**No. 21-3050**

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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Minnesota Department of Natural Resources, et al.

Appellants,

v.

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

Appellee.

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA**

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# APPELLANTS' BRIEF AND ADDENDUM

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## SUMMARY OF THE CASE

This case arises from an unprecedented and plainly prohibited attempt by the White Earth Band of Ojibwe ("the Band") to sue the Minnesota Department of Natural Resources' and its officials ("DNR") in tribal court. The Band seeks a tribal court order requiring the DNR officials to revoke a state-issued permit for a pipeline replacement project – no part of which crosses the Band's reservation.

DNR filed a motion to dismiss in tribal court for lack of subject matter jurisdiction, which the tribal court denied. DNR then filed this action seeking declaratory and injunctive relief against further proceedings in the tribal court. DNR named the Band and Chief Judge David A. DeGroat in his official capacity as the defendants.

The federal district court heard arguments on the DNR's motion for a preliminary injunction – but then *sua sponte* dismissed the federal action, holding that both the Band and Judge DeGroat have sovereign immunity from suit in federal court. While DNR agrees that the Band can assert sovereign immunity *if* it so chooses, Judge DeGroat does not have sovereign immunity. *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1139 (8th Cir. 2019). DNR requests this Court overturn the dismissal and remand with direction to enter a permanent or preliminary injunction against further tribal court proceedings. DNR seeks oral argument of 10 minutes.



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## JURISDICTIONAL STATEMENT

This case arose under federal question jurisdiction pursuant to 28 U.S.C. § 1331. Federal courts have federal question jurisdiction to hear challenges to tribal court jurisdiction brought by nonmembers sued in tribal court. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985).

On September 2, 2021, the district court dismissed the case *sua sponte*, holding both defendants had sovereign immunity from suit in federal court. On September 10, the district court denied DNR's request for leave to file a motion to reconsider. On September 10, DNR filed this appeal. On September 13, the district court entered final judgment.[1]

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 and Fed. R. App. P. 4. The district court's dismissal is final, and there are no other matters pending before the district court.

[1] DNR's appeal is deemed filed and effective on September 13 because a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment is treated as filed and effective on the day of the judgment. *Firstier Mortgage Co. v. Investors Mortgage Ins. Co.*, 498 U.S. 269, 270 (1991).



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## STATEMENT OF THE ISSUES

1. Do federal courts have jurisdiction to hear suits by state officials challenging tribal court jurisdiction through the vehicle of an official capacity suit against a tribal judge?

   *The district court held that sovereign immunity shields tribal judges from official capacity suits in federal court challenging improper assertions of tribal court jurisdiction.*

   *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985)
   *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125 (8th Cir. 2019)
   *Nord v. Kelly*, 520 F.3d 848 (8th Cir. 2008)

2. Should this Court enjoin further tribal court proceedings to prevent the ongoing harm to the state of having to defend a suit in tribal court where the tribal court has no jurisdiction?

   *The district court denied a motion for a preliminary injunction, dismissing the matter sua sponte based on its holding that Judge DeGroat has sovereign immunity from suit in federal court.*

   *Nevada v. Hicks*, 533 U.S. 353 (2001)
   *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125 (8th Cir. 2019)
   *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109 (8th Cir. 1981)



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## STATEMENT OF THE CASE

This case involves two related actions. In the first suit, the Band sued the DNR and its officials in tribal court seeking injunctive and declaratory relief directed to the off-reservation conduct of the DNR officials. In the second suit, the DNR and its officials sued the Band and a tribal judge, in his official capacity, to obtain a declaration that the tribal court lacked jurisdiction over DNR and its officials, and to enjoin further proceedings. The issues on appeal are whether federal courts have the power to hear suits brought by non-band members challenging an improper assertion of tribal court authority, and whether this matter should be remanded with direction to enter an appropriate injunction.[2]

### A. The Band's Tribal Court Action to Enjoin State Officials

On August 5, Manoomin[3], the Band, its tribal council, and a mix of individual Band members and nonmembers filed suit against DNR and DNR officials in the Band's tribal court. (Appendix ("App.") at 34-41, ¶¶ 20-40.) The individual defendants named by the Band were the DNR Commissioner, two named DNR

[2] As set forth in Section I(C) of the argument below, this Court can and should remand this case with an instruction to enter a permanent injunction, rather than a preliminary injunction, because the issues presented are pure questions of law. *Cello P'Ship v. Hatch*, 431 F.3d 1077, 1079 (8th Cir. 2005)

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

employees, and ten unnamed conservation officers. (App. 41-43, ¶¶ 41-45.) The Band sued DNR officials in their official and individual capacities. (*Id.*)[4]

The Band's tribal complaint pleads seven counts. (App. 47-53.) Counts I and II seek a declaration that Band members have usufructuary rights under the Treaty with the Chippewa, 1855 (the "1855 Treaty") to harvest wild rice off-reservation. (App. 47-48, ¶¶ 58-65.) Count III seeks a declaration that the State's failure to recognize certain usufructuary rights under the 1855 Treaty, while recognizing them under other treaties, violates equal protection principles. (App. 48-49, ¶¶ 66-70.) Count IV seeks a declaration that DNR officials violated the Fourth Amendment and the Band members' due process rights by "seizing" 5 billion gallons of water when issuing a water appropriation permit for construction dewatering activities. (App. 49-50, ¶¶ 71-74.) Count V seeks a declaration that tribal members' right to exercise certain usufructuary rights is guaranteed by the First Amendment and the American Indian Religious Freedom Act. (App. 50-51, ¶¶ 75-77.) Count VI seeks a declaration that DNR failed to adequately train staff on Band members' usufructuary rights under the 1855 Treaty. (App. 51-52, ¶¶ 78-81.) Count VII seeks a declaration that DNR and the named defendants violated the *Rights of Manoomin* – a tribal legal code adopted by the Band that creates certain rights conferred on Manoomin. (App. 52-53, ¶¶ 82-85.)

[4] DNR itself has now been dismissed from the tribal court suit.

Much of the Band's tribal court complaint concerns its argument that DNR violated the 1855 Treaty by issuing a groundwater appropriation permit to Enbridge Energy, Limited Partnership for dewatering associated with the construction of the Line 3 replacement pipeline ("Line 3") outside of the White Earth Reservation.[5] (App. 15-31, 43-47 (¶¶ 46-57.)) The Band also pleads that Band members and individuals associated with the Band have been charged with trespass for actions taken to stop the construction of Line 3, though the Band pleads no counts based on these allegations. (*E.g.* App. 37 ¶ 28.)

All of the Band's counts seek either declaratory or injunctive relief directed to DNR, its Commissioner, or the two named DNR employees. (App. 48-55.) All of the relief is directed to DNR or its officials in their official capacities. (*Id.*) The Band seeks no relief that any official could offer in their individual capacity. (*Id.*)

DNR moved the tribal court to dismiss the complaint, agreeing to expedited briefing. (App. 66-67, ¶ 3.) DNR filed a motion and supporting papers on August 12. (*Id.*) DNR argued that DNR and its officials had sovereign immunity from suit in tribal court, and that even if they did not, the tribal court lacked subject

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[5] The Band has been litigating on permits and certifications for the Line 3 project in state and federal courts for years. *See In re Enbridge Line 3 Replacement Project*, Case No. A20-1513, 2021 WL 3853422 (Minn. Ct. App. Aug. 30, 2021); *In re Enbridge Energy, Ltd. P'ship*, 930 N.W.2d 12, 16 (Minn. Ct. App. 2019); *Red Lake Band of Chippewa Indians v. U.S. Army Corps of Engineers*, 338 F.R.D. 1 (Dist. D.C. Jan. 9, 2021). Doubtlessly unsatisfied with the result, the Band now pursues an action in tribal court.



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matter jurisdiction over DNR and its officials for state-permitting actions occurring off-reservation related to an off-reservation project. (App. 58-59.) A hearing was held on August 16. (App. 58.)

On August 18, the tribal court denied the DNR's motion to dismiss. (App. 61.) In relevant part, the tribal court held that the Bands' vital interests were at stake, and as a result the tribal court had subject matter jurisdiction over DNR and its officials for their conduct occurring off-reservation under *Montana v. U.S.*, 450 U.S. 544, 565 (1981). (App. 61.) For the same reason, the tribal court order held DNR was not entitled to sovereign immunity. (*Id.*) Judge DeGroat initially presided over the case and issued this decision. (*Id.*) On August 19, DNR moved to stay further tribal court proceedings pending a potential interlocutory appeal to the Band's court of appeals and federal litigation. (App. 66-67, ¶¶ 3, 4.)

The tribal court held hearings on August 26 on the DNR's motion to stay lower-court tribal proceedings until there was a final adjudication of DNR's assertions of sovereign immunity and lack of subject matter jurisdiction. (App. 70.) Prior to the hearing, Judge DeGroat recused himself. (*Id.*) The newly assigned judge, B.J. Jones, announced that he would *sua sponte* issue an amended order denying the DNR's motion to dismiss with his own additional reasoning. (*Id.*) On August 30, Judge Jones issued his amended order on DNR's motion to dismiss. (App. 69-78.) As part of the order, Judge Jones denied DNR's motion to stay



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proceedings and again denied DNR's motion to dismiss, but indicated his belief that DNR itself should be dismissed while leaving DNR officials in the suit – giving the Band ten days to brief that issue. (App. 78.) DNR has now been dismissed, but the case remains active against DNR officials.

### B. DNR's Federal Court Action to Adjudicate the Tribal Court's Lack of Jurisdiction

On August 19, the same day it unsuccessfully moved to stay the tribal court proceeding, DNR filed this suit to enjoin further proceedings in tribal court. (Addendum ("Add.") at 1.) DNR named the Band and Judge DeGroat as defendants. (Add. 2 ¶¶ 7-8.) DNR named Judge DeGroat in his official capacity and sought only prospective non-monetary relief. (Add. 2 ¶ 8, Add. 6 ¶¶ 30, 31.) Judge DeGroat was still presiding over the tribal case at the time DNR filed its federal action. (App. 70.)

The federal district court heard arguments on DNR's motion for a preliminary injunction on September 1. (App. 79.) The Band and Judge DeGroat made no argument to the federal district court that they have sovereign immunity to suit, nor did they ask for a dismissal on that basis. (*See* Band's Response to DNR's Motion for a Preliminary Injunction, Dkt. 14.)[6] Judge DeGroat made no argument to the

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[6] There was nothing improper in DNR naming the Band itself as a defendant. Tribes frequently choose to defend suits in federal court concerning their powers or jurisdiction. *See, e.g.*, *Nevada v. Hicks*, 533 U.S. 353, 355 (2001); *Nat'l Farmers*, 471 U.S. at 848 (1985). While there is no case directly on point, tribal sovereign

court that he was not properly named in his official capacity, or that he had sovereign immunity from suit if sued in his official capacity. (*Id.*) The federal district court took the matter under advisement. (App. 79.)

On September 3, the federal district court dismissed this action *sua sponte*, holding that under *Fort Yates Public School District No. 4 v. Murphy ex rel. C.M.B.*, 786 F.3d 662 (8th Cir. 2015) the Band and Judge DeGroat had sovereign immunity from suit. (Add. 11-12.) On September 5, DNR filed a letter requesting leave to move to reconsider the dismissal of Judge DeGroat – pointing out that binding precedent from this Court allows official capacity suits against tribal court judges for declaratory and injunctive relief pursuant to *Ex parte Young*. (Add. 14.)[7] The DNR's letter extensively discussed *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125 (8th Cir. 2019) – a case in which this Court ruled that sovereign immunity does not apply to tribal judges sued in their official capacity to enjoin proceedings over

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[*continued from prior page*] immunity is likely an affirmative defense, not a jurisdictional bar that must be raised *sua sponte* by a federal court. *See Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, 389 (1998) (holding that federal courts can normally ignore sovereign immunity unless the sovereign raises it). The district court's dismissal of the Band with no assertion by the Band of its sovereign immunity as a defense was therefore improper.

[7] Under the rules of the district court, parties cannot file a motion for reconsideration without court permission, and must seek that permission through a letter to the Court of no more than two pages. *See* District of Minnesota Local Rule 7.1(j).

which the tribal court has no jurisdiction. On September 10, the district court denied DNR's request for leave to file a motion to reconsider. (Add. 14-16.)

### C. Post-Dismissal Proceedings

On September 9, the tribal court scheduled an evidentiary hearing for September 20 on the Band's request for a preliminary injunction directed to DNR officials. (Add. 91.) Among the relief the Band appeared to seek was an injunction requiring DNR to rescind all State-issued water appropriation permits related to Line 3. (App. 54-55, ¶ 86.)

On September 10, DNR filed this appeal and a motion for a preliminary injunction and expedited briefing. The same day, DNR also filed a notice of interlocutory appeal in the tribal court, seeking tribal appellate review of the issue of the tribal court's subject matter jurisdiction. On September 14, Judge Jones *sua sponte* stayed further proceedings in lower tribal court pending the tribal appeal. The tribal appellate court has not yet ruled on the issue of whether it will hear the appealed issues on an interlocutory basis. On September 15, DNR notified this Court that it would withdraw its request for a preliminary injunction prior to resolution of the appeal on the merits, without prejudice to reinstate it if proceedings in the lower tribal court resumed. DNR maintained its request for entry of an order for expedited treatment of this appeal, which was granted.

On September 24, the Band field a motion in the tribal appellate court for an injunction requiring DNR to rescind water appropriation permits for the Line 3 project. The motion is pending as of the filing of this brief.

## SUMMARY OF ARGUMENT

This matter arises from DNR's efforts to stop a plainly improper attempt by the Band to sue DNR Officials in tribal court to block permits issued by DNR for an off-reservation project. At the heart of this appeal are two simple propositions. First, tribal courts lack jurisdiction to hear claims against state officials for conduct occurring off-reservation. No federal case has ever allowed a tribal court action to proceed that targeted state officials engaged in the administration of state regulatory programs, let alone for projects located off-reservation. Second, the express purpose of *Ex parte Young* is to allow suits in federal courts for prospective injunctive relief against state or tribal officials where their conduct violates federal law. This includes suits to prevent tribal courts from exercising jurisdiction that they do not have. The principle is well-settled and was recently reaffirmed by this court in *Kodiak* – a case indistinguishable from this one.

This Court should reverse the dismissal of this action, address DNR's request for an injunction, and remand to the district court with direction to enter permanent injunction, or in the alternative, a preliminary injunction against further proceedings in the lower tribal courts until a final judgment in this matter.

## ARGUMENT

### I. APPLICABLE LAW

#### A. Standard of Review for Dismissals

This Court reviews dismissal for lack of subject matter jurisdiction *de novo*. *Richardson v. BNSF Ry. Co.*, 2 F.4th 1063, 1067 (8th Cir. 2021). This Court also reviews tribal court assertions of jurisdiction over nonmembers de novo. *Nord v. Kelly*, 520 F.3d 848, 852 (8th Cir. 2008) ("Determining the extent to which an Indian tribe has the power to compel a non-Indian to submit to the civil jurisdiction of a tribal court is a question of federal law, and we review the issue de novo.") (citations omitted).

#### B. Standard of Review and Law Applicable to Preliminary Injunctions

In reviewing a district court's decision on whether to issue a preliminary injunction, the Court gives deference to district court fact findings, but reviews legal holdings de novo. *Comprehensive Health of Planned Parenthood Great Plains v. Hawley*, 903 F.3d 750, 754 (2018). Here, the district court denied DNR's motion for a preliminary injunction exclusively on a legal basis, holding it lacked subject matter jurisdiction to hear the case or issue the injunction. This Court therefore reviews de novo.

This Court's resolution of preliminary injunction issues is controlled by the *Dataphase* factors. *See, e.g.*, *Fresenius Kabi USA, LLC v. Nebraska*, 733 F. App'x

871, 872 (8th Cir. 2018); *Brakebill v. Jaeger*, 905 F.3d 553, 557 (8th Cir. 2018). The *Dataphase* factors are: (1) the threat of irreparable harm to the moving party; (2) the balance between this harm and the injury that granting the injunction would inflict on the non-moving party; (3) the moving party's likelihood of success on the merits; and (4) the public interest. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). Likelihood-of-success factor is generally the most important of the four *Dataphase* factors. *See*, *e.g.*, *Jones v. Jengley*, 947 F.3d 1100, 1105 (8th Cir. 2020). Whether the issue comes to this Court on an appeal from an order denying an injunction or an order granting an injunction, the analysis is the same. *Walker v. Lockhart*, 678 F.2d 68, 70 (8th Cir. 1982).

### C. This Court Has the Power to Remand this Matter with Direction to Enter a Permanent Injunction.

DNR is appealing the district court's denial of a preliminary injunction. This Court would normally consider the issue, and if it reverses, remand with an instruction to enter a preliminary injunction. This case, however, presents a circumstance where the appropriate relief is a remand for entry of a *permanent* injunction.

Where an appeal arises from a district court ruling on a preliminary injunction and the case turns on a dispositive question of law, this Court can and often does enter a permanent injunction if it rules in favor of the moving party. *See Cello P'Ship v. Hatch*, 431 F.3d 1077, 1079 (8th Cir. 2005); *Bank One v. Guttau*, 190 F.3d 844, 847-848 (8th Cir. 1999); *Minn. Dept. of Economic Security v. Riley*, 107 F.3d 648,



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649 (8th Cir. 1997). This reflects a sound policy that there is no reason to remand a case back to a district court for further proceedings on a question of law this Court has already decided and that is dispositive of the case. *Id.*

This is an appropriate case for entry of a permanent injunction because it presents pure questions of law that are dispositive of the case. Whether DNR and DNR officials have sovereign immunity from suit in tribal court is a question of law. *Entergy Arkansas, Inc. v. Nebraska*, 358 F.3d 528, 556 (8th Cir. 2004). DNR's argument that the tribal court would lack subject matter jurisdiction even in the absence of sovereign immunity is also a question of law. *Nord*, 520 F.3d at 852. There is no reason for this Court to remand this case for further proceedings if it resolves the legal questions in this case in DNR's favor.

To the extent the Court believes that some consideration of the issues by the district court is warranted, DNR still requests that the case be remanded with instructions to enter a preliminary injunction for the reasons set forth below in Section III.

## II. THIS COURT SHOULD REVERSE THE DISTRICT COURT'S *SUA SPONTE* DISMISSAL, AND HOLD THAT JUDGE DEGROAT IS SUBJECT TO AN OFFICIAL CAPACITY SUIT IN FEDERAL COURT TO CHALLENGE TRIBAL COURT JURISDICTION OVER STATE OFFICIALS.

Tribal courts have very limited jurisdiction over nonmembers. When a nonmember is haled into tribal court, the nonmember has the right to seek relief from a federal court to declare that the tribal court lacks jurisdiction, and to enjoin further

proceedings. The pleading vehicle for this type of claim is the one DNR used here – an *Ex parte Young* official capacity lawsuit brought against the judge presiding over the tribal case, or the chief judge of the tribal court. This is a well-established practice, with a century of supporting case-law arising from *Ex parte Young*. This includes a recent decision from this Court that is directly on point: *Kodiak*, 932 F.3d at 1139. It is unclear why the district court departed from well-established *Ex parte Young* jurisprudence to dismiss Judge DeGroat. This Court should reverse.

### A. Nonmembers Haled into Tribal Courts Have a Federal-Law Right to a Federal-Court Determination of the Tribal Court's Jurisdiction.

Like many things involving tribal law, the jurisdiction of tribal courts and the processes available to nonmembers to challenge that jurisdiction are unique areas of law. The resolution of these jurisdictional issues is not analogous to the way in which federal or state courts deal with jurisdictional challenges involving other state courts or foreign countries. For example, while DNR cannot sue Quebec in federal court to obtain a declaration that DNR is not subject to the jurisdiction of Quebecois courts, it absolutely can sue the Band in federal court for that relief – through the vehicle of an official capacity claim. This issue is well-settled, having been decided by the Supreme Court no later than its decision in *National Farmers*.

In *National Farmers*, a member of the Crow Tribe of Indians filed suit against a school district in tribal court and obtained a default judgment. 471 U.S. at 847.



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The school and its insurer then commenced suit in federal court to enjoin further tribal court proceedings on the basis that the tribal court lacked jurisdiction over the school. *Id.* The case eventually made its way to the Supreme Court, where one issue was whether there was a federal-law basis for the federal courts to adjudicate whether the tribal court had jurisdiction over a nonmember. *Id.* at 849.

The Supreme Court answered the question in the affirmative, holding that tribal sovereignty is subject to the plenary power of the federal government, and that as a result the question of whether nonmembers are required "to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question'." *Id.* at 852-53. The Supreme Court held that federal courts therefore have the power to adjudicate the jurisdiction of tribal courts over nonmembers pursuant to the federal question jurisdictional grant in 28 U.S.C. § 1331. *Id.* The principle is well-established. The case most commonly cited for this proposition in the Eighth Circuit is *Nord*, where this Court held:

> Determining the extent to which an Indian tribe has the power to compel a non-Indian to submit to the civil jurisdiction of a tribal court is a question of federal law, and we review the issue *de novo.*

520 F.3d at 852 (*citing Nat'l Farmers*).

Based on *National Farmers* and *Nord*, the district court and this Court clearly have federal question jurisdiction to issue declaratory and injunctive relief to prevent an improper exercise of tribal court jurisdiction over state officials. *See, e.g.*,



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*Kodiak*, 932 F.3d at 1139; *Nord*, 520 F.3d at 852. As set forth below, the proper vehicle for the challenge is an official capacity suit against tribal court officials.

**B. Judge DeGroat, in his Official Capacity, Does Not Have Sovereign Immunity from Suit in Federal Court.**

This Court has held that the proper vehicle for a suit challenging tribal court jurisdiction is an official capacity lawsuit naming the sitting judge or chief judge of the relevant tribal court. *Kodiak*, 932 F.3d at 1131; *see also Nord*, 520 F.3d at 848. This is because under *Ex parte Young*, tribal court officials sued in their official capacities do not have sovereign immunity from suit challenging tribal court jurisdiction. *See*, *e.g.*, *Kodiak*, 932 F.3d at 1131; *cf. Fort Yates*, 786 F.3d at 670 (dismissing claim brought against tribal court rather than a tribal official in an official capacity).[8]

This Court's 2019 *Kodiak* decision is directly on point. In *Kodiak*, tribal members sued non-tribal oil and gas companies in tribal courts alleging that the companies were breaching gas leases. 932 F.3d at 1130. The companies filed federal actions (that were consolidated) alleging the tribal courts lacked jurisdiction,

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[8] Other circuits that have considered the issue have come to the same conclusion as the Eighth Circuit – tribal court judges sued in their official capacity to challenge tribal court jurisdiction do not have sovereign immunity. *See Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1156 (10th Cir. 2011); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 63 F.3d 1030, 1051 (11th Cir. 1995). Conversely, DNR was unable to locate any case in which a federal court found a tribal judge has sovereign immunity from an official capacity suit to challenge the tribal court's lack of jurisdiction over a non-member. The district court cites none.



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and sought declaratory and injunctive relief – including preliminary injunctions. *Id.* Unlike the *Fort Yates* plaintiffs, the *Kodiak* plaintiffs correctly named the chief judges of the tribal courts (in their official capacities) as the federal defendants, rather than the courts themselves. *Id.*

The *Kodiak* case came to this Court on an interlocutory appeal after the district courts entered preliminary injunctions against the tribal judges. *Id.* at 1131. The tribal judges argued they had sovereign immunity from the suit – the exact basis for the dismissal here. *Id.* This Court emphatically rejected the argument:

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

*Id.* Indeed, the customary practice in suits challenging tribal court jurisdiction is to name either the judge presiding over the tribal case, or the chief judge of the tribal court, or both, in an official capacity. *See, e.g., Hicks*, 533 U.S. at 355 n.1; *Strate v. A-1 Contractors*, 520 U.S. 438, 444 (1997); *Kodiak*, 932 F.3d at 1131; *Nord*, 520 F.3d at 851.[9] Here, Judge DeGroat was both chief judge and presiding judge at the time of suit.

In dismissing Chief Judge DeGroat and denying the DNR's motion for preliminary injunction, the district court misconstrued DNR's official capacity suit

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[9] The tribal court itself recognized this was the "standard" practice. (App. 70, n.2).

against Judge DeGroat as a prohibited suit against the tribal court itself. However, the case the district court relied on to dismiss, *Fort Yates*, is inapposite. In *Fort Yates*, the plaintiff sued the tribal *court*, not a tribal *judge* in an official capacity. 786 F.3d at 670. Notably, the district court here dismissed DNR's complaint *sua sponte*. (Add. 8-13.) Judge DeGroat made no argument that sovereign immunity applied to him. The district court took no briefing on these issues, mistakenly applying *Fort Yates* and failing to address *Kodiak*. The district court also failed to address or distinguish *Kodiak* after the DNR relied almost exclusively on that case in its request for leave seek reconsideration. (Add. 14-16.)

Rather than follow this Court's binding precedent in *Kodiak,* the district court instead cited four Supreme Court cases to support the dismissal and denial of leave for reconsideration: *V.O.P.A. v. Stewart*, 563 U.S. 247 (2011); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 107 (1984); *Lewis v. Clarke*, 581 U.S. __, 137 S. Ct. 1285 (2017); and *Hawaii v. Gordon*, 373 U.S. 57 (1963). None of the cases is on point. At best, they cite the *general* proposition that sovereign immunity prevents a direct suit against a sovereign entity. The cases, however, also explicitly recognize the *exception* relevant to this appeal – that an official capacity suit is still available for prospective non-monetary relief to prevent violations of federal law.

*See V.O.P.A*, 563 U.S. at 257; *Pennhurst*, 465 U.S. at 102.[10] In *Pennhurst*, for example, the Supreme Court stated the general rule (which the district court cited) but then immediately discussed the exception:

> The Court has recognized an important exception to this general rule: a suit challenging the constitutionality of a state official's action is not one against the State.

465 U.S. at 102.[11]

This Court's recent decision in *Kodiak*, in contrast, is dispositive of the issue of whether sovereign immunity applies to Judge DeGroat for the claims pled here. *Kodiak* applies well-settled law that nonmembers have a federal right to sue in federal court to block an improper assertion of tribal court jurisdiction. *See*, *e.g.*, *Hicks*, 533 U.S. at 358; *Kodiak*, 932 F.3d at 1131; *Nord*, 520 F.3d at 852. *Kodiak* expressly recognizes that the appropriate vehicle for such suits is an official capacity claim against tribal court officials. *Id.* Simply put, *Ex parte Young* allows suits in federal court against tribal judges to challenge tribal court jurisdiction. This Court should reverse the district court's dismissal of Judge DeGroat.

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[10] The other two cases cited by the court in denying leave for reconsideration are inapposite, as *Lewis* addressed a damages claim against a tribal employee in his individual capacity, and *Gordon* (a two-paragraph per curium order) relates to state suits against the federal government. *Lewis*, __ U.S. __, 137 S.Ct. at 1288; *Gordon*, 373 U.S. at 57.

[11] As this Court is well aware, this exception applies not just to constitutional violations, but wherever an official violates a federal law for which there is a right of action. *See*, *e.g.*, *Nat'l Farmers*, 471 U.S. at 852-53; *V.O.P.A.*, 563 U.S. at 257.

## III. THIS COURT SHOULD REMAND THIS CASE WITH DIRECTION TO ENTER AN INJUNCTION AGAINST FURTHER TRIBAL COURT PROCEEDINGS.

The Band's tribal court suit against DNR officials to obtain a tribal court judgment preventing the officials from carrying out state-law permitting activities is unprecedented and improper. The tribal suit will ultimately fail for lack of subject matter jurisdiction. However, its very filing and the continued proceedings in tribal court impose an independent harm on DNR that can only be remedied through the entry of an injunction. DNR officials should not continue to be subjected to tribal court proceedings where the tribal court lacks any colorable basis to assert jurisdiction over them. Every day that the tribal court proceedings continue, DNR officials are subjected to the exact harms the State's sovereign immunity should prevent.

DNR is overwhelmingly likely to succeed on the merits of the claim at the heart of this matter – that the tribal court lacks subject matter jurisdiction over DNR officials for their state-law regulatory activities. The other *Dataphase* factors also favor entering an injunction. This Court should therefore remand this matter with direction to enter a permanent injunction against further tribal court proceedings, or in the alternative, a preliminary injunction while the remanded case proceeds to judgment. *See Cello P'Ship v. Hatch*, 431 F.3d 1077, 1079 (8th Cir. 2005).



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### A. DNR Is Likely to Succeed on Merits of Its Claim that the Tribal Court Lacks Jurisdiction.

The tribal court lacks subject matter jurisdiction to entertain claims against DNR officials for at least two reasons. First, DNR and its officials enjoy sovereign immunity with respect to all counts pled by the Band in tribal court. Second, even in the absence of sovereign immunity the tribal court would lack subject matter jurisdiction to hear suits against DNR and its officials for off-reservation actions.

#### 1. DNR Officials Have Sovereign Immunity to Suit in Tribal Court.

States enjoy absolute sovereign immunity from suit in the courts of other states, or in tribal courts. *Franchise Tax Bd. of California v. Hyatt*, ___ U.S. __, 139 S. Ct. 1485, 1493 (2019); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 53 (1996); *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 782 (1991); *Montana v. Gilham*, 133 F.3d 1133, 1135 (9th Cir. 1998).

Federal law abrogates sovereign immunity for some types of Indian treaty claims – but in a limited fashion that allows for suit only in federal court, and only against state officials in their official capacity. *See* 28 U.S.C. §§ 1331, 1362; *see also*, *e.g.*, *Idaho v. Coeur d'Alene Tribe of ID*, 521 U.S. 261, 268 (1997) (holding tribal claims are subject to the Eleventh Amendment, and tribes are therefore limited to bringing suits against states through official capacity suits for prospective

injunctive relief under *Ex parte Young*); *see also Mille Lacs Band of Chippewa Indians v. Minnesota*, 853 F. Supp. 1118, 1129 (D. Minn. 1994).

Here, the Band sued in tribal court, not federal district court. As a result, there is no applicable abrogation of Minnesota's sovereign immunity or Eleventh Amendment immunity, and DNR is immune from the Band's suit in tribal court. *Coeur d'Alene Tribe*, 521 U.S. at 268. The Band's naming of DNR officials in their official or individual capacities changes nothing. Sovereign immunity extends to both state agencies and state officials if the suit challenges state policies or procedures. *Id.* at 269; *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1043 (8th Cir. 2000); *Weeks Constr., Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 668, 670 (8th Cir. 1986). In the tribal suit, the Band challenges state policies and procedures, or seeks declarations of rights in connection with state policies and procedures. (*E.g.* App. 19-22, ¶¶ a-j.) DNR is therefore likely to succeed with its argument that sovereign immunity bars the Band's claims in tribal court.

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

Tribal courts are courts of limited jurisdiction. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008); *Atty's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Mississippi in Iowa*, 609 F.3d 927,

934 (8th Cir. 2010). Whether "a tribal court has adjudicative authority over nonmembers is a federal question." *Id.* Here, DNR officials are not members of the Band. As a general matter, tribal courts lack jurisdiction over nonmembers. *See, e.g.*, *Duro v. Reina*, 495 U.S. 676, 679 (1990); *Plains Commerce Bank*, 554 U.S. at 328; *Hicks*, 533 U.S. at 358; *Montana*, 450 U.S. at 565. There are two narrow exceptions to this general rule, neither of which applies here.

First, tribal courts may exercise jurisdiction over nonmembers where the nonmember enters into a consensual relationship with the tribe though commercial dealings or a similar arrangement. *Montana*, 450 U.S. at 565. Here, there are no commercial dealings or similar arrangements between DNR and the Band on the subject matters of the tribal suit, and the Band has not argued otherwise.

Second, tribal courts may exercise jurisdiction over nonmembers if the nonmembers engage in conduct *on* tribal or trust lands within its reservation, or "*on* fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566 (emphasis added). In the tribal suit, the Band pleads no acts on lands in its reservation – tribal, trust or fee. Line 3 does not cross any part of the White Earth Reservation. (App. 62 ¶ 2.) This is dispositive of the question of whether there is any colorable basis for tribal court jurisdiction – there is not.



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The two seminal cases on tribal jurisdiction over nonmembers, *Montana* and *Hicks,* are particularly instructive. In *Montana*, the Supreme Court considered whether a tribe could regulate hunting and fishing by nonmembers on fee lands *within* the reservation. 450 U.S. 557. The Supreme Court held the tribe could not – generally limiting the legislative power of tribes over nonmembers to situations in which they act on tribal or trust land within the reservation. *Id.* *Montana* is dispositive of the tribal court's jurisdiction over the Band's claims here. If tribes lack jurisdiction to regulate hunting and fishing of nonmembers even within some parts of the reservation, they clearly lack the authority to regulate the conduct of state officials off-reservation. *Id.*; *see also Plains Commerce Bank*, 554 U.S. at 332 (holding *Montana*'s exception to tribal court jurisdiction over nonmembers applies only to conduct on the reservation). Here, that is what the Band is attempting to do – regulate the conduct of State officials acting off-reservation with respect to a contentious project. And because the jurisdiction of tribal courts extends no further than the tribe's legislative authority, tribal courts have no jurisdiction over nonmembers for acts occurring off-reservation. *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997).

In *Hicks*, the Supreme Court further limited the jurisdiction of tribal courts for suits against state officials. *Hicks* involved a state game warden who executed a search warrant inside a reservation at the home of a tribal member. 533 U.S. at 355-



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56. The member sued the officer in tribal court on a Section 1983 claim, alleging the officer violated his constitutional rights in conducting the search. *Id.* at 357. The Supreme Court held that the tribal court lacked jurisdiction to hear the claims, and the plaintiff was instead required to bring his suit in federal court. *Id.* Like *Montana*, *Hicks* is dispositive here. If tribal courts lack jurisdiction over claims for acts taken by state officials *on* the reservation, they clearly lack jurisdiction over claims for acts by state officials *off* the reservation.

Because DNR is likely to succeed with its claim that the tribal court has no subject matter jurisdiction over DNR officials for conduct occurring off-reservation, this Court should enter an injunction precluding further tribal court proceedings.

**B. The DNR Faces Irreparable Harm in the Absence of an Injunction.**

DNR faces two types of irreparable harm that can only be avoided by this Court remanding with an injunction to prevent further proceedings in the tribal court.

First, if DNR is forced to litigate the merits of the Band's suit in tribal court, the DNR would lose the benefit that sovereign immunity confers – the ability to avoid suit in a foreign (non-federal) court. *See*, *e.g.*, *Parton v. Ashcroft*, 16 F.3d 226, 228 (8th Cir. 1994)(holding that a court's failure to confer immunity is in and of itself a harm); *McSurely v. McClellan*, 697 F.2d 309, 317 (D.C. Cir. 1982)(holding that the purpose of immunity is "as much to protect the relevant persons from a trial on their actions as it is to protect them from the outcome of the trial"); *Briggs v.*

*Goodwin*, 569 F.2d 10, 60 (D.C. Cir. 1977)("[I]mmunity is designed to protect against amenability to suit itself as well as to a verdict of liability at trial.") Moreover, if DNR is forced to litigate tribal claims in tribal court to a resolution on the merits before seeking a federal determination that the tribal court has no subject matter jurisdiction, it is reasonable to expect a raft of such tribal litigation to be filed in tribal courts challenging every controversial project in the State that has potential environmental impacts.

Second, the State faces the very real possibility the tribal court matter will proceed to entry of a preliminary injunction before this matter can be resolved. The tribal case is presently stayed at the lower court level. However, the Band has now filed a motion in the tribal court of appeals for an injunction. And even if that motion is denied, the whole matter may soon be back in the lower court for further proceedings. DNR anticipates that the tribal appeal could be resolved in as soon as 45-60 days. If the tribal court of appeals affirms the lower court's determination that it has subject matter jurisdiction, proceedings in the lower court would recommence and the parties in this federal action would be back litigating the Band's request for a preliminary injunction. The tribal-court injunction the Band seeks would, among other things, purportedly require DNR officials to rescind DNR-issued permits. (App. 22 ¶ j, App. 54-55 ¶ 86.) This would constitute an unprecedented direct

interference with the DNR's administration of a State-law regulatory program concerning a project located off-reservation.

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

**C. The Balance of Harms Favors the DNR.**

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

First, the federal courts will be the ultimate arbiter of the tribal court's subject matter jurisdiction – and thus there is no harm in advancing an adjudication of that issue. Unlike a judgment from a state or federal court in which the court rules on its own subject matter jurisdiction, a tribal court determination that it has subject matter jurisdiction is not entitled to full faith and credit, but is instead subject to a *de novo* collateral attack. *Nevada*, 533 U.S. at 369; *Nord*, 520 F.3d at 852. As a result, the Band will have to come to federal court to establish the tribal court's jurisdiction, and the only harm from entering an injunction now is that the Band must litigate the issue of tribal court jurisdiction *before* reaching the merits of the Band's claim instead of after. In contrast, DNR faces the prospect of litigating in tribal court before it can obtain an adjudication that the tribal court has no jurisdiction.

Second, the Band has adequate recourse even if an injunction is entered. To the extent the Band has valid claims against DNR officials for which there are no applicable immunities, those claims can be brought in federal district court under *Ex parte Young*. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997). Indeed, that is the mechanism the Mille Lacs Band Ojibwe used to successfully litigate its claims for usufructuary rights against the State. *Mille Lacs Band of Chippewa Indians v. Minnesota*, 853 F. Supp. 1118, 1129 (D. Minn. 1994). The balance of harms therefore favors remanding with a preliminary injunction.

**D. The Public Interest Favors Remanding with an Injunction.**

The public interest also favors remanding with an injunction. The failure to recognize the DNR's sovereign immunity would lead to jurisdictional chaos. One of the animating principles behind sovereign immunity is comity. *Franchise Tax Bd. of California v. Hyatt*, 587 U.S. __, 139 S. Ct. 1485, 1492, 203 L. Ed. 2d 768 (2019). For a sovereign to assert immunity, it must in turn confer immunity on other sovereigns. *Id.* The Band zealously protects its own sovereign immunity when sued in state or federal court, as it should. *See Harper v. White Earth Hum. Res.*, No. CV 16-1797 (JRT/LIB), 2017 WL 701354, at *1 (D. Minn. Feb. 22, 2017). Minnesota courts recognize tribal sovereign immunity, including the Band's. *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 289 (Minn. 1996). Public policy requires reciprocity. The alternative is the two sovereigns filing competing lawsuit in their own courts.



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While the mutual immunities of tribes and states certainly produces challenges when there are disputes between them, that is not a basis to reject sovereign immunity. *State of Montana v. Gilham*, 133 F.3d 1133, 1135 (9th Cir. 1998). There is a solution to this challenge, dictated by the constitution and federal law as a matter of sound public policy. The solution is to require suits between a tribe and the State be brought in federal court. *Id.* Public policy therefore favors remaining with a preliminary injunction.

## CONCLUSION

For the reasons set forth above, DNR request this Court reverse the district court's dismissal, and remand with direction to enter a preliminary injunction against further tribal court proceedings.

Dated: September 28, 2021

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## CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 7,519 words, excluding certificates of compliance.

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/s/ **Oliver J. Larson**
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## CERTIFICATE OF COMPLIANCE
## WITH 8th Cir. R. 28A(h)(2)

The undersigned, on behalf of the party filing and serving this motion, certifies that the motion has been scanned for viruses and that the motion is virus-free.

/s/ **Oliver J. Larson**
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