No. 21-3050

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MINNESOTA DEPARTMENT OF NATURAL RESOURCES *et al.*,
Appellants,

v.

WHITE EARTH BAND OF OJIBWE *et al.*,
Appellees.

Appeal from the United States District Court
for the District of Minnesota
Hon. Wilhelmina M. Wright, District Judge
Case No. 0:21-cv-01869-WMW-LIB

BRIEF OF *AMICI CURIAE* BAY MILLS INDIAN COMMUNITY, LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, RED LAKE BAND OF CHIPPEWA INDIANS, SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, AND ST. CROIX CHIPPEWA INDIANS OF WISCONSIN IN SUPPORT OF APPELLEES WHITE EARTH BAND OF OJIBWE AND DAVID A. DEGRAOT AND AFFIRMANCE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), *Amici Curiae* Bay Mills Indian Community, Lac Courte Oreilles Band of Lake Superior Chippewa Indians, Lac du Flambeau Band of Lake Superior Chippewa Indians, Red Cliff Band of Lake Superior Chippewa Indians, Red Lake Band of Chippewa Indians, Sault Ste. Marie Tribe of Chippewa Indians, and St. Croix Chippewa Indians of Wisconsin are federally recognized Tribal Nations, not nongovernmental corporations.

INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae Bay Mills Indian Community, Lac Courte Oreilles Band of Lake Superior Chippewa Indians, Lac du Flambeau Band of Lake Superior Chippewa Indians, Red Cliff Band of Lake Superior Chippewa Indians, Red Lake Band of Chippewa Indians, Sault Ste. Marie Tribe of Chippewa Indians, and St. Croix Chippewa Indians of Wisconsin are federally recognized Tribal Nations (collectively, "*Amici*"). 86 Fed. Reg. 7,554, 7,554-57 (Jan. 29, 2021).

As Tribal Nations, *Amici* have strong sovereign interests in Tribal Nations' ability to make, enforce, and be governed by their own laws; ensuring the continuation of cultural, spiritual, and subsistence lifeways of Tribal communities through the protection of cultural, natural, and water resources, as well as treaty-reserved rights and treaty-protected resources; in safeguarding the political integrity, economic security, and health and welfare of Tribal Nations; and in defending Tribal Nations' exercise of civil adjudicatory and regulatory jurisdiction over the activities and conduct of both Indians and non-Indians that threaten these sovereign interests and resources. These interests are at the core of Tribal sovereignty and are implicated

[1] This brief is filed without leave of the Court because the Parties have consented to its filing. Fed. R. App. P. 29(a)(2). *Amici* certify that none of the Parties' counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting this brief, and no person—other than *Amici*, their members, or its counsel—contributed money that was intended to fund preparing or submitting this brief. Fed. R. App. P. 29(a)(4)(E).

in this case. *Amici*, therefore, have strong interests in this case and, more generally, in Tribal Nations' ability to defend these interests through the exercise of their inherent civil adjudicatory and regulatory authority over non-Indians. This brief reflects *Amici*'s experiences, interests, and perspectives in defending and protecting these sovereign interests and resources.

INTRODUCTION

In its opening brief, Appellants Minnesota Department of Natural Resources, Sarah Strommen, Barb Naramore, Ronald Doneen, and Unnamed DNR Conservation Officers 1-10 (collectively, "the State") argue that Appellees White Earth Band of Ojibwe and David A. DeGroat (together, "White Earth Band") lack jurisdiction over the State in the underlying Tribal Court proceeding because, in the State's view, the activities subject to the Tribal Court proceeding "do not cross any part of the White Earth Reservation." Appellants' Br. & Addendum at 23 (Doc. 5081593) (citation omitted). The State claims that "[t]his is dispositive of whether there is any colorable basis for tribal court jurisdiction[,]" *id.*, and asserts that "tribal courts have no jurisdiction over nonmembers from acts occurring off-reservation." *Id*. at 24 (citation omitted). *Amici* address the State's mischaracterization of the law in this brief.

"The exercise of tribal jurisdiction over activities of non-Indians is an important part of tribal sovereignty." *Bruce H. Lien Co. v. Three Affiliated Tribes*,

93 F.3d 1412, 1419 (8th Cir. 1996) (citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987)). Tribal Nations may exercise this authority over non-Indians when non-Indians' activities and conduct "'implicate[] tribal governance and internal relations.'" *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa*, 609 F.3d 927, 936 (8th Cir. 2010) (quoting *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 335 (2008)). "Threats to tribal natural resources, including those that affect tribal cultural and religious interests, constitute threats to tribal self-governance, health and welfare." *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 935 (9th Cir. 2019) (citations omitted).

Non-Indian activities and conduct effecting Tribal water resources pose a sufficient threat to the political integrity, economic security, and health and welfare of Tribal Nations for federal courts to sustain Tribal jurisdiction over such activities and conduct under the second exception articulated in *Montana v. United States* ("*Montana*"), 450 U.S. 544, 566 (1981). *See, e.g.*, *Montana v. U.S. Envtl. Prot. Agency* ("*U.S. EPA*"), 137 F.3d 1135, 1141 (9th Cir. 1998) ("[T]hreats to water rights may invoke inherent tribal authority over non-Indians."). Moreover, "no case . . . expressly rejects an application of *Montana* to off-reservation activities that have significant effects within the reservation." *Wisconsin v. Envtl. Prot. Agency*, 266 F.3d 741, 749 (7th Cir. 2001). A true application of *Montana* takes a functional view of the location of non-Indians' activities and conduct. *See Sprint Commc'ns Co. v.*

Wynn, 121 F. Supp. 3d 893, 899-900 (D.S.D. 2015) (citing *Attorney's Process*, 609 F.3d at 937) ("[P]hysical location, while relevant, is not dispositive[.]"). Where non-Indian activities and conduct originate off-reservation but are aimed at or have an effect on the reservation, Tribal jurisdiction is appropriate under *Montana*, or, at a minimum, is not plainly lacking, thereby requiring the exhaustion of Tribal remedies. *See Wisconsin*, 266 F.3d at 749 (A Tribal Nation's "inherent authority over activities having a serious effect on the health of the tribe[] . . . is not defeated even if it exerts some regulatory force on off-reservation activities[.]").

At its core, this case implicates the White Earth Band's "sovereign interest in exercising governmental power over the natural resources within [its] Reservation[.]" *Deschutes River Alliance v. Portland Gen. Elec. Co.*, 323 F. Supp. 3d 1171, 1179 (D. Or. 2018). Nonetheless, the question before this Court is far narrower: Whether the District Court erred in dismissing the State's complaint. *Amici* agree with the White Earth Band that the District Court properly dismissed The State's complaint on the basis of White Earth Band's sovereign immunity.

If this Court is not inclined to affirm the District Court on these grounds, however, it should affirm on the alternative grounds that the State has failed to exhaust Tribal Court remedies. *Accord Campbell v. Comm'r*, 943 F.2d 815, 818 (8th Cir. 1991) ("We may affirm a trial court's decision on any ground supported by the record, whether or not that ground was addressed by the lower court."); *Stanko v.*

Oglala Sioux Tribe, 916 F.3d 694, 698 (8th Cir. 2019) ("We affirm the dismissal . . . on a different ground, failure to exhaust tribal court remedies."). Alternatively, this Court should remand to the District Court to determine whether the State must exhaust Tribal Court remedies.

ARGUMENT

I. Tribal Nations may exercise civil jurisdiction over non-Indians' activities and conduct effecting Tribal water resources under the second *Montana* exception, even when those activities and conduct originate outside Tribal Nations' reservations.

Tribal Nations are "'distinct, independent political communities' exercising sovereign authority." *United States v. Cooley*, 141 S. Ct. 1638, 1642 (2021) (quoting *Worcester v. Georgia*, 31 U.S. 515, 559 (1832)). Tribal Nations' inherent sovereign authority includes the power to exercise civil adjudicatory and regulatory jurisdiction over non-Indians and their activities and conduct. *See Three Affiliated Tribes*, 93 F.3d at 1419 (citing *Iowa Mut.*, 480 U.S. at 18).

"[T]ribal courts are presumed to have civil jurisdiction over the actions of non-Indians on reservation lands absent the affirmative limitations of federal treaties and statutes." *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094, 1097 (8th Cir. 1989) (citing *Iowa Mut.*, 480 U.S. at 15); *Montana*, 450 U.S. at 557 (Tribal Nations retain civil jurisdiction over non-Indians "on land belonging to the Tribe or held in trust by the United States for the Tribe[.]" (citation omitted)). This power is derived from Tribal Nations' "inherent sovereign authority to set conditions on

entry, preserve tribal self-government, or control internal relations." *Plains Commerce*, 554 U.S. at 337 (citing *Montana*, 450 U.S. at 564); *see Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982) (The power to exclude non-Indians from Tribal lands "necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct[.]").

As opposed to this straightforward affirmation of Tribal jurisdiction over non-Indians on Tribal lands, the Supreme Court has contrived a more complex two-part test for determining Tribal Nations' civil jurisdiction over non-Indians' activities and conduct occurring on non-Indian land, *see Montana*, 450 U.S. at 562, or its equivalent. *See Strate v. A-1 Contractors*, 520 U.S. 438, 440 (1997) (trust land subject to federally-granted right-of-way is "equivalent, for nonmember governance purposes, to alienated, non-Indian land" (footnote omitted)).

First, "[a] tribe may regulate, through taxation, licensing, or other means, the activates of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565 (citations omitted). Second, "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians 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 and welfare of the tribe."

Id. at 566 (citations omitted). These tests are generally referred to as the "*Montana* exceptions."

A. Non-Indians must exhaust Tribal remedies before federal courts will exercise jurisdiction over challenges to Tribal Nations' exercise of civil jurisdiction over non-Indians.

Tribal Nations' exercise of civil jurisdiction over non-Indians raises questions of federal law and, thus, is reviewable by the federal courts. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852-53 (1985). Nevertheless, the "examination of tribal court jurisdiction 'should be conducted in the first instance in the Tribal Court itself[.]'" *DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 882 (8th Cir. 2013) (quoting *Nat'l Farmers*, 471 U.S. at 856). As a matter of comity, federal courts should abstain from exercising jurisdiction over challenges to Tribal civil jurisdiction to allow for the exhaustion of Tribal remedies. *Id*. (citing *Iowa Mut.*, 480 U.S. at 15). "Exhaustion includes both an initial decision by the tribal court and the completion of appellate review." *Colombe v. Rosebud Sioux Tribe*, 747 F.3d 1020, 1024 (8th Cir. 2014) (quoting *DISH Network*, 725 F.3d at 882-83) (quotation marks omitted).

"Tribal courts play a vital role in tribal self-government[.]" *Iowa Mut.*, 480 U.S. at 14 (citing *United States v. Wheeler*, 435 U.S. 313, 332 (1978)). Tribal exhaustion, therefore, promotes "Tribal self-government and self-determination" by affording Tribal courts "'the first opportunity to evaluate the factual and legal basis

for the challenge' to [their] jurisdiction." *Id.* at 15-16 (quoting *Nat'l Farmers*, 471 U.S. at 856). Tribal exhaustion also serves a functional purpose in federal courts' review of Tribal jurisdiction. As this Court has recognized, Tribal exhaustion "assist[s] in the orderly administration of justice, provid[es] federal courts with the benefit of tribal expertise, and clarif[ies] the factual and legal issues that are under dispute and relevant for any jurisdictional evaluation." *DISH Network*, 725 F.3d at 882 (citing *Nat'l Farmers*, 471 U.S. at 856-57); *Duncan Energy Co. v. Three Affiliated Tribes of Ft. Berthold Reservation*, 27 F.3d 1294, 1300 (8th Cir. 1994) (quoting *Nat'l Farmers*, 471 U.S. at 856) ("[T]he requirement of tribal exhaustion contemplates the development of a factual record that will serve the 'orderly administration of justice in the federal court.'").

Tribal exhaustion, however, "is not jurisdictional[.]" *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1133 (8th Cir. 2019). The Supreme Court has articulated exceptions to the Tribal exhaustion requirement, *see Nat'l Farmers*, 471 U.S. at 856 n.21, including when "it is 'plain' the tribal court lacks jurisdiction[.]" *Kodiak*, 932 F.3d at 1133 (citing *Strate*, 520 U.S. at 459 n.14). So long as Tribal Nations "can 'make a colorable claim that they have jurisdiction[,]'" non-Indians must exhaust Tribal remedies before seeking federal court review. *Romero v. Wounded Knee, LLC*, No. CIV. 16-5024-JLV, 2018 WL 4279446, at *6 (D.S.D. Aug. 31, 2018) (quoting *Norton v. Ute Indian Tribe of Uintah & Ouray Reservation*, 862 F.3d 1236,

1243 (10th Cir. 2017)); *see Elliot v. White Mountain Apache Tribal Court*, 566 F.3d 842, 848 (9th Cir. 2009) (quoting *Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 948 (9th Cir. 2008)) ("If 'jurisdiction is colorable or plausible,' then the exception does not apply and exhaustion of tribal court remedies is required." (quotation marks omitted)). Tribal Nations do not need to definitely establish their jurisdiction for non-Indians to exhaust Tribal remedies. "Certainty is not required because our review at this stage of the proceeding is solely to establish whether the lack of jurisdiction is 'plain,' that is, whether its absence is so obvious that the invocation of tribal jurisdiction serves no other purpose than delay." *DISH Network*, 725 F.3d at 884 (quoting *Strate*, 520 U.S. at 459 n.14).

B. Non-Indian activities and conduct effecting Tribal water resources imperil the subsistence of Tribal Nations and support Tribal Nations' exercise of civil jurisdiction over such activities and conduct under the second *Montana* exception.

"A water system is a unitary resource. The actions of one user have an immediate and direct effect on the other users. . . . Its regulation is an important sovereign power." *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52 (9th Cir. 1981). Accordingly, "'threats to water rights may invoke inherent tribal authority over non-Indians' due to the tangible and direct impact that such threats pose to tribal health and welfare." *Bugenig v. Hoopa Valley Tribe*, 229 F.3d 1210, 1222 (9th Cir. 2000) (quoting *U.S. EPA*, 137 F.3d at 1141), *vacated on other grounds* 266 F.3d 1201 (9th Cir. 2001) (en banc). Federal courts have consistently recognized that non-

Indian activities and conduct effecting Tribal water resources threaten the political integrity, economic security, and health and welfare of Tribal Nations and support Tribal Nations' exercise of civil jurisdiction over such activities and conduct under the second *Montana* exception. At a minimum, Tribal Nations' civil jurisdiction over such activities is not plainly lacking, thereby requiring the exhaustion of Tribal remedies.

The United States Court of Appeals for the Ninth Circuit has extensively discussed, and upheld, Tribal jurisdiction over non-Indian activities and conduct effecting Tribal water resources. The court first considered this issue in *Colville*, which concerned competing claims by the Confederated Tribes of the Colville Reservation and the State of Washington over which sovereign could regulate a non-Indian's use of surface water and groundwater on non-Indian fee land within the Colville Reservation. 647 F.2d at 42. Applying the *Montana* framework, the Ninth Circuit held: "A tribe retains the inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the health and welfare of the tribe. *This includes conduct that involves the tribe's water rights*." *Id*. at 52 (citing *Montana*, 450 U.S. at 566 n.15) (emphasis added).[2] Underpinning the Ninth Circuit's holding

[2] *Montana*'s footnote 15 states that a Tribal Nation's "inherent power to exercise civil jurisdiction over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the

was its recognition that "[a] water system is a unitary resource. The actions of one user have an immediate and direct effect on the other users." *Id*. The court observed that the "[r]egulation of water on a reservation is critical to the lifestyle of its residents and the development of its resources. Especially in arid and semi-arid regions of the West, water is the lifeblood of the community. Its regulation is an important sovereign power." *Id*. The court found that the Colville Tribes' allegations that the non-Indian's "appropriations from No Name Creek imperiled the agricultural use of downstream tribal lands and the trout fishery, among other things[,]" were sufficient to uphold Tribal jurisdiction under the second *Montana* exception. *Id.* (citation omitted); *In re Gen. Adjudication of All Rights to Use Water in Big Horn River Sys.*, 835 P.2d 273, 300 (Wyo. 1992) (Golden, J., dissenting) ("Water regulation is an important sovereign power. It is hard to imagine a resource more critical to the economic security or health and welfare of the Wind River Reservation Tribes." (internal citation omitted)).

The Ninth Circuit further examined this issue in detail in *U.S. EPA*, which concerned the Environmental Protection Agency's ("EPA") decision to grant the

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economic security, or health and welfare of the tribe[,]" 450 U.S. at 566 (citations omitted), is "a corollary" to a Tribal Nation's "retain[ed] rights to river waters necessary to make their reservation livable." *Id*. at 566 n.15 (citing *Arizona v. California*, 373 U.S. 546, 599 (1963)); *Ute Indian Tribe v. Utah*, 521 F. Supp. 1072, 1156 n.219 (D. Utah 1981) (citing *Colville*, 647 F.2d 42), *aff'd in part, rev'd in part on other grounds* 716 F.2d 1298 (10th Cir. 1983) ("This apparently includes the power to control the use of that water.")

Confederated Salish and Kootenai Tribes ("CSKT") treatment as a state ("TAS") status under the Clean Water Act ("CWA"), allowing it to promulgate water quality standards "that apply to all sources of pollutant emissions within [the] boundaries of the Reservation, regardless of whether the sources are located on land owned by members or non-members of the Tribe." 137 F.3d at 1138. To receive TAS status, the "EPA require[d] a tribe to show that the regulated activities affect 'the political integrity, the economic security, or the health or welfare of the tribe.'" *Id*. at 1139 (citations omitted). Applying the *Montana* framework, the EPA approved CSKT's TAS status, finding "that the activities of the non-members posed such serious and substantial threats to Tribal health and welfare that Tribal regulation was essential." *Id*. at 1141.

Separately applying the *Montana* framework, *id*. at 1140 ("EPA's delineation of the scope of inherent tribal authority is not entitled to deference."), the Ninth Circuit upheld the EPA's decision, noting that it had "previously recognized that threats to water rights may invoke inherent tribal authority over non-Indians." *Id*. at 1141. The court observed:

> *Colville* also supports EPA's generalized finding that due to the mobile nature of pollutants in surface water it would in practice be very difficult to separate the effects of water quality impairment on non-Indian fee land from impairment on tribal portions of the reservation: "A water system is a unitary resource. The actions of one user have an immediate and direct effect on other users."

Id. (quoting *Colville*, 647 F.2d at 52). Contrasting other cases that applied *Montana*, the court recognized "the threat inherent in impairment of the quality of the principle water source." *Id*. The Ninth Circuit concluded that CSKT's enforcement of their own water quality standards against non-Indians on non-Indian land within the reservation was "valid as reflecting [the] appropriate delineation and application of inherent Tribal regulatory authority over non-consenting non-members." *Id*.

The Ninth Circuit's decision in *U.S. EPA* is consistent with the United States Court of Appeals for the Seventh Circuit's and the United States Court of Appeals for the Tenth Circuit's opinions affirming the EPA's decisions granting TAS status to other Tribal Nations, based on those Tribal Nations' inherent authority to enforce water quality standards against non-Indians. *See Wisconsin*, 266 F.3d at 750 ("Because the Band has demonstrated that its water resources are essential to its survival, it was reasonable for the EPA, in line with the purposes of the Clean Water Act and the principles of *Montana*, to allow the tribe to regulate water quality on the reservation[.]"); *Albuquerque v. Browner*, 97 F.3d 415, 423 (10th Cir. 1996) ("[The TAS program] does not prevent Indian tribes from exercising their inherent sovereign power to impose standards or limits that are more stringent than those imposed by the federal government. Indian tribes have residual sovereign powers that already guarantee the powers enumerated in [the TAS program.]"); *c.f. MacArthur v. San Juan Cnty.*, 391 F. Supp. 2d 895, 938 (D. Utah 2005) (discussing

Tribal Nations "developing and enforcing their own tribal air and water quality standards," the court noted that "Tribal authority in these matters has consistently been confirmed by the federal courts.").[3]

In *Confederated Salish & Kootenai Tribes of Flathead Reservation v. Namen*, CSKT sought to regulate non-Indian "use of the bed and banks of the south half of Flathead Lake[,]" within their reservation. 665 F.2d 951, 964 (9th Cir. 1982). Applying the *Montana* framework, the Ninth Circuit found that such conduct "ha[d] the potential for significantly affecting the economy, welfare, and health of the Tribes. Such conduct, if unregulated, could increase water pollution, damage the ecology of the lake, interfere with treaty fishing rights, or otherwise harm the lake, which is one of the most important tribal resources." *Id*. Accordingly, the court held that CSKT's regulation of such non-Indian conduct "f[ell] squarely within the exception recognized in *Montana*." *Id*. (emphasis added, footnote omitted); *Bugenig*,

[3] While *U.S. EPA*, *Wisconsin*, and *Albuquerque* all concern Tribal Nations' authority to enforce water quality standards against non-Indians pursuant to their TAS status under the CWA, the dispositive issue in each case was whether the Tribal Nations possessed the inherent sovereign authority to enforce water quality standards against non-Indians in the first place. *See U.S. EPA*, 137 F.3d at 1140-41; *Wisconsin*, 266 F.3d at 748-50; *c.f. Albuquerque*, 97 F.3d at 424 n.14. Accordingly, theses cases' discussions on Tribal Nations' *inherent* authority (whether in reference to the *Montana* framework or not) to regulate such non-Indian activities and conduct are relevant in non-CWA contexts. *See, e.g.*, *FMC Corp.*, 942 F.3d at 935; *Bugenig*, 229 F.3d at 1222; *Rincon Mushroom Corp. of Am. v. Mazzetti*, No. 09cv2330-WQH-POR, 2010 WL 3768347, at *8 (S.D. Cal. Sept. 21, 2010), *rev'd on other grounds* 490 Fed. App'x 11 (9th Cir. 2012).

229 F.3d at 1222 ("[I]t is difficult to imagine how serious threats to water quality could not have profound implications for tribal self-government.").[4]

Additionally, in *Rincon Mushroom Corporation of America v. Mazzetti*, the Ninth Circuit addressed the Rincon Band of Mission Indians' exercise of civil jurisdiction over a non-Indian's activities on non-Indian fee land within the reservation that, the Rincon Band alleged, "could contaminate the tribe's sole water source and increase risk of forest fires that could jeopardize its casino[.]" 490 Fed. App'x at 13. Noting that the Ninth Circuit had previously "held that both forest fires and contamination of a tribe's water quality are threats sufficient to sustain tribal jurisdiction[,]" *id*. (citing *Elliot*, 566 F.3d at 850; *U.S. EPA*, 137 F.3d at 1139-40), the court held that the alleged "threats are sufficient to make the tribe's assertion of jurisdiction over activities on Rincon Mushroom's property 'colorable' or 'plausible.'" *Id*. Like the Ninth Circuit in *Rincon*, district courts have also repeatedly recognized that Tribal jurisdiction over similar non-Indian activities and conduct is not plainly lacking, thereby requiring the exhaustion of Tribal remedies.[5]

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[4] *See also United States ex rel. Lummi Indian Nation v. Washington*, No. C01-0047Z, 2007 WL 3273545, at *7 n.7 (W.D. Wash. Nov. 2, 2007); *Governing Council of Pinoleville Indian Cmty. v. Mendocino Cnty.*, 684 F. Supp. 1042, 1045-47 (N.D. Cal. 1988).

[5] *See, e.g.*, *BP Am. Inc. v. Yerington Paiute Tribe*, No. 3:17-cv-00588-LRH-WGC, 2018 WL 6028697, at *2 (D. Nev. Nov. 15, 2018); *St. Isidore Farm LLC v. Coeur d'Alene Indian Tribe*, No. 2:13-CV-00274-EJL, 2013 WL 4782140, at *7 (D. Idaho Sept. 5, 2013); *Rogers-Dial v. Rincon Band of Luiseno Indians*, No. 10cv2656-

C. Tribal Nations may exercise civil jurisdiction over non-Indian activities and conduct originating off-reservation when those activities and conduct are directed towards or has an effect on Tribal Nations' reservations.

"[N]o case . . . expressly rejects an application of *Montana* to off-reservation activities that have significant effects within the reservation." *Wisconsin*, 266 F.3d at 749. Indeed, a number of federal courts, including this Court and district courts within this Circuit, have recognized that Tribal Nations may exercise civil jurisdiction under *Montana* over non-Indian activities and conduct originating off-reservation, when the activities or conduct are directed towards or have effects on-reservation.

This Court and district courts in this Circuit, in particular, take a functional view of the location of non-Indians' activities and conduct when applying the *Montana* framework. For example, in *DISH Network*, this Court held that the Turtle Mountain Band of Chippewa Indians did not plainly lack jurisdiction over one its member's abuse of process lawsuit in Tribal court against DISH Network, and required the exhaustion of Tribal court remedies. 725 F.3d at 885. DISH argued that Turtle Mountain plainly lacked jurisdiction because even though the Tribal member was served on the reservation, the tort of abuse of process occured at the court where

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WQH-POR, 2011 WL 2619232, at *7 (S.D. Cal. July 11, 2011); *Donius v. Mazzetti*, No. 10cv591-WQH-POR, 2010 WL 3768363, at *5 (S.D. Cal. Sept. 21, 2010).

the summons was issued; which, in this case, was the United States District Court in Minot, North Dakota, off-reservation. *Id*. at 883-84.

This Court disagreed, stating that under North Dakota law, the tort of abuse of process occurs where the party is served, not where the summons is issued. *Id*. at 884. This Court held that while DISH was located off-reservation, the Tribal court did not plainly lack jurisdiction under the first *Montana* exception because the lawsuit in Tribal court "ar[ose] out of a contract governing activities on tribal lands." *Id*. at 885. Nonetheless, this Court stated that "[e]ven if the alleged abuse of process tort occurred off tribal lands, jurisdiction would not clearly be lacking in the tribal court because the tort claim ar[ose] out of and is intimately related to DISH's contract with [the Tribal member] and that contract relates to activities on tribal land." *Id*. at 884.

In *Sprint*, the United States District Court for the District of South Dakota held that the Oglala Sioux Tribe did not plainly lack civil jurisdiction over Sprint Communications, despite Sprint having no physical presence on the reservation. 121 F. Supp. 3d at 901. Sprint argued that the Oglala Sioux Tribe lacked jurisdiction to regulate it under the first *Montana* exception because it did not have a physical presence on the reservation. *Id*. at 899. While Sprint provided long-distance telephone service to customers on the reservation, a local carrier routed calls to and

from Sprint's on-reservation customers to Sprint's off-reservation network. *Id*. at 896.

The court rejected this argument, holding that it "would exempt from tribal jurisdiction any business that had no physical presence on a reservation regardless of the degree of contact and involvement it has with tribal members or *the impact on the tribe's welfare*." *Id*. at 900 (emphasis added). This, the court concluded, would be "inconsistent with . . . the overarching federal policy to encourage tribal self-government and self-sufficiency." *Id*. (citing *Fed. Trade Comm'n v. Payday Fin., LLC*, 935 F. Supp. 2d 926, 939 (D.S.D. 2013)).

The court held that "physical location, while relevant, is not dispositive because the focal point under *Montana* is the location of the nonmember's activities or conduct." *Id*. at 899-900 (citing *Attorney's Process*, 609 F.3d at 937) (footnote omitted). "[W]hen a nonmember begins an activity outside the reservation, the effects of which are directed on to the reservation, it is not clear that such an activity occurred wholly outside the reservation." *Id*. at 899 n.5. The court found that the regulations the Oglala Sioux Tribe sought to enforce were "aimed at protecting customers on [the reservation,]" and concluded that "the fact that Sprint . . . has no physical presence on [the reservation] does not plainly show that Sprint is not subject to tribal jurisdiction under federal law." *Id*. at 900.

Similarly, in *AT&T Corp. v. Oglala Sioux Tribe Utility Commission*, the South Dakota District Court held that the Oglala Sioux Tribe did not plainly lack jurisdiction to regulate AT&T and required Tribal exhaustion. No. CIV 14-4150, 2015 WL 5684937, at *9-10 (D.S.D. Sept. 25, 2015). While AT&T had no physical presence on the reservation, the court noted that "under *Montana*, physical location is merely relevant, not dispositive[,]" and that "the focal point of *Montana* analysis is the location of the nonmember's activity or conduct, not the location of the nonmember him or herself." *Id*. at *6 (citing *Sprint Commc'ns*, 121 F. Supp. 3d at 899) (emphasis removed). The court pointed out that in *DISH Network*, this Court "observed that while an alleged tort of abuse of process may have taken place off reservation land, the harm of the tort would still be felt on the reservation[.]" *Id*. (citing *DISH Network*, 725 F.3d at 884). In concluding that the Oglala Sioux Tribe's jurisdiction to regulate AT&T was not plainly lacking, the court observed that "[a] holding dependent upon physical presence would also ignore the challenges that have come about concerning electric communications and electronic transactions." *Id*.; *c.f. Payday*, 935 F. Supp. 2d at 940 ("Reducing the *Montana* jurisdictional analysis from a thorough investigation of the nonmember's course of conduct and contact with the reservation, to a mere determination of the nonmember's physical location is improper and would render *Montana*'s jurisdictional inquiry inapplicable to many modern-day contracts." (emphasis added)).

While these cases concern the first *Montana* exception, their recognition that "the focal point of *Montana* analysis is the location of the nonmember's activity or conduct, not the location of the nonmember him or herself[,]" *AT&T Corp.*, 2015 WL 5684937, at *6 (citing *Sprint Commc'ns*, 121 F. Supp. 3d at 899), is applicable to the entire *Montana* framework, including the second *Montana* exception. *C.f. Sprint Commc'ns*, 121 F. Supp. 3d at 990 ("Sprint's position would exempt from tribal jurisdiction any business that had no physical presence on a reservation regardless of . . . *the impact on the tribe's welfare*." (emphasis added)). This is exemplified in the Seventh Circuit's opinion in *Wisconsin*, which is most closely on point with the case at bar.

Wisconsin concerned the EPA's decision granting TAS status to the Mole Lake Band of Lake Superior Chippewa Indians. 266 F.3d at 743. In order to be granted TAS status, the EPA required the Mole Lake Band to demonstrate under the *Montana* framework that it "already possessed inherent authority over the activities undoubtedly affected by [its] water regulations." *Id*. at 748. As with the Ninth Circuit in *U.S. EPA*, the Seventh Circuit separately applied the *Montana* framework to determine whether the EPA's decision to grant the Mole Lake Band TAS status was lawful. *Id*. at 748-50. Unlike *U.S. EPA*, however, *Wisconsin* concerned the Mole Lake Band's authority to enforce its water quality standards against "upstream *off-reservation* dischargers[.]" *Id*. at 748 (emphasis added). The State of Wisconsin

argued that the Mole Lake Band could not enforce its water quality standards against off-reservation polluters, as "[t]his is a classic extraterritorial effect, . . . and takes this case beyond the scope of *Montana*[.]" *Id*.

The Seventh Circuit acknowledged that the Mole Lake Band's TAS status meant that it could impose (theoretically) higher water quality standards against upstream, off-reservation polluters. *Id*. The court, however, did not view this as impermissible under the *Montana* framework.

> [A]ctivities located outside the regulating entity (here the reservation), and the resulting discharges to which those activities can lead, can and often will have "serious and substantial" effects on the health and welfare of the downstream state or reservation. There is no case that expressly rejects an application of *Montana* to off-reservation activities that have significant effects within the reservation.

Id. at 749. The Seventh Circuit concluded that the EPA's interpretation that, under *Montana*, the Mole Lake Band's "inherent authority over activities having a serious effect on the health of the tribe[] . . . is not defeated even if it exerts some regulatory force on off-reservation activities[]" was reasonable. *Id*. "Because the Band has demonstrated that its water resources are essential to its survival, it was reasonable for the EPA, in line with the purposes of the Clean Water Act and the principles of *Montana*, to allow the tribe to regulate water quality on the reservation, even though that power entails some authority over off-reservation activities." *Id*. at 750.

CONCLUSION

"A water system is a unitary resource. The actions of one user have an immediate and direct effect on other users." *Colville*, 647 F.2d at 52. Therefore, "activities located outside the . . . reservation[] . . . can and often will have 'serious and substantial' effects on the health and welfare of the downstream . . . reservation." *Wisconsin*, 266 F.3d at 749. As the cases discussed herein demonstrate, Tribal Nations may exercise civil jurisdiction over non-Indian activities and conduct originating off-reservation that effect on-reservation Tribal water resources under the second *Montana* exception. *See id*. (A Tribal Nation's "inherent authority over activities having a serious effect on the health of the tribe[] . . . is not defeated even if it exerts some regulatory force on off-reservation activities."). As the South Dakota District Court has succinctly noted, "when a nonmember begins an activity outside the reservation, the effects of which are directed on to the reservation, it is not clear that such an activity occurred wholly outside the reservation." *Sprint Commc'ns*, 121 F. Supp. 3d at 899 n.5; *Wisconsin*, 266 F.3d at 748 ("[N]o case . . . expressly rejects an application of *Montana* to off-reservation activities that have significant effects within the reservation."). At a minimum, the cases discussed herein establish that Tribal Nations' civil jurisdiction over such activities and conduct is not plainly lacking, thereby requiring the exhaustion of Tribal remedies.

The White Earth Band's exercise of civil jurisdiction over the State in the underlying Tribal Court case presents complex factual and legal questions about the

interconnectedness of water systems and the nature and extent of Tribal jurisdiction. The examination of these complex factual and legal issues "'should be conducted in the first instance in the Tribal Court itself[.]'" *DISH Network*, 725 F.3d at 882 (quoting *Nat'l Farmers*, 471 U.S. at 856). While promoting "Tribal self-government and self-determination," *Iowa Mut.*, 480 U.S. at 15, the exhaustion of Tribal Court remedies here, in particular, will also "assist[] in the orderly administration of justice" by providing this Court and the District Court "with the benefit of tribal expertise, and clarifying the factual and legal issues that are under dispute and relevant for any jurisdictional evaluation." *DISH Network*, 725 F.3d at 882 (citing *Nat'l Farmers*, 471 U.S. at 856-57).

Accordingly, this Court should affirm the District Court's dismissal of The State's complaint, either on the grounds articulated by the District Court, or on the grounds that the State has not exhausted Tribal Court remedies. Alternatively, this Court should remand to the District Court to determine whether the State must exhaust Tribal Court remedies.

RESPECTFULLY SUBMITTED this 27th day of October, 2021.

/s/ Wesley James Furlong
/s/ Daniel D. Lewerenz
Wesley James Furlong
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NATIVE AMERICAN RIGHTS FUND

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