PLUMER LAW OFFICE

Joseph Plumer
Attorney at Law

9352 N Grace Lake Rd SE
Bemidji, Minnesota 56601
Telephone: (218) 759-7052

September 8, 2021

Honorable Wilhelmina M. Wright
United States District Court for the District of Minnesota
316 N. Robert Street
St. Paul, MN 55101

Re: *Minnesota Department of Natural Resources, et al. v. White Earth Band of Ojibwe, et al.*, Case No. 21-cv-1869-WMW-LIB

Dear Judge Wright:

I represent Defendants the White Earth Band of Ojibwe and Hon. David A. DeGroat, Chief Judge of the White Earth Band of Ojibwe Tribal Court in the above-captioned case and write in response to Plaintiffs' request for leave to file a motion to reconsider the Court's September 3, 2021 Order (Doc. No. 20). For the reasons discussed below, the Order does not merit reconsideration.

First, contrary to Plaintiffs' assertion, tribal sovereign immunity is a "threshold jurisdictional matter" and a "jurisdictional prerequisite" that may be raised by a party at any time in the proceedings or "raised *sua sponte* by the court." *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 686 (8th Cir. 2011). As a threshold jurisdictional matter, the Court thus may properly dismiss Defendants from this case *sua sponte* on tribal sovereign immunity grounds. *See Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 434 (2007) ("[I]t is of course true that once a court determines that jurisdiction is lacking, it can proceed no further and must dismiss the case on that account.").

Second, Plaintiffs' contention that Judge DeGroat is a proper defendant and "does not enjoy sovereign immunity from DNR's claims, even when sued in his official capacity" is wrong. Tribal sovereign immunity "extends to tribal officials who act within the scope of the tribe's lawful authority." *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1131 (8th Cir. 2019). As a tribal official acting on behalf of the White Earth Band of Ojibwe, Judge DeGroat enjoys sovereign immunity from suit.

Third, Plaintiffs misunderstand the *Ex parte Young* exception to tribal sovereign immunity as applied to the facts of this case. Specifically, *Ex parte Young* holds that sovereign immunity "does not prevent federal courts from granting injunctive relief to prevent a continuing violation of federal law." *Green v. Mansour*, 474 U.S. 64, 68 (1985). The *Ex parte Young* exception only applies to an official acting contrary to applicable federal law. *Cory v. White*, 457 U.S. 85, 91

(1982); *see also N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 460 (8th Cir. 1983) ("*Ex parte Young* applies to the sovereign immunity of Indian tribes[.]"). Plaintiffs' Complaint does not contain any allegation that Judge DeGroat is acting contrary to federal law. This case is distinguishable from *Kodiak Oil & Gas*, where the plaintiffs' claims for relief were based on alleged violations of federal law. 932 F.3d at 1131–33. As such, the *Ex parte Young* exception is inapplicable to this case.

Fourth, because the *Ex parte Young* exception does not apply, Plaintiffs "bear the burden of proving that either Congress or [the White Earth Band of Ojibwe] has expressly and unequivocally waived tribal sovereign immunity." *Amerind*, 633 F.3d at 685–86. Plaintiffs allege no waiver. Plaintiffs' Complaint cites to no federal law that abrogates tribal sovereign immunity. As the Court found in its September 3, 2021 Order, lack of waiver is fatal to Plaintiffs' claims.

Finally, Plaintiffs' argument that federal courts have authority to "review tribal court jurisdiction and enjoin tribal court proceedings" is erroneous. The well-established tribal court exhaustion doctrine provides that a federal court should "stay . . . its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction." *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985). According to the Supreme Court, "[t]he federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts. At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts." *Id.* at 16–17.

The tribal court exhaustion doctrine is not optional. While the framework outlined by the Supreme Court in *Montana v. United States*, 450 U.S. 544 (1981), limits tribal court jurisdiction over nonmembers, tribal courts, including the White Earth Tribal Court, may properly exercise jurisdiction over certain cases involving nonmembers. As explained by the White Earth Tribal Court in its Order Clarifying the August 18, 2021 Order Denying the Motion to Dismiss, the Eighth Circuit has not "adopt[ed] a blanket rule that state political entities and their officials are beyond the purview of tribal court jurisdiction because of sovereign immunity." Doc. 16-1, at 5. Because the second *Montana* exception is particularly relevant to this case, the White Earth Tribal Court should have "the first opportunity to evaluate the factual and legal bases for the challenge[s]" to its jurisdiction. *Nat'l Farmers*, 471 U.S. at 856. The Court should reject Plaintiffs' attempt to bypass tribal court jurisdiction when tribal remedies have clearly not been exhausted.

Based on the foregoing, the Court should deny Plaintiffs' request to reconsider the Court's September 3, 2021 Order.

Sincerely,

/s/ Joseph Plumer
Joseph Plumer

Attorney for Defendants