No. 21-3050

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

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Minnesota Department of Natural Resources, et al.,

Plaintiffs-Appellants,

vs.

White Earth Band of Ojibwe; Judge David DeGroat, in his official capacity as Chief Judge of the White Earth Band of Ojibwe Tribal Court,

Defendants-Appellees.

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On Appeal from the United States District Court for the District of Minnesota
(0:21-cv-01869-WMW)

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# DEFENDANTS-APPELLEES' RESPONSE BRIEF

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Frank Bibeau (MN #0306460)
55124 County Road 118
Deer River, MN 56636
Telephone: (218) 760-1258
Email: frankbibeau@gmail.com

Joseph Plumer (MN #164859)
PLUMER LAW OFFICE
9352 N. Grace Lake Rd. SE
Bemidji, MN 56601
Telephone: (218) 556-3824
Email: jplumer@paulbunyan.net

Riley Plumer (D.C. #1643274)
HOBBS, STRAUS, DEAN & WALKER LLP
1899 L Street NW, Suite 1200
Washington, D.C. 20036
Telephone: (202) 822-8282
Email: rplumer@hobbsstraus.com

*Attorneys for Defendants-Appellees*

## SUMMARY OF THE CASE

The principal issue in this appeal is whether the District Court properly dismissed the attempt by the Minnesota Department of Natural Resources ("DNR") to enjoin the White Earth Band of Ojibwe ("Band") court from adjudicating a case in which DNR is a defendant.

The District Court correctly declined DNR's request to oust the Tribal Court's authority to hear the pending case against DNR. The Court properly held that the Band and its Chief Tribal Court Judge enjoy sovereign immunity from DNR's claims.

Moreover, the Tribal Court proceedings were in their infancy: DNR has not exhausted its Tribal Court remedies, as its appeal of the denial of its motion to dismiss remains pending before the Tribal Court of Appeals. DNR argues it enjoys "absolute immunity" from tribal court jurisdiction and it can never be sued in tribal court as long as it does not physically enter the Band's reservation, regardless of the impact and harm that its conduct or activities have on-reservation. But DNR cannot cite a single case in which a court has enforced this interpretation of the legal framework for exercising tribal jurisdiction over a nonmember party.

If the Court believes it would benefit from oral argument, Defendants-Appellees agree that 10 minutes should suffice.

## CORPORATE DISCLOSURE STATEMENT

Defendants-Appellees the White Earth Band of Ojibwe, and Judge David DeGroat are not corporations.

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## JURISDICTIONAL STATEMENT

In the proceedings below, Plaintiffs-Appellants asserted that the District Court had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1362 to enjoin further proceedings in a related case pending before the White Earth Tribal Court. On September 3, 2021, the District Court dismissed Plaintiffs-Appellants' complaint and denied their motion for preliminary injunction. The District Court found that it lacked subject matter jurisdiction over the case because Defendants-Appellees are immune from suit.

On September 10, 2021, the District Court denied Plaintiffs-Appellants' motion for leave to request reconsideration. On September 10, 2021, Plaintiffs-Appellants also filed a notice of appeal of the District Court's decision in this Court, and an interlocutory appeal to the White Earth Tribal Court of Appeals, which remains pending at the time of the filing of this brief.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

## STATEMENT OF ISSUES

**I. Whether Defendants-Appellees Enjoy Sovereign Immunity From DNR's Claims.**

*Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782 (2014);

*Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978);

*Belcourt Pub. Sch. Dist. v. Davis*, 786 F.3d 653 (8th Cir. 2015);

*Fort Yates Pub. Sch. Dist. v. Murphy*, 786 F.3d 662 (8th Cir. 2015).

**II. Whether Tribal Court Jurisdiction Over DNR is Plainly Lacking and Thus DNR is Not Required to Exhaust Tribal Court Remedies.**

*Attorney's Process & Investigation Servs. v. Sac & Fox Tribe of Miss. in Iowa*, 609 F.3d 927 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 1003 (2011);

*DISH Network Serv., LLC v. Laducer*, 725 F.3d 877 (8th Cir. 2013);

*Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842 (9th Cir. 2009);

*United States v. Cooley*, 141 S. Ct. 1638 (2021).

## STATEMENT OF THE CASE

### I. Factual Background

#### A. White Earth Band and Treaty History

The White Earth Band of Ojibwe ("Band") is one of the six Chippewa Bands comprising the Minnesota Chippewa Tribe, a federally recognized sovereign Indian tribe that occupies lands within the boundaries of the State of Minnesota. 86 Fed. Reg. 7554, 7556 (Jan. 29, 2021).

Through treaties with the United States, the Band secured usufructuary rights, including the right to gather wild rice, on lands located off the White Earth Reservation. The 1867 Treaty with the Chippewa established the White Earth Reservation. *See White Earth Band of Chippewa Indians v. Alexander*, 683 F.2d 1129, 1132 (8th Cir. 1982). "[I]t is well established that the White Earth Band has aboriginal rights to hunt, fish, and gather wild rice on the White Earth Reservation." *United States v. Aanerud*, 893 F.2d 956, 961 (8th Cir. 1990).

By treaty executed on July 29, 1837, the Chippewa ceded to the United States lands located in present-day Minnesota and Wisconsin. Treaty with the Chippewa, art. 1, July 29, 1837, 7 Stat. 536 ("1837 Treaty"). The 1837 Treaty between the United States and the Chippewa Indians expressly guaranteed the Chippewa the right to gather wild rice:

> The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is

> guarantied [sic] to the Indians, during the pleasure of the President of the United States.

*Id.* at art. 5; *see also United States v. Brown*, 777 F.3d 1025, 1031 (8th Cir. 2015) ("The wording of the 1837 treaty is broad[.]").[1]

The 1837 Treaty was signed by leaders of several bands of Chippewa Indians and representatives of the United States after extensive negotiation in which Chippewa leaders specifically expressed their desire to retain the right to exercise usufructuary rights on the ceded lands. The "historical importance" of hunting, fishing, and gathering "in Chippewa life and the emphasis of the Chippewa chiefs on usufructuary rights during the negotiations with the United States indicate that the Indians believed they were reserving unrestricted rights to hunt, fish, and gather throughout a large territory." *Brown*, 777 F.3d at 1031.

The treaty negotiations documented Chippewa chief Ma-ghe-ga-bo's statement that, "Of all the country that we grant to you we wish to hold on to a tree where we get our living, & to reserve the streams where we drink the waters that give us life." *Id.* at 1028 (citation omitted).

[1] The "privilege" of hunting, fishing and gathering is commonly referred to as a "usufructuary right" – the right to "live off the land," or "to make a modest living by hunting and gathering from the resources of the land." *United States v. Gotchnick*, 222 F.3d 506, 508 n.3 (8th Cir. 2000) (citing *United States v. Bresette*, 761 F. Supp. 658, 660 (D. Minn. 1991)).

Flatmouth, chief of the Pillager Band of Chippewa Indians, reiterated the importance of reserving usufructuary rights on the ceded lands:

> My Father. Your children are willing to let you have their lands, but they wish to reserve the privilege of making sugar from the trees, and getting their living from the Lakes and Rivers, as they have done heretofore, and of remaining in this Country.... You know we can not live, deprived of our Lakes and Rivers; ... we wish to remain upon them, to get a living.

*Id.* Governor Henry Dodge of Wisconsin Territory, which in 1837 included all of the future State of Minnesota, explained to the Chippewa Indians that "I will agree that you shall have the free use of the rivers and the privilege of hunting on the lands you are to sell, during the pleasure of your great father." *United States v. Good*, No. 13-072, 2013 WL 6162801, at *6 (D. Minn. Nov. 25, 2013).

In sum, the Band's understanding of the usufructuary rights preserved under the 1837 Treaty exemplifies how integral gathering wild rice is to the Chippewa way of life, and the extent and reach of the Band's and its members' unrestricted and exclusive right to gather wild rice free from state regulation and interference.

### B. Wild Rice and Ojibwe Culture

"Associated with origin stories, wild rice is central to notions of being Ojibwe; managing wild rice in its natural state is a moral obligation." Rachel Durkee Walker & Jill Doerfler, *Wild Rice: The Minnesota Legislature, A Distinctive Crop, GMOs, and Ojibwe Perspectives*, 32 HAMLINE L. REV. 499, 509 (2009) [hereinafter *Wild Rice and Ojibwe Perspectives*]. "The Ojibwe migration story tells of a time when

they lived in the East and were instructed by the Creator to follow … on a westward journey that would end when they reached 'the place where the food grows on water.' Wild rice is this food." *Id.*

"Ojibwe people call wild rice manoomin, the good seed that grows in the water."[2] BRENDA J. CHILD, MY GRANDFATHER'S KNOCKING STICKS: OJIBWE FAMILY LIFE AND LABOR ON THE RESERVATION 161 (2014). Wild rice "is a sacred food intertwined in countless ways with Ojibwe spiritual practices, kinship relations, economies, gender roles, history, place, and contemporary existence." *Id.* "Ojibwe people continue to cherish the wild rice that brought [their] ancestors into the western Great Lakes and Mississippi River region and find it difficult to imagine a future without it, even as [they] solemnly recognize that today Minnesota is one of the very last places in the country where genuine manoomin still grows wild and in abundance." *Id.* at 191.

For the Ojibwe people, "wild rice has medicinal and nutritional value derived from its spiritual significance-a belief reflected in the use of wild rice to promote recovery from sickness as well as for ceremonial feasts." Durkee Walker & Doerfler, *Wild Rice and Ojibwe Perspectives*, at 509. Today, Ojibwe people continue to serve wild rice "at spiritual ceremonies, pow-wows, family gatherings, other special events, and as a regular part of family meals." *Id.* "Naming feasts for infants and

[2] Manoomin is the Ojibwe word for wild rice.

children always include wild rice, as do wakes and funerals and every meaningful cultural event in between birth and death." CHILD at 161. While wild rice "originated because of its value as a food," "cultural, social, and economic considerations are equally important." Charlene L. Smith & Howard J. Vogel, *The Wild Rice Mystique: Resource Management and American Indians' Rights as a Problem of Law and Culture*, 10 WILLIAM MITCHEL L. REV. 743, 748 (1984).

Wild rice is a delicate resource as it depends on stable water levels and other factors to thrive. "Wild rice requires a certain water depth and a mild, regular current." MELISSA L. MEYER, THE WHITE EARTH TRAGEDY: ETHNICITY AND DISPOSSESSION AT A MINNESOTA ANISHINAABE RESERVATION, 1889-1920, at 217 (1994). "Wild rice grows well in waters with gentle currents and steady water levels." CHILD at 172. "[W]ild rice beds can be analogized to fishing grounds because wild rice can only be harvested in fixed, discrete locations." Nathan Frischkorn, *Treaty Rights and Water Habitat: Applying the United States v. Washington Culverts Decision to Anishinaabe Akiing*, 11 ARIZ. J. ENVTL. & POL'Y 34, 68 (2020). "[B]ecause wild rice only grows in discrete locations, the destruction of one wild rice bed may cause a significant reduction in one Tribe's harvest." *Id.* at 85.

### C. White Earth Tribal Law on Rights of Wild Rice

In 2018, the Band enacted a tribal law entitled Rights of Manoomin, which grants wild rice legally enforceable rights.[3] The tribal law recognizes that wild rice possesses "inherent rights to exist, flourish, regenerate, and evolve, as well as inherent rights to restoration, recovery, and preservation," and that those rights include a "right to pure water and freshwater habitat" and "the right to a healthy climate system and a natural environment free from human-causing global warming impacts and emissions." *Id.* § 1(a).

The Rights of Manoomin provides that the Band and its members have the right to enforce the tribal law "free of interference from corporations, other business entities, governments, or other public or private entities." *Id.* § 1(c). The law provides for enforcement of the rights against offenders, primarily by requiring violators to pay for damages caused to wild rice and its habitat. *Id.* § 3(b)–(c). In effect, the Rights of Manoomin recognize the Band's sovereign right to make decisions involving impacts or threats to its treaty-protected wild rice, both on and off the White Earth Reservation.

[3] The Rights of Manoomin can be found on the Band's website at: White Earth Nation Legal Codes, *1855 Treaty Authority Resolution Establishing Rights of Manoomin*, https://whiteearth.com/divisions/judicial/forms.

## II. Procedural Background

### A. The Tribal Court Proceedings

On August 4, 2021, the Band, Manoomin, and other parties (collectively, "Band Parties") filed suit against the Minnesota Department of Natural Resources and several of its officials (collectively, "DNR") in the White Earth Tribal Court ("Tribal Court"). Tribal Court Compl.; reprinted in Appellants' Appendix ("App.") 8–55.

In the Tribal Court case, the Band Parties allege, among other things, that by "unilaterally and without formal notice to tribal leaders" granting water-use permits to Enbridge Energy, Limited Partnership ("Enbridge"), a multi-national pipeline company, in conjunction with Enbridge's construction and operation of an oil pipeline called Line 3 across northern Minnesota, DNR has violated the Band Parties' rights, including treaty-protected usufructuary rights. *Id.* at 15.

The Band Parties asserted that the draining of approximately 5 *billion* gallons of public ground and surface water for horizontal drilling under rivers and other waterways of the upper Mississippi watershed relating to the Enbridge pipeline has infringed on the Band's treaty-protected right to gather and harvest wild rice. *Id.* at 22. The Band Parties brought causes of action against DNR based on the Band's Rights of Manoomin tribal law, the 1855 Treaty with the Chippewa, and the U.S. Constitution. *Id.* at 47–53. They sought declaratory and injunctive relief directed at

DNR, the DNR Commissioner, and DNR employees in their official capacities. *Id.* at 53–55.

On August 12, 2021, DNR moved to dismiss the Band Parties' complaint, asserting that it is immune from suit and the Tribal Court lacks subject-matter jurisdiction because DNR is a nonmember party and none of the alleged acts occurred on tribal lands. Tribal Court Order Denying Motion to Dismiss; App. 58–59. DNR based its arguments, in part, on the Supreme Court's decision in *Montana v. United States*, 450 U.S. 544 (1981), which sets forth a legal framework for analyzing the exercise of tribal court jurisdiction over a nonmember party on non-Indian land. *Id.* at 59.

On August 18, 2021, Tribal Court Judge DeGroat denied DNR's motion to dismiss, holding that DNR's arguments regarding subject-matter jurisdiction and sovereign immunity "must give way" to the Band's vital interests. *Id.* at 61. In the order, Judge DeGroat explained that "[t]he activity at issue here impacts the ecosystem of Manoomin in that it allows [DNR] to control the water quantity and quality on which the plant depends." *Id.* at 60.

"In formally adopting laws to protect Manoomin both on and off its reservation," Judge DeGroat stated that the "Band is exercising its inherent authority to protect a necessary and vital resource." *Id.* Such inherent sovereign authority "predates the U.S. Constitution and is reflected in the numerous treaties made

between the United States and Anishinaabeg people."[4] *Id.* Judge DeGroat also noted that the relevant treaties "contain nothing that would indicate the signatories intended to give up their rights to regulate, or at least have a say in the regulation of, such a vital resource." *Id.* at 60–61.

On August 18, 2021, DNR moved to stay further Tribal Court proceedings pending an interlocutory appeal to the White Earth Tribal Court of Appeals and federal court suit. Decl. of Oliver Larson in Support of DNR's Mot. for Prelim. Inj.; App. at 66–67. On August 26, 2021, the Tribal Court held a hearing on DNR's motion to stay the lower court Tribal Court proceedings until a final adjudication of DNR's assertion of sovereign immunity and lack of subject-matter jurisdiction. Status Order and Order Clarifying Order Denying Mot. to Dismiss; App. at 70. Prior to the hearing, Judge DeGroat recused himself from the case due to being a named Defendant in the present case. *Id.*

On August 30, 2021, newly assigned Tribal Court Judge B.J. Jones issued a modified order clarifying Judge DeGroat's earlier order denying DNR's motion to dismiss. *Id.* at 69–78. In the modified order, Judge Jones declined DNR's claim that the Supreme Court's decision in *Nevada v. Hicks*, 533 U.S. 353 (2001) ("*Hicks*"), provides a complete bar for an exercise of tribal court jurisdiction over state officials

[4] Anishinaabeg (plural form of Anishinaabe) refers to Indian groups who settled in the Midwest and Great Lake regions, which include the Ojibwe, also known as the Chippewa.

in any case. *Id.* at 72–74. Rather, the "vast majority of courts," Judge Jones said "simply restate" *Hicks*'s holding that a "tribal court may not exercise civil jurisdiction over state agents for on-reservation investigations stemming from off-reservation conduct" with regard to Section 1983 claims. *Id.* at 72.

Judge Jones also found that "the Eighth Circuit [has] not adopted a blanket rule that state political entities and their officials are beyond the purview of tribal court jurisdiction because of sovereign immunity." *Id.* at 73. Judge Jones explained that the Eighth Circuit has noted that the second *Montana* exception "remains a viable alternative for the exercise of jurisdiction over a state entity and state actors." *Id.* at 74 (citing *Belcourt Pub. Sch. Dist. v. Davis*, 786 F.3d 653 (8th Cir. 2015); *Fort Yates Pub. Sch. Dist. v. Murphy*, 786 F.3d 662 (8th Cir. 2015)).

Judge Jones rejected DNR's claim that the Tribal Court lacks subject-matter jurisdiction over the case because it has not taken or failed to take actions on the White Earth Reservation. *Id.* at 76. Judge Jones pointed out that the Band Parties' complaint alleges that DNR's actions or inactions have resulted in harm to their rights on the White Earth Reservation. *Id.* Because "[t]his issue has not been fully briefed" before the Tribal Court, Judge Jones stated that "the Court is hesitant to make this finding at this point." *Id.*

In the order, Judge Jones determined that the DNR's filing of a federal court suit to enjoin the Tribal Court proceedings "is not a sufficient basis for a stay." *Id.*

at 77. Judge Jones explained that "[u]nder the tribal court exhaustion rule the federal courts have to stay their jurisdictional hand in deference to the tribal court to allow the tribal court to develop the record and assess its jurisdiction." *Id.* Consistent with the tribal court exhaustion doctrine, Judge Jones determined that staying the Tribal Court proceedings was not justified as it "would result in [a] jurisdictional impasse" by "allow[ing] the federal court to take a stab at this case when it is required to stay its hand." *Id.*

**B. The District Court Litigation**

One day after Judge DeGroat denied DNR's motion to dismiss, on August 19, 2021, DNR commenced this action seeking declaratory and injunctive relief against the Band and Judge DeGroat. Federal Court. Compl.; Appellants' Addendum ("Add.") at 1–7. DNR contended that the Tribal Court lacks subject-matter jurisdiction over the Band Parties' lawsuit. Citing the Supreme Court's decision in *Hicks*, DNR alleged that it "is not required to exhaust its remedies" in the Tribal Court because "'it is plain that no federal grant provides for tribal governance' of the conduct pled in the Tribal Suit." *Id.* at 6. DNR also filed a motion for preliminary injunction seeking to enjoin the Band and Judge DeGroat from proceeding with the case pending before the Tribal Court. *See* Appellants Brief ("Apps' Br.") at 7.

On September 3, 2021, the District Court denied DNR's motion for preliminary injunction and dismissed DNR's complaint. Order of Dismissal; Add. at

8–13. It stressed that "[t]ribal sovereign immunity is a jurisdictional threshold matter" and the "Supreme Court has made clear … that a tribe's sovereign immunity bars suits against [a] tribe for injunctive and declaratory relief." *Id.* at 11 (citations omitted). The District Court explained that there are only two exceptions to tribal sovereign immunity: (1) "where Congress has authorized the suit" and (2) when the tribe has "waived its immunity." *Id.* (citing *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998)).

Because the Band and Judge DeGroat "are both protected from suit by tribal sovereign immunity" and DNR has "not identified an applicable waiver or abrogation of tribal sovereign immunity," the District Court found it "lacks authority to enjoin Defendants." *Id.* at 11–12. In the absence of subject-matter jurisdiction, the District Court declined to review whether the Tribal Court lacks jurisdiction over DNR based on the Supreme Court's decision in *Montana v. United States*, 450 U.S. 544 (1981), finding that "such opinion would be an improper advisory opinion." *Id.* at 12 n.4 (citing U.S. Const. art. III, § 2). It therefore dismissed DNR's Complaint without prejudice. *Id.* at 13.

On September 5, 2021, DNR filed a letter requesting leave to move to reconsider the dismissal of Judge DeGroat. Order on Reconsideration; Add. at 14–16. On September 10, 2021, the District Court denied DNR's letter request for permission to file a motion to reconsider. *Id.* at 16. It rejected the contention that

Judge DeGroat does not enjoy sovereign immunity under the *Ex parte Young* doctrine. *Id.* at 15–16. The District Court concluded that the Tribal Court is the real party in interest to DNR's suit. *Id.* at 16.

Following the District Court's denial of the request to file a motion reconsider, DNR filed this appeal. On September 10, 2021, DNR also filed a notice of interlocutory appeal in the Tribal Court, seeking review in the White Earth Tribal Court of Appeals of the issue of the Tribal Court's subject-matter jurisdiction. On September 14, 2021, Judge Jones stayed further proceedings in the Tribal Court pending the review by the White Earth Tribal Court of Appeals.

On September 24, 2021, the Band filed a motion for injunction in the White Earth Tribal Court of Appeals, which was voluntarily withdrawn by the Band Parties on October 15, 2021. As of the time of this filing, the White Earth Tribal Court of Appeals has not ruled on DNR's interlocutory appeal, and neither the White Earth Trial Court or Court of Appeals have considered the merits of the Band Parties' claims.

## SUMMARY OF THE ARGUMENT

The Court should affirm the District Court's dismissal of DNR's case. The Band and its Chief Judge enjoy sovereign immunity from federal suit in the absence of a congressional abrogation or tribal waiver. DNR has failed to point to any limitation on the Band and its Chief Judge's sovereign immunity in this case. DNR's

claim that this suit may proceed against Judge DeGroat under the *Ex parte Young* doctrine also lacks merit. The *Ex parte Young* doctrine applies only when there is an ongoing and prospective violation of federal law. Unlike *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125 (8th Cir. 2019), there has been no showing that Judge DeGroat has exceeded the scope of his authority by exercising tribal jurisdiction over claims arising exclusively under federal law. The Court thus should affirm the District Court's dismissal on sovereign immunity grounds.

If the Court finds that sovereign immunity does not bar DNR's claims, it should affirm the District Court's dismissal based on DNR's failure to exhaust tribal court remedies. Contrary to DNR's arguments, a tribal court may properly exercise jurisdiction over a state entity and its officials—as it could any other nonmember person or entity—consistent with the legal framework set forth by the Supreme Court in *Montana v. United States*, 450 U.S. 544 (1981). Specifically, state agencies and their officials do not enjoy blanket immunity from tribal court suit. Eleventh Amendment immunity imposes no bar to tribal court suit, as the U.S. Constitution does not impose restrictions on sovereign Indian tribes. Moreover, threats and harm to tribal natural resources within a tribe's reservation may trigger the second *Montana* exception, which allows for tribal jurisdiction over a nonmember party when their conduct or activities threaten or impose some direct effect on the political

integrity, the economic security, or the health and welfare of the tribe. *Montana*, 450 U.S. at 566.

The Tribal Court case here concerns DNR's issuance of a permit allowing for the displacement of five *billion* gallons of water in northern Minnesota in close proximity to the Band's reservation. The permit was issued by DNR in connection with the construction of a pipeline project without notice or consultation with the Band. The Band alleges that DNR's issuance of the dewatering permit has significantly impacted its rights, including the wild rice and other natural resources within its reservation. The Band has inherent and exclusive sovereign authority to regulate the natural resources in its reservation. Because the Tribal Court's jurisdiction is not plainly lacking in this case under the second *Montana* exception, DNR must fully exhaust its tribal court remedies before seeking federal court review.

## STANDARD OF REVIEW

This Court reviews the District Court's grant of a motion to dismiss for lack of subject matter jurisdiction de novo. *Sanzone v. Mercy Health*, 954 F.3d 1031, 1037 (8th Cir. 2020). The denial of a preliminary injunction is reviewed for abuse of discretion. *Phyllis Schlafly Revocable Tr. v. Cori*, 924 F.3d 1004, 1009 (8th Cir. 2019).

## ARGUMENT

### I. Sovereign Immunity Bars DNR's Claims.

The District Court correctly held that the Band and Judge DeGroat are immune from suit and DNR fails to allege any applicable waiver of sovereign immunity or that Congress has authorized this suit to proceed. Order of Dismissal; Add. at 11–12. To avoid tribal sovereign immunity, DNR argues that its lawsuit falls within the *Ex parte Young* doctrine. Apps' Br. at 16. DNR claims that tribal court officials sued in their official capacities "do not have sovereign immunity from suit challenging tribal court jurisdiction." *Id.* But DNR's *Ex parte Young* argument pertaining to Judge DeGroat, however, fails because he is not violating federal law and thus remains immune from suit.

#### A. Tribal Sovereign Immunity is a Jurisdictional Issue.

"[T]ribal sovereign immunity is a threshold jurisdictional question." *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 684 (8th Cir. 2011). Tribal sovereign immunity may be raised by a party at any time in the proceedings or "raised *sua sponte* by the court." *Id.* at 686. "[I]f the Tribe possessed sovereign immunity, then the district court had no jurisdiction." *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1244 (8th Cir. 1995). "[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." *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 434 (2007).

**B. The Band is Immune From Suit.**

Indian tribes are "separate sovereigns pre-existing the Constitution." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)). One of the "core aspects of sovereignty that tribes possess" is their sovereign immunity from suit, which the Supreme Court has regarded as "a necessary corollary to Indian sovereignty and self-governance." *Id.* This immunity accords with the recognition that it "is 'inherent in the nature of sovereignty not to be amenable' to suit without consent." *Id.* at 788–89 (quoting The Federalist No. 81, at 511 (Alexander Hamilton) (B. Wright ed. 1961)).

In *Bay Mills*, the Supreme Court explained that "[t]he baseline position … is tribal immunity," absent a tribal waiver or congressional abrogation. 572 U.S. at 790. Additionally, "Congress has consistently reiterated its approval of the immunity doctrine," which accords with its "desire to promote the 'goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development.'" *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510 (1991) (citation omitted).

Here, DNR "bear[s] the burden of proving that either Congress or [the Band] has expressly and unequivocally waived tribal sovereign immunity." *Amerind*, 633

F.3d at 685–86. DNR does not allege any waiver of the Band's sovereign immunity, or point to any federal law that purports to abrogate the Band's immunity. Although DNR omitted the Band from the caption of its Opening Brief to this Court, DNR has not amended its Complaint, and the Band remains a Defendant in this case. Lack of waiver or abrogation of the Band's sovereign immunity is fatal to DNR's claims against the Band.

### C. The *Ex Parte Young* Doctrine Does Not Apply in this Case.

The *Ex parte Young* doctrine 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* doctrine applies only to an official acting contrary to applicable federal law. *Cory v. White*, 457 U.S. 85, 91 (1982); *see N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 460 (8th Cir. 1993) (applying the *Ex parte Young* to tribal officials).

DNR declares that *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125 (8th Cir. 2019) is "indistinguishable" and "directly on point" to this case, Apps' Br. at 10, 14, but fails to mention the obvious differences. *Kodiak* involved claims brought in tribal court relating to oil royalties allegedly owed to individual tribal members. 932 F.3d at 1130. This Court concluded that "suits over oil and gas leases on allotted

trust lands are governed by federal law, not tribal law, and the tribal court lacks jurisdiction over the non-member oil and gas companies." *Id.* at 1129–30.

In particular, the Court found that "complete federal control of oil and gas leases on allotted lands – and the corresponding lack of any role for tribal law or tribal government in that process – undermines any notion that tribal regulation is necessary for tribal self-government." *Id.* at 1138. There, "the entire relationship [was] mediated by the federal government," *id.* – the federal government had "issued" the relevant lease, which "required approval by" the Bureau of Indian Affairs, *id.* at 1130, and collected and disbursed the disputed royalties, *id.* at 1136.

The Court in *Kodiak* held that the *Ex parte Young* doctrine applied because tribal court officials exceeded the scope of their authority by improperly exercising tribal jurisdiction over claims based on "oil and gas leases on allotted trust lands [that] are governed by federal law, not tribal law." *Id.* at 1134. The Court also found that "neither of the two exceptions in *Montana* to the general rule that tribes may not regulate the activities of non-members applies here." *Id.*

By contrast, in this case, Judge DeGroat is not violating federal law. A tribal court's mere exercise of jurisdiction over a case involving a nonmember is not a violation of federal law for purposes of the *Ex parte Young* doctrine. Unlike *Kodiak*, there is no allegation that Judge DeGroat is acting outside the scope of his authority

in hearing claims arising exclusively under federal law. *Cf. Kodiak*, 932 F.3d at 1135 (finding that "the tribal court plaintiffs' claim for relief is based on federal law").

Rather, DNR's allegations pertain to conduct within Judge DeGroat's official capacity and authority. Specifically, Judge DeGroat has presided over a case in Tribal Court, which alleges issues arising under tribal law, including the Band's Rights of Manoomin tribal law. Federal Ct. Compl.; Add. at 2–3. The Tribal Court case involves allegations that DNR's conduct had detrimental effects on the Band's treaty-protected usufructuary rights, which the Band's law explicitly authorizes the Tribal Court to hear. *See* Status Order and Order Clarifying Order Denying Mot. to Dismiss; App. at 76 (stating that the Band's tribal law authorizes the Tribal Court to hear cases alleging "actions taken off the reservation that impact on-reservation rights"). As this Court has explained, "the Supreme Court has determined that 'tribal courts are best qualified to interpret and apply tribal law.'" *Prescott v. Little Six, Inc.*, 387 F.3d 753, 756 (8th Cir. 2004) (quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 845, 856 (1985)).

DNR's reliance on *Nevada v. Hicks*, 533 U.S. 353 (2001), is also misplaced. In *Hicks*, the Supreme Court considered whether a tribal court had "jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation." *Id.* 355. The Court held that tribal courts are not "courts of general

jurisdiction" and cannot hear claims invoking federal statutes absent congressional authorization to do so. *Id.* at 366–67. The Court determined that because "no provision in federal law provides for tribal-court jurisdiction over § 1983 actions … tribal courts cannot entertain § 1983 suits." *Id.* at 368–69.

Like DNR's arguments based on *Kodiak*, *Hicks* does not bar the exercise of tribal court jurisdiction over state officials in all types of cases. In fact, this Court has interpreted *Hicks* to stand only for the proposition that "tribal courts lack jurisdiction to adjudicate federal causes of action absent congressional authorization." *Kodiak*, 932 F.3d at 1135. This Court has not construed *Hicks* to impose a complete bar on tribal court jurisdiction over state agencies and their employees. *See Fort Yates Pub. Sch. Dist.*, 786 F.3d at 669; *Belcourt Pub. Sch. Dist.* 786 F.3d at 659–60.

The Supreme Court has stated that "tribal immunity does not bar such a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct." *Bay Mills*, 572 U.S. at 796 (citing *Santa Clara Pueblo*, 436 U.S. at 59) (emphasis in original). Judge DeGroat has not engaged in unlawful conduct or acted outside the scope of his authority. The *Ex parte Young* doctrine is inapplicable, and therefore, Judge DeGroat is immune from DNR's claims.

## II. DNR Must Exhaust Tribal Court Remedies.

### A. DNR Does Not Enjoy Blanket Immunity From Suit in Tribal Court.

DNR claims that states enjoy "absolute sovereign immunity" from suits in tribal court—implying that it can never be subject to tribal court jurisdiction. Apps' Br. at 21. DNR is wrong. The Eleventh Amendment does not impose any hurdle on DNR being sued in Tribal court. The Eleventh Amendment provides that "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state." *Fryberger v. Univ. of Ark.*, 889 F.3d 471, 473 (2018) (quoting *Port Auth. Trans–Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990)); *see also Grand River Enters. Six Nations, Ltd. v. Beebe*, 467 F.3d 698, 701 (8th Cir. 2006) (stating that "[t]he Eleventh Amendment protects states from being sued in federal court"); *Quinnett v. Iowa*, 644 F.3d 630, 632 (8th Cir. 2011).

Nothing in the Eleventh Amendment or any other provision of the U.S. Constitution imposes a bar upon states or their instrumentalities from being sued in tribal court. "[T]he Constitution does not apply to restrict the actions of Indian tribes as separate, quasi-sovereign bodies." *United States v. Cavanaugh*, 643 F.3d 592, 595 (8th Cir. 2011). The Supreme Court has long recognized that the U.S. Constitution does not "operat[e] upon" "the powers of local self-government enjoyed" by tribes. *Talton v. Mayes*, 163 U.S. 376, 384 (1896).

"As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo*, 436 U.S. at 56. As this Court has explained "the United States Constitution levies particular restraints upon federal courts or upon Congress, these restraints do not apply to the courts or legislatures of the Indian Tribes." *Barta v. Oglala Sioux Tribe of Pine Ridge Reservation of S.D.*, 259 F.2d 553, 557 (8th Cir. 1958) (citations omitted).

Furthermore, this Court has previously addressed whether a state agency and its employees could be subject to tribal court jurisdiction. In *Belcourt Public School District*, a school district—a "political subdivision of the State of North Dakota"—and its employees brought suit against a tribe and its tribal court, contending that a tribal court lacked jurisdiction to hear certain claims brought against them. 786 F.3d at 655–56. Instead of holding that the school district enjoyed blanket immunity from suit in tribal court, the Court considered whether the school district was subject to tribal court jurisdiction by applying the *Montana* framework. *Id.* 658–60.

In considering the second *Montana* exception, the Court in *Belcourt* noted that "the Tribal Court will have jurisdiction only if the claims at issue involve 'conduct [that] threatens or has some direct effect on the political integrity, the economic security, or the health of welfare of the tribe.'" *Id.* at 659–60 (quoting *Montana*, 450

U.S. at 566); *see also Fort Yates Pub. Sch. Dist.*, 786 F.3d at 669 (stating that a "remaining avenue" to subject a state school district and its employees to tribal court jurisdiction is the second *Montana* exception).

This Court in *Belcourt* and *Fort Yates* did not in any way suggest that a state agency and its employees could *never* be sued in tribal court, but rather it recognized that a state agency and its employees could be subject to tribal court jurisdiction based on the *Montana* exceptions just like any other nonmember party.

### B. The Tribal Court Must Be Accorded the Opportunity to Determine the Scope of its Jurisdiction in the First Instance.

The Supreme Court has explained that examination of tribal court jurisdiction "should be conducted in the first instance in the Tribal Court itself" as part of the "policy of supporting tribal self-government and self-determination." *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856 (1985). "[F]ederal court jurisdiction does not properly arise until available remedies in the tribal court system have been exhausted." *Auto-Owners Ins. Co. v. Tribal Court of Spirit Lake Indian Reservation*, 495 F.3d 1017, 1021 (8th Cir. 2007). "[T]he doctrine of exhaustion of tribal remedies is analogous to dismissals under the doctrine of abstention." *Krempel v. Prairie Island Indian Cmty.*, 125 F.3d 621, 623 (8th Cir. 1997).

A tribal court's initial evaluation of its own jurisdiction "serves several important functions, such as assisting in the orderly administration of justice, providing federal courts 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 Serv., LLC v. Laducer*, 725 F.3d 877, 882 (8th Cir. 2013). Consistent with these principles "considerations of comity direct that tribal remedies be exhausted before a federal court can exercise jurisdiction over a challenge to tribal jurisdiction." *Id.* (citations and internal quotation marks omitted).

Exhaustion of tribal court remedies is "mandatory … when a case fits within the policy." *Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 849 (8th Cir. 2003). The 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.*, 471 U.S. at 857. "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." *Iowa Mut. Ins. Co.*, 471 U.S. at 16–17; *Nat'l Farmers Union Ins. Co.*, 471 U.S. at 857.

Only if it is "plain" that tribal jurisdiction does not exist and the assertion of tribal jurisdiction is for "no purpose other than delay," exhaustion of tribal remedies is not required. *DISH Network Serv.*, 725 F.3d at 883 (quoting *Strate v. A–1 Contractors*, 520 U.S. 438, 459 n.14 (1997)). This Court has found that exhaustion of tribal court remedies is appropriate in several cases. *See, e.g.*, *DISH Network Serv.,* 725 F.3d at 884 (finding that tribal court jurisdiction is not plainly lacking even if an alleged tort "occurred off tribal lands" when it arose out of a contract

relating "to activities on tribal land"); *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1420 (8th Cir. 1996); *Gaming World Int'l, Ltd.*, 317 F.3d at 849–50; *Colombe v. Rosebud Sioux Tribe*, 747 F.3d 1020, 1025 (8th Cir. 2014).[5]

Here, DNR does not claim that its tribal court remedies have been exhausted, but only that it seeks "to stop a plainly improper attempt by the Band to suit DNR Officials in tribal court." Apps' Br. at 10. But, as explained below, tribal jurisdiction is not plainly lacking in this case, and DNR must exhaust tribal court remedies before seeking federal court review. In the Tribal Court, DNR moved to dismiss the Tribal Court case; its motion was denied, and it filed an interlocutory appeal in the White Earth Tribal Court of Appeals, but did not allow that appeal to conclude (or even to proceed) before filing this federal suit to challenge tribal jurisdiction. *See* Apps' Br. at 9. DNR's interlocutory appeal currently remains pending before the White Earth Tribal Court of Appeals. The sole issue on appeal before the Tribal Court of Appeals is the subject matter jurisdiction issue, and no issues of fact have been addressed or decided by the White Earth Trial Court or Court of Appeals. DNR's attempt to evade tribal jurisdiction is thus inappropriate.

While the District Court did not address exhaustion of tribal court remedies, this Court may affirm a lower court decision on any ground supported by the record.

[5] Even in *Kodiak*, a case on which DNR heavily relies, this Court found that "the oil and gas companies exhausted their tribal court remedies" before filing suit in federal court. 932 F.3d at 1133.

*Campbell v. Comm'r of Internal Revenue*, 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.").

### C. Tribal Court Jurisdiction is Not Plainly Lacking Under the Second *Montana* Exception.

Even if DNR does not enjoy sovereign immunity, it claims that the Tribal Court lacks subject matter jurisdiction over the claims pled because it has not physically performed "acts on lands in [the] reservation." Apps' Br. at 23. Under DNR's theory, it can never be subject to tribal court jurisdiction regardless of the damaging and destructive impacts that its conduct and activities may have within the Band's reservation boundaries—just as long as it is at least one step off the reservation. DNR's argument fails. First, the focus of the *Montana* analysis is on the nonmember's "conduct" or "activities," not the nonmember's physical location. Second, a nonmember's conduct or activities that imposes threats to or harms tribal natural resources may in fact invoke the second *Montana* exception. Because the Tribal Court's jurisdiction is not plainly lacking in this case, DNR must fully exhaust its tribal court remedies.

In *Montana*, the Supreme Court recognized two exceptions under which tribes may exercise "civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." 450 U.S. at 565. These exceptions include: (1) "the activities of non-members who enter consensual relationships with the tribe or its members," and

(2) conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Id.* at 565–66. "The *Montana* exceptions are rooted in the tribes' inherent power to protect certain sovereign interests." *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa*, 609 F.3d 927, 937 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 1003 (2011); *see also Bruce H. Lien Co.* 93 F.3d at 1419 ("The exercise of tribal jurisdiction over activities of non-Indians is an important part of tribal sovereignty.").

The "starting point" for the *Montana* "jurisdictional analysis is to examine the specific conduct the Tribe's legal claims would seek to regulate." *Attorney's Process & Investigation*, 609 F.3d at 937. "The *Montana* exceptions focus on 'the activities of nonmembers' or the 'conduct of non-Indians.'" *Id.* (quoting *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008)). Contrary to DNR's arguments, "physical location, while relevant, is not dispositive because the focal point under *Montana* is the location of the nonmember's activities or conduct." *Sprint Commc'ns Co. L.P. v. Wynne*, 121 F. Supp. 3d 893, 899 (D.S.D. 2015) (citing *Attorney's Process & Investigation*, 609 F.3d at 937); *see also Fed. Trade Comm'n v. Payday Fin., LLC*, 935 F. Supp. 2d 926, 940 (D.S.D. 2013) (stating that the focus of the *Montana* analysis is "not solely the nonmember['s] *physical location*") (emphasis in original). This Court has also advised that "courts applying *Montana*

should not simply consider the abstract elements of the tribal claim at issue, but must focus on the specific nonmember conduct alleged, taking a functional view of the regulatory effect of the claim on the nonmember." *Attorney's Process & Investigation*, 609 F.3d at 938

The reason for not limiting the second *Montana* exception's analysis to the nonmember's physical location is straightforward and simply: "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. The precise location of the [nonmember's] activity or conduct should be evaluated by the tribal court when it applies *Montana* in the first instance." *Sprint Commc'ns Co. L.P.*, 121 F. Supp. 3d at 900 n.5 (D.S.D. 2015). Further, "[r]educing 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." *Payday Fin., LLC*, 935 F. Supp. 2d at 940; *see also id* at 939 (recognizing that a nonmember "can conduct business on the reservation and can affect the Tribe and tribal members without physically entering the reservation").

When it comes to a tribe's regulation of natural resources under the second *Montana* exception, a tribe "may quite legitimately seek to protect its members from

noxious uses that threaten tribal welfare or security, or from nonmember conduct on the land that does the same." *Plains Commerce Bank*, 554 U.S. at 336. This is because "[t]hreats 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), *cert. denied*, 141 S. Ct. 1046 (2021); *see also Plains Commerce*, 554 U.S. at 334–35 (listing "commercial development" as one example of nonmember conduct that might "threaten tribal self-rule").

This Court in *Attorney's Process & Investigation*, 609 F.3d at 938, favorably cited the Ninth Circuit's decision in *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 849 (9th Cir. 2009), which considered the extent of alleged damage before deciding whether a tribe had colorable jurisdiction to enforce regulations prohibiting trespass and requiring a permit to ignite a fire on tribal land. The Ninth Circuit in *Elliott* concluded that a tribe has a "strong interest" in the "prevention of forest fires, and preservation of its natural resources," which can plausibly support tribal court jurisdiction under the second *Montana* exception. *Id.* at 850. The court noted "the regulations at issue are intended to secure the tribe's political and economic well-being, particularly in light of the result of the alleged violations of those regulations in this very case: the destruction of millions of dollars of the tribe's

natural resources." *Id.* The court did not rest its decision solely on the categorical elements in the tribal regulations, but on "the circumstances of th[e] case." *Id.*

Likewise, in this case, the Band seeks to regulate DNR's conduct and activities relating to dewatering occurring on the Band's reservation that has imposed direct threats and harm to the Band's right to manage and gather wild rice. Tribal Ct. Compl.; App. at 22. In Tribal Court, the Band Parties allege that DNR has granted an unrestricted dewatering permit to Enbridge allowing for the displacement of water in close proximity to the White Earth Reservation for construction of the Line 3 pipeline without any notice or consultation with the Band. *Id.* at 20. DNR's original dewatering permit allowed for 500 million gallons of water, and without notice or consultation with the Band, increased to 5 billion gallons of water. *Id.* at 29–30. The dewatering activities have the effect of lowering water levels in nearby areas, including Lower Rice Lake located within the boundaries of the White Earth Reservation. Lower Rice Lake is the White Earth Band's crown jewel; it is the largest, continuously producing wild rice bed in the world.

Because DNR's alleged conduct and activities impose direct threats and harm on the Band's natural resources, including wild rice, within its reservation under the second *Montana* exception, the Tribal Court's jurisdiction is not plainly lacking. As the Tribal Court has explained, wild rice is "central to the culture and history of the Anishinaabe people and is an integral part of wetland ecosystem and natural

communities." Tribal Court Order Denying Motion to Dismiss; App. at 60. Moreover, DNR's alleged "activity at issue here impacts the ecosystem of Manoomin in that it allows [DNR] to control the water quantity and quality on which the plant depends." *Id.* DNR's "activity threatens the cultural welfare and continuity of the Band due to the unique status of Manoomin." *Id.* It is also true that "[t]he White Earth Band of Chippewa Indians is entitled to hunt, fish, and gather wild rice on the White Earth Reservation without interference from or regulation by the State of Minnesota." *White Earth Band of Chippewa Indians v. Alexander*, 518 F. Supp. 527, 537–38 (D. Minn. 1981), *aff'd*, 683 F.2d 1129 (8th Cir. 1982).

While DNR's underlying dewatering conduct and activities may have occurred off-reservation, the Band has suffered direct impacts on its reservation. Under similar circumstances, the Ninth Circuit has held that "threats to water rights may invoke inherent tribal authority over non-Indians" pursuant to the second *Montana* exception. *Montana v. U.S. Env't Prot. Agency*, 137 F.3d 1135, 1141 (9th Cir. 1998). It explained 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 the 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.* (internal quotation marks omitted).

Under the Band's Rights of Manoomin tribal law, wild rice holds certain rights, including "the right to pure water and freshwater habitat; the right to a healthy climate system and a natural environmental free from human-caused global warming impacts and emissions." Rights of Manoomin § 1(a). The tribal law makes it "unlawful for any business entity or government, or any other public or private entity, to engage in activities which violate, or which are likely to violate, the rights or prohibitions of th[e] law." *Id.* § 2(a). Under the Rights of Manoomin tribal law, "[a]ny business entity or government … that violates any provisions" is subject to Band's jurisdiction. *Id.* § 3(b)–(c). These regulations "plainly concern" the Band's exclusive right to regulate its natural resources within its reservation boundaries and to "prohibit[] destruction of natural resources." *Elliott*, 566 F.3d at 850.

Finally, the Supreme Court's recent decision in *United States v. Cooley*, 141 S. Ct. 1638 (2021), further supports the Band's regulation of DNR's alleged activities and conduct at issue in this case that have occurred on the White Earth Reservation. In *Cooley*, the Court recognized under the second *Montana* exception that a tribe has the inherent authority to detain and investigate non-Indians for potential violations of federal or state law to protect the health or welfare of the tribal community. *Id.* at 1643.

The Court in *Cooley* found that the "second [*Montana*] exception … fits the present case, almost like a glove," as the exception "speaks of the protection of the

'health or welfare of the tribe' and denying tribal police officers such authority would "make it difficult for tribes to protect themselves against ongoing threats." *Id.* The Court noted that "no treaty or statute has explicitly divested Indian tribes of the policing authority at issue." *Id.* As the Tribal Court in this case pointed out, the Supreme Court in *Cooley* did "not adopt the catastrophic consequence or imperil the subsistence of the Tribe standard" that has been applied by federal courts—"calling into question where that standard is appropriate." Status Order and Order Clarifying Order Denying Mot. to Dismiss; App. at 74 (internal quotation marks omitted).

In enacting the Rights of Manoomin Tribal Law, the Band "exercise[ed] its inherent authority to protect a necessary and vital resource," Tribal Court Order Denying Motion to Dismiss; App. at 60, and its sovereign right to "make [its] own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). This Court has previously recognized that "[t]he Band's right to hunt, fish and gather wild rice is an attribute of its inherent sovereignty." *Alexander*, 683 F.2d at 1137.

No treaty or federal statute has divested the Band of its inherent sovereign authority to regulate wild rice on the White Earth Reservation. The Band's exercise of authority to regulate activities and conduct which directly impact vital resources on its reservation, and which have a direct impact on its wild rice and other natural resources—which the Band has an exclusive right to regulate—is fundamental to protect its culture and the health and welfare of the Band and its members for future

generations. Because the Tribal Court's jurisdiction is not plainly lacking, DNR must fully exhaust its tribal court remedies.

## CONCLUSION

The Court should affirm the decision below.

*/s/ Joseph Plumer*

Frank Bibeau (MN #0306460)
55124 County Road 118
Deer River, MN 56636
Telephone: (218) 760-1258
Email: frankbibeau@gmail.com

Joseph Plumer (MN #164859)
PLUMER LAW OFFICE
9352 N. Grace Lake Rd. SE
Bemidji, MN 56601
Telephone: (218) 556-3824
Email: jplumer@paulbunyan.net

Riley Plumer (D.C. #1643274)
HOBBS, STRAUS, DEAN & WALKER LLP
1899 L Street NW, Suite 1200
Washington, D.C. 20036
Telephone: (202) 822-8282
Email: rplumer@hobbsstraus.com

*Attorneys for Defendants-Appellees*

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(A), and it also complies with Fed. R. App. P. 32(a)(7)(B) because the brief contains 8,303 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016, Times New Roman, Font Size 14.

3. The undersigned also certifies that this brief has been scanned for viruses and is virus-free.

Dated: October 25, 2021 *<u>/s/ Joseph Plumer</u>*

## CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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