UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Minnesota Department of Natural Resources, Commissioner Sarah Strommen, Deputy Commissioner Barb Naramore, DNR Section Manager Randall Doneen, Unnamed DNR Conservation Officers 1-10, Plaintiffs, v. The White Earth Band of Ojibwe and Hon. David A. DeGroat, in his official capacity as Judge of the White Earth Band of Ojibwe Tribal Court, Defendants	)	Case No. 21-cv-1869 (WMW/LIB) **MEMORANDUM IN SUPPORT OF DNR'S MOTION FOR A PRELIMINARY INJUNCTION**

In an unprecedented lawsuit, the White Earth Band of Ojibwe and associated parties (hereinafter the "Band") have sued the Minnesota Department of Natural Resources and DNR officials (hereinafter "DNR") in the Band's tribal court (the "Tribal Court") for injunctive and declaratory relief. The Band challenges actions DNR is taking off-reservation, concerning DNR's administration of State-law regulatory programs – most notably DNR's issuance of a dewatering permit for construction activities associated with the Line 3 replacement project. DNR has made every effort to respect the Tribal Court process, filing and briefing a motion to dismiss for lack of subject matter jurisdiction on an expedited basis in tribal court. That motion was denied. DNR has also requested a stay of tribal proceedings so that the subject matter jurisdiction issue can be litigated to a final resolution through the White Earth Band of Ojibwe's Court of Appeals and proceedings in

this Court. At this point, however, it is unclear that the Tribal Court will agree to a stay of proceedings, and the Band has brought a motion for a TRO.

DNR requires this Court's intervention to resolve the Tribal Court's lack of subject matter jurisdiction. DNR and its officials have sovereign immunity from suits in tribal courts. Even putting the issue of sovereign immunity aside, tribal courts have no subject matter jurisdiction over non-members – particularly State officials – for conduct occurring off-reservation in furtherance of State regulations. The Tribal Court denied DNR's motion to dismiss, holding that it has subject matter jurisdiction because the issues in suit are "vital" to the Band's interests, and overrode DNR's claim to sovereign immunity. There is no vital interest exception conferring subject matter jurisdiction on the Tribal Court. And to the extent the Band has vital interests to secure that are justiciable, it has a federal forum in which to pursue those interests. DNR is entitled to a preliminary injunction against further proceedings in Tribal Court.

BACKGROUND

On August 5th, Manoomin[1], the White Earth Band of Ojibwe, its tribal council, and a mix of individual band members and non-band members filed suit against the DNR and DNR officials in Tribal Court. (Band Compl. ¶¶ 20-40.)[2] The individual defendants

[1] Manoomin is wild rice, which in the Band's Tribal Court can bring suit. *See* White Earth Band of Ojibwe code *1855 Treaty Authority Resolution Establishing Rights of Manoomin*, a copy of which is available here: https://whiteearth.com/divisions/judicial/forms.

[2] The Band's complaint in Tribal Court, without exhibits, is attached to the DNR complaint here as Exhibit A.

named by the Band were the DNR Commissioner, two named DNR employees, and ten unnamed conservation officers. (*Id.* at 41-45.) The Band sued DNR officials in their official and individual capacities. (*Id.*)

The Band's complaint pleads seven counts. (*Id.* ¶¶ 58-85.) Counts I and II seek a declaration that application of State wild rice regulations to members of the White Earth Band of Ojibwe conflicts with usufructuary rights that were granted to band members under the Treaty with the Chippewa, 1855 (the "1855 Treaty"). Count III seeks a declaration that the State's failure to recognize certain usufructuary rights under the 1855 Treaty, while recognizing them under other treaties, violates equal protection principles. Count IV seeks a declaration that DNR and named defendants violated the Fourth Amendment and the Band Members' due process rights by "seizing" 5 billion gallons of water when issuing the appropriation permit to Enbridge Energy, Limited Partnership for Line 3 dewatering activities. Count V seeks a declaration that tribal members' right to exercise certain usufructuary rights is guaranteed by the First Amendment and the American Indian Religious Freedom Act. Count VI seeks a declaration that DNR failed to adequately train staff on Band Members' usufructuary rights under the 1855 Treaty. Count VII seeks a declaration that DNR and the named defendants violated the *Rights of Manoomin* – a tribal legal code adopted by the Band that creates certain rights conferred on Manoomin.

Much of the Band's tribal complaint concerns its argument that DNR violated the 1855 Treaty by issuing a groundwater appropriation permit to Enbridge Energy, Limited Partnership for construction dewatering associated with the construction of the Line 3 replacement pipeline outside of the White Earth Reservation. (*Id.* ¶¶ 1, 46-57.) The Band

also pleads that Band members and individuals associated with the Band have been charged with State-law trespass for actions taken to stop the construction of Line 3, though the Band pleads no counts based on these allegations. (*E.g.* ¶ 28.)

All of the Bands' counts seek either declaratory or injunctive relief directed to the DNR, its Commissioner, or the two named DNR employees. (*Id.* ¶¶ 58-85, "Remedies".) All of the relief is directed to DNR or its officials in their official capacities. (*Id.*) The Band seeks no relief that any official could offer in their individual capacity. (*Id.*)

DNR moved to dismiss the complaint, agreeing to expedited briefing. (Larson Dec. ¶ 3.) The DNR filed motion and supporting papers on August 12. (*Id.*) A hearing was held on August 16. (*Id.*) On August 18, the Tribal Court denied the DNR's motion to dismiss. In relevant part, the Tribal Court held that the Bands' vital interests were at stake, and as a result the Tribal Court had subject matter jurisdiction over non-members for their conduct occurring off-reservation under *Montana v. U.S.*, 450 U.S. 544, 565 (1981). (Tribal Court Order at 5.)[3] For the same reason, the Tribal Court Order held DNR was not entitled to sovereign immunity.

On August 19, DNR moved to stay further proceedings pending a potential interlocutory appeal to the Band's court of appeals, and this federal court action. (Larson Dec. ¶ 3.) The Band requested until August 23 to file a response to the motion for a stay. (*Id.* ¶ 4.) The Band filed only a perfunctory response to the motion for stay on August 23, instead focusing its efforts on drafting and filing a motion for a TRO. (*Id.* ¶ 5.) The parties

[3] The Tribal Court Order is attached as Exhibit B to the DNR's complaint.

thereafter corresponded with the Tribal Court concerning the status of further proceedings. (*Id.* ¶ 6.) At present, it is unclear if the Tribal Court will proceed with the TRO. (*Id.* ¶ 7.)

Also on August 19, DNR filed this suit to enjoin further proceedings in Tribal Court. DNR named the White Earth Band of Ojibwe and the Honorable David A. DeGroat as defendants. Judge DeGroat is named in his official capacity for purposes of the injunctive relief, which is the customary practice in these types of matters. *See*, *e.g.*, *Nevada v. Hicks*, 533 U.S. 353 (2001). DNR initially delayed filing a motion for a preliminary injunction to determine if the Tribal Court would stay further proceedings – allowing the issue in this suit to be handled on a motion for judgment on the pleadings instead. (Larson Dec. ¶ 5.) Given the uncertainty of the Tribal Court stay, DNR now proceeds with a motion for a preliminary injunction.

ARGUMENT

Tribal, state, and federal courts all recognize the principle of sovereign immunity, which prevents one sovereign from hailing another sovereign into its courts in the absence of a waiver or abrogation of that immunity. *See Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 289 (Minn. 1996). Tribal nations throughout Minnesota, including the White Earth Band of Ojibwe, rely on the principle of sovereign immunity when sued in state or federal courts. *See, e.g., id.*; *Harper v. White Earth Hum. Res.*, No. CV 16-1797 (JRT/LIB), 2017 WL 701354, at *1 (D. Minn. Feb. 22, 2017) (dismissing action on motion of the White Earth Band of Ojibwe asserting sovereign immunity).

The State of Minnesota, and its agencies, are entitled to the same defense when sued in tribal courts. *State of Montana v. Gilham*, 133 F.3d 1133, 1135 (9th Cir. 1998). Even

in the absence of sovereign immunity, the Tribal Court lacks subject matter jurisdiction to hear the claims pled by the Band because the DNR and its officials are not members of the Band, and the acts challenged occurred off-reservation. Tribal courts have a limited jurisdiction that is delineated by federal law, which does not extend to off-reservation conduct by non-members – let alone a sovereign state exercising its regulatory authority. *See*, *e.g.*, *Duro v. Reina*, 495 U.S. 676, 679 (1990); *Nevada v. Hicks*, 533 U.S. 353, 358 (2001); *Montana v. U.S.*, 450 U.S. 544, 565 (1981). The DNR is entitled to a preliminary injunction to preclude further proceedings in the Tribal Court. *Nevada*, 533 U.S. at 358.[4]

I. LEGAL STANDARD

This Court has jurisdiction to review and enjoin the Tribal Court's determination of its own subject matter jurisdiction, and does so *de novo* without regard to the Tribal Court's holdings. *Nord v. Kelly*, 520 F.3d 848, 852 (8th Cir. 2008) ("Determining the extent to which an Indian tribe has the power to compel a non-Indian to submit to the civil jurisdiction of a tribal court is a question of federal law, and we review the issue de novo.") (citations omitted).

Federal courts consider four factors in determining whether to grant a preliminary injunction: (1) the threat of irreparable harm to the moving party; (2) the balance between this harm and the injury that granting the injunction would inflict on the non-moving party; (3) the moving party's likelihood of success on the merits; and (4) the public

[4] Pursuant to *Nevada*, states are not required to exhaust remedies in tribal courts before challenging the tribal court's jurisdiction in federal court where, as here, the tribal court's lack of jurisdiction is clear. *Nevada*, 533 U.S. at 358

interest. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). In the Eighth Circuit, the likelihood-of-success factor is the most important of the four *Dataphase* factors. *Barrett v. Claycomb*, 705 F.3d 315, 320 (8th Cir. 2013).

II. THE DNR IS LIKELY TO SUCCEED ON MERITS OF ITS CLAIM THAT THE TRIBAL COURT LACKS JURISDICTION.

The Tribal Court lacks subject matter jurisdiction for at least two reasons. First, DNR and its officials enjoy sovereign immunity with respect to all counts pled by the Band. Second, even in the absence of sovereign immunity the Tribal Court would lack subject matter jurisdiction to hear suits against DNR and its officials, none of whom are tribal members, on the claims pled by the Band.

A. The DNR and Its Officials Have Sovereign Immunity from Suit in Federal Court.

States enjoy absolute sovereign immunity from suit in the courts of other states, or in tribal courts. *Franchise Tax Bd. of California v. Hyatt*, __ U.S. __,139 S. Ct. 1485, 1493, 203 L. Ed. 2d 768 (2019); *Gilham*, 133 F.3d at 1135. This immunity originates in the inherent sovereign immunity afforded to all states, as confirmed by the Eleventh Amendment – which shields states from tribal suits even in federal court unless there is a waiver from the State, or an explicit abrogation of that sovereignty in federal law. *See*, *e.g.*, *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 53 (1996) (holding that in the absence of federal abrogation, inherent sovereign immunity of the states shields them from suits brought by tribes, even in federal courts); *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 782 (1991) (same); *Gilham*, 133 F.3d at 1137 (same). Notably, the reverse is also true – tribes retain sovereign immunity from suit in state or federal court,

even on an action brought by a state, unless there has been a waiver or abrogation under federal law. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 791 (2014).

Federal law abrogates sovereign immunity and Eleventh Amendment immunity for some types of treaty claims – but in a limited fashion that allows for suit only in federal court, and only against state officials in their official capacity under an *Ex Parte Young* analysis. *See* 28 U.S.C. §§ 1331, 1362; *see also*, *e.g.*, *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997) (holding tribal claims are subject to the Eleventh Amendment, and tribes are therefore limited to bringing suits against states through official capacity suits for prospective injunctive relief under *Ex Parte Young*); *Mille Lacs Band of Chippewa Indians v. State of Minnesota*, 853 F. Supp. 1118, 1129 (D. Minn. 1994).

Here, the Band sued in tribal court, not federal district court. As a result, there is no applicable abrogation of Minnesota's sovereign immunity or Eleventh Amendment immunity, and DNR is immune from the Band's suit in in tribal court. *Id.* The Band's naming of individual defendants in their official or individual capacities changes nothing. Sovereign immunity extends to both state agencies and state officials acting in their official capacities, as well as state officials in their individual capacities if the suit challenges state policies or procedures. *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 269; *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1043 (8th Cir. 2000); *Weeks Constr., Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 668, 670 (8th Cir. 1986); *Harper v. White Earth Hum. Res.*, No. CV 16-1797 (JRT/LIB), 2017 WL 701354, at *1 (D. Minn. Feb. 22, 2017). Here, the plaintiffs challenge state policies and procedures. When "suit is commenced against state officials, even if they are named and served as individuals, the

State itself will have a continuing interest in the litigation whenever state policies or procedures are at stake." *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 269. As a result, state agencies and state officials are immune when, as here, the suit challenges state policies or procedures irrespective of the label the plaintiff uses to describe the action. *Id.*

There is also no "vital interest" exception to sovereign immunity. No federal case has rejected sovereign immunity on the basis that the suit concerned a matter of vital interest to the forum state. Instead the reverse is true – cases analyzing sovereign immunity describe a state's interest in its own sovereign immunity as a "vital interest" that *requires* application of sovereign immunity in the absence of a specific waiver or abrogation. *Id.* at 274 (dismissing tribal claim against Idaho brought in federal court on the basis of sovereign immunity, holding "it is acknowledged that State have real and vital interests in preferring their own forums in suits brought against them")

Because DNR and its officials are likely to succeed with a sovereign immunity defense, this factor favors entry of a preliminary injunction.

B. Even in the Absence of Sovereign Immunity, The Tribal Court Lacks Subject Matter Jurisdiction Over the Claims Pled.

Tribal courts are courts of limited jurisdiction. *Plains Commerce Bank . Long Family Land and Cattle Co.*, 554 U.S. 316, 324 (2008); *Attorney's Process and Investigation Services, Inc. v. Sac & Fox Tribe of Mississippi in Iowa*, 609 F.3d 927, 934 (8th Cir. 2010). Whether "a tribal court has adjudicative authority over nonmembers is a federal question." *Id.* Here, the DNR and its officials are not members of the Band. As a general matter, tribal courts lack jurisdiction over non-members. *See*, *e.g.*, *Duro*, 495 U.S.

at 679; *Nevada*, 533 U.S. at 358; *Montana*, 450 U.S. at 565. There are two narrow exceptions to this general rule, neither of which applies here.

First, tribal courts may exercise jurisdiction over non-members where the non-member enters into a consensual relationship with the tribe though commercial dealings or a similar arrangement. *Id.* Here, there are no commercial dealings or similar arrangements between DNR and the White Earth Band of Ojibwe on the subject matters of this suit, the Band has not argued that there are, and the Tribal Court did not rule that there are.

Second, tribal courts may exercise jurisdiction over non-members if their conduct occurs *on* tribal or trust lands within its reservation, or "*on* fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566 (emphasis added). In the Tribal Suit, the Band pleads no acts on lands in the White Earth Reservation – tribal, trust or fee. Line 3 does not cross any part of the White Earth Reservation.[5] (Doneen Dec. ¶ 2.) The DNR dewatering permits the Band challenges were issued in St. Paul. (*Id.* ¶ 3.) The DNR conduct alleged by the Band involves the administration of a State-law regulations to a State-issued permit, for conduct off the White Earth Reservation.

[5] If Line 3 crossed the White Earth Reservation that might confer jurisdiction over Enbridge, but it would not confer jurisdiction over State agencies or their personnel for their conduct in administering State regulatory programs connected to Line 3. *Montana*, 450 U.S. 557. By way of example, Line 3 crosses part of the Fond du Lac Band's Reservation, and as a result, that band has exercised jurisdiction over the Line 3 project on issues such as the wetlands certifications inside the reservation necessary for Enbridge to obtain a permit under the federal Clean Water Act.

The two seminal cases on tribal jurisdiction over nonmembers, *Montana* and *Nevada,* are particularly instructive. In *Montana*, the Supreme Court considered whether a tribe could regulate hunting and fishing by non-members on fee lands *within* the reservation. *Montana*, 450 U.S. 557. The Supreme Court held the tribe could not – generally limiting the legislative power of tribes over non-members to situations in which they act on tribal or trust land within the reservation. *Id.* *Montana* is dispositive of the Tribal Court's jurisdiction over the Band's claims. If tribes lack jurisdiction to regulate hunting and fishing of non-members even within some parts of the reservation, they clearly lack the authority to regulate the conduct of non-members (particularly State officials) off-reservation. *Id.* Here, that is what the Band is attempting to do – regulate the conduct of State officials acting off-reservation with respect to the State's regulation of an off-reservation project. And because the jurisdiction of tribal courts extends no further than the tribe's legislative authority, tribal courts have no jurisdiction over non-members for acts occurring off-reservation. *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997).

In *Nevada*, the Supreme Court further limited the jurisdiction of tribal courts for suits against State officials. That case involved a state game warden who executed a search warrant inside a reservation at the home of a tribal member for an alleged crime occurring off-reservation. *Nevada*, 533 U.S. at 355-56. The member sued the officer in tribal court on a Section 1983 claim, alleging the officer violated his constitutional rights in conducting the search. *Id.* at 357. The Supreme Court held that the tribal court lacked jurisdiction to hear the claims, and the plaintiff was instead required to bring his suit in federal court. *Id.* Like *Montana*, *Nevada* is dispositive here. If tribal courts lack jurisdiction over claims for

acts taken by state officials *on* the reservation by non-members, they clearly lack jurisdiction over claims for acts by state officials *off* the reservation.

The Tribal Court nonetheless held that it had jurisdiction under *Montana* on the basis that the Band had a vital interest in protecting waters and wild rice. The Tribal Court, however, ignored an important limiting principle of *Montana* – it applies only to on-reservation conduct. The *Montana* exception cited by the Tribal Court for acts that threaten "the health or welfare of the tribe" is expressly limited to conduct that occurs "*on fee lands*" within the boundaries of the reservation. *Montana*, 450 U.S. at 566 (emphasis added). None of the conduct the Band challenges occurred within the boundaries of the White Earth Reservation.

The Tribal Court's reliance *Montana* is further misplaced because it focuses on an exception for jurisdiction left open by *Montana* while ignoring its actual holding. In Montana, the Supreme Court rejected tribal authority over the conduct of non-members even *on* the reservation. It is a case limiting tribal court jurisdiction. It then discusses, in passing, an exception to its limitation that allows tribes to regulate the conduct of nonmembers *on fee lands* in the reservation in limited circumstances. The Tribal Court decision here turns *Montana* on its head – reading a case *limiting* tribal court jurisdiction on reservation as a case *expanding* tribal court jurisdiction off-reservation.

The limits of the *Montana* exception (to on-reservation conduct) is also recognized by other tribal court decisions – including the one tribal decision cited by the Tribal Court here, *Dale Nicholson Tr. v. Chavez*, 5 Am. Tribal Law 365, 2004 WL 5658105 (Navajo Jan. 6, 2004). (*See* Tribal Court Order at 1 n.1.)

Nicholson involved a suit brought in Navajo tribal court against New Mexico tax officials who were seeking to enforce a state tax lien against the property of a tribal member. *Id.* at 368. The state officials did not appear, and the trial court dismissed *sua sponte*, finding it had no subject matter jurisdiction. *Id.* On an unopposed appeal, the Navajo Supreme Court remanded for further proceedings, holding that the tribal member might be able to make out a factual showing of sufficient contact with the reservation to establish jurisdiction under the *Montana* exceptions. *Id.* at 374. However, the *Nicholson* court also *expressly* recognized that for the *Montana* exceptions to apply, the conduct at issue must have occurred inside the reservation:

> [I]n a situation where a plaintiff sues state officials, the general rules discussed above . . . apply in our courts. The plaintiff must allege that the cause of action arises on one of two categories of land: (1) tribal land, or (2) non-Indian owned fee land. If the activity is on the first category of land, no other showing is needed to establish jurisdiction. If on the second category, the plaintiff must allege fulfillment of one of the two *Montana* exceptions, with as much information as the plaintiff has before discovery or an evidentiary hearing.

Id. The *Nicholson* court then remanded for evidentiary showings on, among other things, "the status of the land on which [the] cause of action" arose. *Id.* As a result, if the Tribal Court here had actually followed *Nicholson*, it would have dismissed the Band's suit.

Finally, the Tribal Court's holding is precluded by *Duro*, supra. The Band's arguments, and the Tribal Court's ruling, are grounded in arguments that the Band has inherent retained authority independent of any grant of authority from the federal government. Put another way, the Band argues that it never surrendered authority to legislate in the ceded territory in Minnesota, and never surrender authority to exercise

judicial authority in the ceded territory, and therefore retains those powers even as applied to State officials. Even under the most favorable construction of the applicable case law, this is only half right – with the wrong half being fatal to the argument.

Tribes do retain some inherent authority arising out of their "retained sovereignty." But that authority extends *only* to the tribe's own members. *Duro*, 495 U.S. at 679 (holding that the "retained sovereignty" of a tribe does not extend "outside its own membership"). The issue in *Duro* was whether a tribe could exercise criminal jurisdiction over an Indian nonmember for conduct on the reservation. *Id.* The tribe argued it had "retained sovereignty" to adjudicate such matters. *Id.* The Supreme Court held it did not, because retained sovereignty could confer jurisdiction only over the tribe's own members. *Id.* Congress fixed this issue (in the appropriately named *Duro* fix) by passing a federal statute extending tribal jurisdiction over criminal matters occurring on reservation to all Indians, irrespective of tribal membership. *See* 25 U.S.C. § 1301(2); *United States v. Lara*, 541 U.S. 193, 200 (2004). But the principle of *Duro* remains good law – tribes have no inherent authority over nonmembers. As a result, the Band and the Tribal Court have no "inherent" authority to exercise jurisdiction over the State, DNR, or its officials. And there is no *Duro* fix to apply in this civil matter.

Because DNR is likely to succeed with its claim that the Tribal Court has no subject matter jurisdiction over State officials for conduct occurring off-reservation, this Court should enter a preliminary injunction enjoining the Tribal Court from exercising subject matter jurisdiction over DNR and its officials.

III. THE DNR FACES IRREPARABLE HARM IN THE ABSENCE OF A PRELIMINARY INJUNCTION.

DNR faces two types of irreparable harm if this Court does not enter a preliminary injunction to prevent further proceedings in the Tribal Court.

First, if the DNR is forced to litigate the merits of the Band's suit in tribal court, the DNR would lose the benefit that sovereign immunity confers – the ability to avoid suit in a foreign court. Federal courts recognize a loss of immunity as an irreparable harm, irrespective of the potential outcomes of the litigation, because the litigation itself brings harm. *See*, *e.g.*, *Parton v. Ashcroft*, 16 F.3d 226, 228 (8th Cir. 1994); *McSurely v. McClellan*, 697 F.2d 309, 317 (D.C. Cir. 1982); *Briggs v. Goodwin*, 569 F.2d 10, 60 (D.C. Cir. 1977).

Second, the State faces the very real possibility the Tribal Court will enter a TRO or preliminary injunction based on an application of tribal law, or a tribal interpretation of the 1855 Treaty. The injunction the Band seeks would, among other things, putatively require the DNR to rescind DNR-issued construction dewatering permits. (Band Compl. p. 14, p. 46 ¶ 86.) This would constitute a direct interference with the DNR's administration of a State-law regulatory program concerning a project located off-reservation. This qualifies as irreparable harm.

The DNR clearly meets the requirements for showing irreparable harm, and this factor favors the entry of a preliminary injunction.

IV. THE BALANCE OF HARMS FAVORS THE DNR.

As set forth above, in the absence of a preliminary injunction, the DNR will suffer significant harms of the exact type its sovereign immunity is designed to prevent. In contrast, the harms the Band faces would be temporary and capable of remedy.

First, this Court will be the ultimate arbiter of the Tribal Court's subject matter jurisdiction – and thus there is no harm in advancing an adjudication of that issue through a preliminary injunction. Unlike a judgment from a state or federal court in which the court rules on its own subject matter jurisdiction, a tribal court determination that it has subject matter jurisdiction is not entitled to full faith and credit, and is subject to a *de novo* collateral attack. *Nevada*, 533 U.S. at 369; *Nord v. Kelly*, 520 F.3d 848, 852 (8th Cir. 2008). As a result, even if the DNR litigates the Tribal Court matter to a full resolution in Tribal Court, and an adverse judgment is entered against DNR, DNR can then initiate a federal court action challenging the Tribal Court's jurisdiction – and this Court would review the exact issue now before it. *Nord*, 520 F.3d at 852. As a result, the only harm the Band faces from the preliminary injunction is an early determination that the Tribal Court lacks jurisdiction. Indeed, because the Tribal Court's lack of jurisdiction is apparent from the face of the Band's complaint, it would be appropriate for the Court to advance the final decision on this matter to the preliminary injunction phase of this case. *See* Fed. R. Civ. Proc. 65(a)(2); *Branson Label, Inc. v. City of Branson, Mo.*, 793 F.3d 910, 914 (8th Cir. 2015) (holding that where a party makes a facial challenge to a court's subject matter jurisdiction, the issue can be decided as a matter of law on a motion for judgment on the pleadings).

Second, a preliminary injunction would not leave the Band without recourse. To the extent the Band has valid claims for which there are no applicable immunities, those claims can be brought in federal district court under an *Ex Parte Young* basis. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997). Indeed, that is the mechanism the Mille Lacs Band Ojibwe used to successfully litigate its claims for usufructuary rights against the State. *Mille Lacs Band of Chippewa Indians v. State of Minnesota*, 853 F. Supp. 1118, 1129 (D. Minn. 1994). Entering a preliminary injunction recognizing the Tribal Court's lack of subject matter jurisdiction would simply require the Band to bring its claims in an appropriate forum. The balance of harms therefore favors entry of a preliminary injunction.

V. THE PUBLIC INTEREST FAVORS ENTERING THE PRELIMINARY INJUNCTION

The public interest also favors entering the preliminary injunction. In addition to being required by well-established case law, a failure to recognize the DNR's sovereign immunity would lead to jurisdictional chaos. One of the animating principles behind sovereign immunity is comity. *Franchise Tax Bd. of California v. Hyatt*, __ U.S. __, 139 S. Ct. 1485, 1492, 203 L. Ed. 2d 768 (2019). For a sovereign to assert immunity, it must in turn confer immunity on other sovereigns. *Id.* The White Earth Band of Ojibwe zealously protects its own sovereign immunity when sued in state or federal court, as it should. *See Harper v. White Earth Hum. Res.*, No. CV 16-1797 (JRT/LIB), 2017 WL 701354, at *1 (D. Minn. Feb. 22, 2017). Minnesota courts recognize tribal sovereign immunity, including the Band's. *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 289 (Minn. 1996). Public policy requires reciprocity.

While the mutual immunities of tribes and states certainly produces challenges when there are disputes between them that is not a basis to reject sovereign immunity. "The States and Indian tribes, as co-existing sovereigns with significant and complex commercial, governmental and property interrelationships, often require a mechanism to determine their respective rights and interests." *State of Montana v. Gilham*, 133 F.3d 1133, 1135 (9th Cir. 1998). "Finding a forum to resolve disputes is problematic, for each sovereign naturally defends the jurisdictional reach of its own courts and resists being "dragged before" the courts of the other." *Id.* The solution dictated by the constitution and federal law, as a matter of sound public policy, is to limit suits between a tribe and a state to federal court. *Id.* Public policy therefore favors entry of a preliminary injunction.

CONCLUSION

For the reasons set forth above, the Court should enter a preliminary injunction enjoining further proceedings in the Tribal Court for lack of subject matter jurisdiction.

Dated: August 24, 2021

Respectfully submitted,

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