable to this case. In *Kodiak*, tribal members sued non-tribal oil and gas companies in tribal courts alleging that the companies were breaching gas leases. 932 F.3d at 1130. The companies unsuccessfully challenged the tribal courts' subject matter jurisdiction in the tribal courts. They then filed federal actions (that were consolidated) alleging the tribal courts lacked jurisdiction, seeking declaratory and injunctive relief – including preliminary injunctions. *Id.* Unlike in *Fort Yates*, the *Kodiak* plaintiffs correctly named the chief judges of the tribal courts in their official capacities as the defendants, rather than the courts themselves. *Id.*

The *Kodiak* court agreed with the companies that the tribal courts lacked subject matter jurisdiction, and entered a preliminary injunction against the tribal court officials, who then appealed to the Eighth Circuit arguing they had sovereign immunity. *Id.* at 1131. The Eighth Circuit rejected the argument (*id.*):

> Here, the oil and gas companies seek only declaratory and injunctive relief, not damages. They also contend the tribal court officials exceeded the scope of their lawful authority. Thus, this case falls squarely within the *Ex parte Young* doctrine and is not barred by tribal sovereign immunity.

The underlying principle that federal courts have jurisdiction to review tribal court jurisdiction and enjoin tribal court proceedings is well established. *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985). In *Nat'l Farmers*, the Supreme Court held that non-members sued in tribal court have a federal-law right to challenge the tribal court's jurisdiction through a federal lawsuit. *Id.* This right can be vindicated through *Ex parte Young* actions for injunctive and declaratory relief directed to tribal officials in their official capacities. *See*, *e.g.*, *Kodiak*, 932 F.3d at 1131.

Given the clear authority directly on point, the fact the defendants did not argue for sovereign immunity, and the fact the Court did not take briefing specific to the *Ex parte Young*/official capacity issue, DNR meets the standard for reconsideration.

DNR also notes that while the White Earth Band of Ojibwe has sovereign immunity from suit, the immunity is waivable. Tribes and tribal courts often waive immunity in federal suits challenging the jurisdiction of tribal courts because of their desire to participate directly. *See*, *e.g.*, *Nevada v. Hicks*, 533 U.S. 353, 356 (2001); *Nord v. Kelly*, 520 F.3d 848, 852 (8th Cir. 2008). This is, of course, a decision for the White Earth Band of Ojibwe to make here. DNR does not seek reconsideration of the band's dismissal, as the band can move to intervene if it sees fit.

DNR seeks expedited treatment this request and any resulting motion practice.

Sincerely,

/s/ *Oliver J. Larson*
OLIVER J. LARSON
Assistant Attorney General

*Attorney for Minnesota Department of Natural Resources*

cc: Frank Bibeau (via ecf)
Joseph Plummer (via ecf)