

EXHIBIT 1

PERMIT APPLICATION FINDINGS OF FACT

MN DNR Water Appropriation Permit

Date: August 11, 2023

Permit Application Number: 2023-0709

Applicant Name: David Vipond

Name of Reviewer: Joshua Prososki, Groundwater Appropriation Hydrologist

Recommendation: Based on these findings of fact, information in the administrative record and on file at the Minnesota Department of Natural Resources (DNR) Division of Ecological and Water Resources authorization to appropriate water under DNR Water Appropriation Permit Application No. 2023-0709 can be approved as drafted.

FACTUAL FINDINGS

Requirement for DNR Water Appropriation Permit

1. On March 27, 2023 the DNR received a water appropriation permit application No. 2023-0709 from Aaron Vipond on behalf of David Vipon for the appropriation of up to 65.2 million gallons of surface water per year for agricultural irrigation on 353 acres.
2. DNR Water Appropriation Permit Application No. 2023-0709 proposes to use one surface water pump. It is proposed that the surface water will be pumped from the Wild Rice River (H-026-047) at rates up to 1,000 gallons per minute.
3. DNR Water Appropriation Permit Application No. 2023-0709 proposes to irrigate corn, dry beans, soybeans, wheat, sugar beets and alfalfa in Mahnomen County, Minnesota.
4. Minnesota Statute section 103G.271, subd. 4 requires a DNR water appropriation permit for water appropriations that use more than 10,000 gallons of water per day (GPD) or more than one million gallons of water per year (MGY).
5. The proposed water appropriation requested pursuant to DNR Permit Application No. 2023-0709 is in excess of 10,000 GPD and one MGY and requires a DNR water appropriation permit.

Property Description and Ownership Interest

7. The applicant owns a combined 611 riparian acres of farmland adjacent to the Wild Rice River in Sections 18 and 19 of Pembina Township, Mahnomen County, Minnesota. (Minn. Rule 6115.0660 Subp. 2).

Sufficiency of Information Submitted with DNR Water Appropriation Permit Application

8. A check in the amount of \$150.00 drawn on the account of David Vipond covering the permitting fee, was submitted to the DNR in conjunction with DNR water appropriation permit application #2023-0709 as required by Minn. Rule 6115.0660, subp. 3B.

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9. Graphic data meeting the requirements of Minn. Rule 6115.0660, subp. 3C showing the location of the proposed appropriation use, the boundaries of the David Vipond properties and the location of the proposed surface water pump.

10. A signed statement that copies of the application and accompanying documents that have been sent to the mayor of the city, secretary of the board of supervisors of the soil and water conservation district, or the secretary of the board of managers of the watershed district as required by Minn. Rule 6115.0660, subp. 3D, was waived because MPARS, the DNR online permitting and reporting system, automatically sends to the appropriate commenting agencies electronic notification and documents during the application and evaluation process.

11. Minn. Rule 6115.0660, subp. 3.E.(1)-(5) requires a statement of justification supporting the reasonableness and practicality of use with respect to adequacy of water source. The applicant provided a partial statement of justification in completing the required fields in MPARS (MN DNR Permitting and Reporting System). Also, the DNR waived this requirement in part as the applicant did not have the technical means to determine item 1 and historically, applicants have not been able to respond well to this requirement in the application process.

12. The applicant submitted data on proposed water conservation practices in compliance with Minn. Rule 6115.0660, subp. 3.F. The applicant will implement a low flow irrigation system, soil moisture monitoring and buffer strips.

13. The applicant has submitted a contingency plan that describes the alternatives they will use if further appropriation is restricted due to low flows or low water levels in the river, stream, or basin where the water appropriation is occurring. The permittee agrees to withstand the results of not being able to appropriate water (Minn. Stat. § 103G.285, subd.6.).

14. The DNR has waived the requirements in Minn. Stat. 103G.285 subd. 3 thru 5. The proposed appropriation is not within a water basin or from a designated trout stream.

15. A request for comments period was held from April 24, 2023, through May 25, 2023. White Earth Nation, BWSR, DNR Nongame, DNR Regional Environmental Assessment, DNR Wildlife, DNR Fisheries, Mahnommen County, Wild Rice Watershed District, and Mahnommen SWCD staff were all included in the request. The Wild Rice River Watershed District Administrator commented that a local permit would be required for the project. The applicant supplied an approved Wild Rice WSD permit on June 18, 2023.

16. Information was sent to, and comments have been solicited from, various White Earth Nation tribal staff. Tribal coordination began on April 24, 2023, with no comments being received by August 11, 2023.

17. Additional attempts to obtain White Earth Nation comment were made including a phone call on August 8th, 2023. On August 11, 2023, the White Earth Nation Director of Natural Resources was sent an email informing the tribe that DNR Water Appropriation Permit Application No. 2023-0709 would be issued. The permit's cover letter that will inform the landowner of the need to obtain any other permits that may apply including any permits required by White Earth Nation.

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Hydrologic Setting of the Proposed Appropriation

18. The proposed surface water pump will be directly installed in the Wild Rice River, approximately 0.6 miles upstream of the Norman and Mahnomen County border. Water flows generally to the west for approximately 44 miles to the confluence with the Red River of the North (H-026).

19. The confluence with Spring Creek (H-026-047-029) is located approximately three miles downstream and the confluence with Marsh Creek (H-026-047-027) is located approximately 5.3 miles downstream of the proposed appropriation point.

20. There is one active Water Appropriation Permit downstream of the proposed appropriation point on the Wild Rice River. Permit #1977-1284 is located approximately 27 miles downstream in Norman County. The permit authorizes the use of up to 19.6 million gallons of water pumped at a rate of 1,200 gpm.

21. The Wild Rice River is listed as an impaired water for total suspended solids. A total maximum daily load (TMDL) report has not been completed for this impairment. Further evaluation of the impairment may be conducted in the future as new information becomes available.

Data and Analysis

22. The proposed appropriation is subject to suspensions due to low flows. The sentinel gauge is located approximately 10.5 miles downstream (Wild Rice River at Twin Valley, USGS ID #05062500). The low flow suspension level is 18 cfs.

23. StreamStats is an online tool developed by the United States Geological Survey (USGS). A report for the proposed appropriation point was generated on April 24, 2023. Basin and various flow statistics are contained within the report and can be viewed in MPARS as the attachment "2023-04-24-WAP2023-0709-StreamStatsReport.pdf".

24. Flows for the growing season (May 1 thru October 31) from 2015 through 2020 were evaluated for the USGS gauge at Twin Valley and the DNR operated gauge near Mahnomen (Wild Rice River nr Mahnomen, DNR ID 60029001). Average daily flows are approximately 275 and 205 cfs respectively. The proposed appropriation would be approximately one percent of the average daily flow evaluated at the Twin Valley stream gauge.

25. Evaluation of low flow information from the Twin Valley stream gauge indicates the lowest daily flow from 2015 to 2020 was 26.3 cfs (August 2020). The proposed appropriation would have been approximately 12% of the low flow value.

26. Negative impacts of the proposed appropriation on the water supply in the Wild Rice River are not anticipated. DNR may set a protected flow value on the Wild Rice River in the future as new information becomes available. If a protected flow is established, the proposed appropriation may need to be modified.

27. Since 2008, surface water appropriation permits have been suspended in the Wild Rice River watershed twice (2008 and 2021).

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28. One species of special concern is located approximately three miles downstream of the proposed appropriation point (*Igumia recta*). A standard requirement of surface water appropriation permits is to screen the intake to prevent the incidental take of aquatic species and thus no negative impacts as a result of this appropriation.

29. An S3 plant community is located adjacent to the Wild Rice River on the NW side. No negative impacts are expected due to this appropriation.

Application of the Statutory Criteria

30. The DNR may issue a water appropriation permit for appropriations from surface water only if it determines that the use is reasonable, practical and will adequately protect public safety and promote public welfare within the meaning of Minn. Stat. § 103G.315, subd. 3.

Based on the factual findings set out in this findings of fact and the record on file with the Department of Natural Resources, Water Appropriation Permit Application Number 2023-0709 is consistent with state water appropriation statutes and rules and is recommended for permit issuance.

DNR Staff Authorized Signature:

A handwritten signature in black ink, appearing to read 'J. Prososki', with a stylized flourish at the end.

Joshua Prososki, Groundwater Appropriation Hydrologist

Date: August 11, 2023

EXHIBIT 2

**WHITE EARTH RESERVATION BUSINESS COMMITTEE
WHITE EARTH BAND OF CHIPPEWA INDIANS**

Resolution No. - 057-23-017

Whereas, the White Earth Reservation Business Committee is the duly elected governing body of the White Earth Reservation pursuant to Article VI, Section 1, of the revised constitution of the Minnesota Chippewa Tribe, as amended, and organized under Section 16, of the Act of June 18, 1934 (48 Stat. 984), and

Whereas, the White Earth Reservation Business Committee is the duly authorized governing body of the White Earth Band, and

Whereas, the White Earth Reservation Business Committee adopted the White Earth Reservation, Environmental Code (Resolution number 057-11-001) for the protection, management, restoration, enforcement and enhancement of the Band's natural resources, including ground and surface waters, and

Whereas, with the establishment of the White Earth Reservation, the Band obtained federally protected property rights to a sufficient quantity and quality of water to fulfill the purposes of the Reservation now and into the future, *United States v. Winans*, 198 U.S. 371 (1905); *Winters v. United States*, 207 U.S. 564, 577 (1908), and

Whereas, the Band is entitled to sufficient quantity and quality of water in order to make the Reservation livable, enable tribal members to maintain customary ways of life, including hunting, fishing and gathering, and permit tribal members to change and adopt to new ways of life, *Arizona v. California*, 373 U.S. 546, 599 (1963); *Menominee Tribe v. United States*, 391 U.S. 404, 406 (1968); *Winters v. United States*, 207 U.S. 564, 577 (1908), and

Whereas, the White Earth Reservation Business Committee established the White Earth Natural Resources Department to protect, restore and regulate the natural resources of the Band, in order to ensure environmental and human health and spiritual, cultural and economic sustainability of the Band, and

Whereas, the White Earth Natural Resources Department working with relevant scientific and community experts has identified significant threats to the Band's health and welfare, spiritual subsistence, water rights and other treaty rights and treaty-protected natural resources from the individual and cumulative operation of high-capacity wells and high-capacity surface water pumps on the White Earth Reservation and in the five-mile buffer area immediately surrounding the White Earth Reservation, and

Whereas, the Band possesses "inherent powers of a limited sovereignty which has never been extinguished" and has plenary and exclusive power over its members and territory subject only to limitations imposed by federal law, *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978); *Worcester v. Georgia*, 31 U.S. 515, 555 (1832), and

Whereas, the Band “retain[s] inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Montana v. United States*, 450 U.S. 544, 565-66 (1981).

NOW, THEREFORE, in consideration of the above Recitals, which are incorporated herein by reference, the White Earth Reservation Business Committee pursuant to the above referenced authority, scientific and cultural review and recommendation of the White Earth Natural Resources Department, ordains as follows:

Section 1- Title and Purpose:

1.1 Title. The title of this Ordinance is the **White Earth Reservation Groundwater and Surface Water Protection Ordinance**.

1.2 Purpose. The purpose of this Ordinance is to establish standards and a process for high-capacity well and high-capacity pump permitting, high-capacity well and high-capacity pump operations and high-capacity well and high-capacity pump regulation on the White Earth Reservation and in the appurtenant five-mile buffer area around the White Earth Reservation in the 1855 Treaty Territory.

Section 2- Authority:

2.1 The White Earth Reservation Business Committee relies on the authorities set forth in the above Recitals in enacting the Ordinance.

Section 3- Applicability and Scope:

3.1 This Ordinance shall apply to all high-capacity wells and high-capacity pumps within the exterior boundaries of the White Earth Reservation and the appurtenant five-mile buffer area around the White Earth Reservation in the 1855 Treaty Territory. The geographic area covered by this Ordinance is displayed in the map included in Appendix A of this Ordinance.

Section 4- Definitions:

4.1 **Appropriate** means withdrawal, removal, or transfer of water from its source regardless of how it is used.

4.2 **Pesticide** means any substance or mixture of substances intended to prevent, destroy, repel or mitigate any pest or any substance, or mixture of substances, intended for use as a plant regulator, defoliant or desiccant.

4.3 **Existing Source** means High-capacity wells or High-capacity pumps located on the White Earth Reservation or in the appurtenant five-mile buffer area surrounding the White Earth Reservation in the 1855 Treaty Territory, which were in existence and operating on or before the effective date of this Ordinance.

4.4 **Fertilizer** means a substance containing one or more recognized plant nutrients that is used for its plant nutrient content and designed for use or claimed to have value in promoting plant growth.

4.5 **High-capacity well** means any groundwater well capable of pumping more than 10,000 gallons per day or one million gallons per year.

4.6 **High-capacity pump** means any surface water pump capable of pumping more than 10,000 gallons per day or one million gallons per year.

4.7 **Irrigation** means the act of supplying water for agricultural and horticultural purposes to land, crops, or plants by means of pipes, hoses, sprinklers, drippers, ditches, furrows, or other devices that are connected directly to a source of ground or surface water.

4.8 **Landowner** means any person holding fee title, an easement or other interest in property, which enables the person to undertake groundwater or surface water pumping activities.

4.9 **New Source** means High-capacity wells or High-capacity pumps located on the White Earth Reservation or in the appurtenant five-mile buffer surrounding the White Earth Reservation in the 1855 Treaty Territory, which were not in existence on or before the effective date of this Ordinance.

4.10 **Operation** means the land on which a High-capacity well or High-capacity pump is located as well as the land on which water from a High-capacity well or High-capacity pump is applied.

4.11 **Operator** means Persons, other than a Landowner, applying for or operating under a Permit and having possession or control of a site on which groundwater or surface water pumping activities are proposed.

4.12 **Ordinance** means the White Earth Reservation Groundwater and Surface Water Protection Ordinance.

4.13 **Permit** means a permit to Appropriate ground or surface water issued under and in accordance with the standards of this Ordinance.

4.14 **Persons** means any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not, including a person acting in fiduciary or representative capacity, and further including any governmental agency.

4.15 **Retained Expert** means professional consultants including but not limited to engineers, attorneys, planners, environmental specialists, and other consultants with skills relevant to reviewing, processing and acting upon Permit applications or to issues associated with the inspection, monitoring and enforcing of approvals arising under this Ordinance.

4.16 **Sustainable Yield** means the rate an aquifer can be pumped on a long-term basis without adverse consequences to aquifers, groundwater, surface water, aquatic resources, water-dependent resources or human health and welfare.

4.17 **White Earth Band or Band** means the government incorporated into the Minnesota Chippewa Tribe through the revised constitution and bylaws enacted pursuant to Section 16 of the Indian Reorganization Act of 1934.

4.18 **White Earth Natural Resources Department or WEDNR** means the expert agency within the White Earth Band with the delegated authority to protect, restore and regulate the natural resources of the Band, in order to ensure environmental and human health and spiritual, cultural and economic sustainability of the Band.

4.19 **White Earth Reservation** means the White Earth Reservation as established by an Act of March 19, 1867, 16 Stat. 719.

4.20 **White Earth Reservation Business Committee** means the duly elected Governing body of White Earth Reservation and Band, organized under Section 16 of the Act of June 18, 1934, 48 Stat. 984, as amended and pursuant to the revised Constitution and By-Laws of the MN Chippewa Tribe.

Section 5- New and Existing Source Permits Required:

5.1 **New Source Permit Requirement.** New Sources are not permitted on the White Earth Reservation or within the appurtenant five-mile buffer area depicted in Appendix A of this Ordinance, without a permit from the WEDNR.

5.2 **Existing Source Permit Requirement.** Existing Sources are not permitted on the White Earth Reservation or within the appurtenant five-mile buffer area depicted in Appendix A of this Ordinance, without a permit from the WEDNR.

a. **Extended Time for Submission of Existing Source Permits.** Unless due to concerns regarding public health and safety or significant harm to natural resources, another timeline is specified by the WEDNR, all Landowners and Operators of Existing Sources on the White Earth Reservation or within the appurtenant five-mile buffer area shall submit Permit applications to the WEDNR within one year after the effective date of this Ordinance.

b. **Time for Approval of Existing Source Permits.** WEDNR shall take final action approving or denying Permit applications for Existing Sources under this Ordinance within three years of the effective date of this Ordinance. WEDNR shall take final action approving or denying at least one-third of all Existing Source Permit applications each year after the effective date of this ordinance. Any Existing Source may continue operation in accordance with its Permit application until WEDNR requests additional information required to determine compliance with this Ordinance or takes final action approving or denying the Permit application.

5.3 **Permit Term.** The term of a Permit issued under this Ordinance is five years.

5.4 **Permit Amendment.** If the WEDNR has issued a Permit, the Operator may request an amendment to that Permit during the Permit term, using the same process as the original Permit application.

5.5 **Permit Transfer.** A Permit may not be assigned or transferred to any other Person without the express written consent of the WEDNR.

5.6 **Permit Revocation.** A Permit may be revoked under the procedures in Section 9.

Section 6- Permit Application Process:

6.1 Application. An applicant for a Permit shall submit one paper copy and one electronic copy of a Permit application on the form provided by the WEDNR that contains all the documentation required under Section 7. Paper copies of applications shall be mailed to WEDNR at the department address provided at https://whiteearth.com/divisions/natural_resources/contact and electronic copies of applications shall be emailed to waterpermit@whiteearth-nsn.gov.

6.2 Reimbursement of Fees and Costs.

a. Reimbursable Costs. The WEDNR may expend time reviewing, processing and acting upon a Permit. The WEDNR may also retain the services of a Retained Expert for the purpose of reviewing, processing, and acting upon a Permit. Permit applicants shall reimburse the WEDNR for staff time and Retained Expert time spent reviewing, processing and acting upon Permits.

b. Application and Initial Review Fee. At the time a Permit application is filed with the WEDNR, the applicant shall provide an application and initial review fee of \$5,000 to allow for initial review. Costs expended by WEDNR and Retained Experts in conducting initial review will be debited against the application and initial review fee and any unused amounts shall be returned within 30 days of completion of initial review.

c. Cost Reimbursement Agreement for Completion of Permit Review. Within 60 days of receipt of a Permit application and Initial Review fee, the WEDNR or a Retained Expert shall review a Permit application to determine if additional information is necessary to complete a Permit application review or determine a proposed Operation's conformance with the Ordinance. The Permit applicant is responsible for any additional costs necessary to complete Permit review. WEDNR shall not continue to process a Permit application until the Permit applicant enters a cost reimbursement agreement with the Band and agrees to reimburse necessary costs for completion of Permit application review.

6.3 Permit Review Process

a. Additional Information. The WEDNR or a Retained Expert may request a Permit applicant to submit additional information if the WEDNR or Retained Expert determines that the application is incomplete or fails to provide sufficient information to enable the WEDNR or Retained Expert to determine whether a proposed High-capacity well or High-capacity pump meets the standards of this Ordinance.

b. Permit Review. If no additional information is deemed necessary, the WEDNR or a Retained Expert shall proceed to review a Permit application to determine whether the proposed High-capacity well or High-capacity pump meets the standards of this Ordinance.

c. Decision on Permit. After receipt of a complete Permit application, including all necessary additional information and appropriate fees, the WEDNR shall make findings of fact and either deny or grant a Permit with or without conditions within 90 days. Conditions may include pumping rate limitations, pumping timing or duration restrictions, limits on amount of water withdrawn during a given period, apportionment among multiple Permit holders in a geographic area and monitoring requirements. WEDNR shall provide written notice of the same to the Permit applicant.

Section 7- Permit Application Contents

7.1 All Permit applicants shall submit the information required in this Section.

7.2 Ownership Information.

a. Contact information. The name, address, phone number, and e-mail address of the Operator and Landowner, provided the Landowner is a Person other than the Operator.

b. Operation information. Description of the purposes for which water Appropriation will be used and any other permits or licenses that the Permit applicant will apply for or has already acquired.

7.3 Site Information and Surrounding Area Information.

a. Parcel identification numbers. Parcel identification numbers for all Operation parcels.

b. Aerial photo. An aerial photo of the proposed Operation at a scale of not less than 1-inch equals 660 feet. Additional photos or photos at a different scale may be required as part of the Permit application if such additional photos are necessary to discern and assess potential environmental impacts associated with the proposed Appropriation.

c. Five-mile well map. A map, at a scale of not less than 1-inch equals 660 feet, on which all residences as well as all residential, agricultural and municipal wells within five miles of the boundaries of the proposed High-capacity well or High-capacity pump are marked and labeled with locational coordinates. All surrounding, existing High-capacity Wells and High-Capacity Pumps must be clearly noted on the map. Appropriation amounts for all identified High-capacity wells should accompany the map or be included therein.

d. Five-mile Surface Water Map. A map showing the location and name of all surface waters, including lakes, private or public ponds, rivers, streams (including intermittent streams and headwaters), drainage ditches, wetlands, and other relevant water features within five miles of the proposed High-capacity well or High-capacity pump.

7.4 Operation Plan.

a. Commencement and Cessation. Dates of proposed commencement and cessation of the Operation.

b. Annual Pumping Plan. Dates of proposed Appropriation and Appropriation volumes on an annual basis.

c. Fertilizer and Pesticide Application. Plans to utilize Appropriation for Irrigation purposes. Specify whether Irrigation will include application of Fertilizer or Pesticides.

d. Monitoring. Equipment to be used to monitor and report annual pumping volumes to WEDNR and maintenance plan for the same.

7.5 Information Demonstrating Compliance with Minimum Standards. All information necessary to determine whether a proposed High-capacity well or High-capacity pump and accompanying Operation will comply with the minimum standards in Section 8.

7.6. Special Exceptions. A Permit applicant may request a special exception from the Permit application requirements of this Section if it can demonstrate that the information required can be provided by alternative means or is not necessary for an evaluation of the particular Operation, and that the public health, safety and welfare of White Earth Tribal Members and natural resources on the White Earth Reservation will not be adversely affected by the proposed Appropriation.

Section 8- Minimum Standards of Operation

8.1 Required Demonstration. All Permit applicants must demonstrate that the following minimum standards of operation will be met.

8.2 General Standard. Compliance with all provisions of this Ordinance and other applicable Band Regulations.

8.3 Standards Regarding Groundwater.

a. Impacts to Other Wells. Operations, when evaluated individually or cumulatively, shall not cause a significant reduction in the quantity of groundwater available for reasonable use by current groundwater users within 5 miles. A significant reduction includes a drop in the water table that results in a substantial adverse impact on a private or municipal well including but not limited to the inability of a well to provide water on a continuous basis.

b. Sustainable Yield. Operations, when evaluated individually or cumulatively, shall not exceed the Sustainable Yield of an aquifer.

8.4 Standards Regarding Surface Water. Operations, when evaluated individually or cumulatively, shall not cause adverse effects on surface waters within 5 miles. Adverse effects include but are not limited to, reductions in base flows or water levels of surface waterbodies that negatively impact aquatic life or alter water chemistry, water quality or water temperature in a manner that negatively impacts ecosystem health and sustainability.

8.5 Standards Regarding Monitoring. Operators shall conduct all monitoring and testing necessary to comply with this Ordinance.

Section 9- Reporting, Annual Report and Permit Renewal

9.1 On-going Reporting Requirements.

a. Notice of Violations, Citations or Enforcement Actions. The Operator shall provide notice to the WEDNR of any notices of violations, citations, or other enforcement actions taken by any other governmental authority against the Operator, Landowner or Operation within ten days after receiving such notice.

b. Monitoring Data. All monitoring data, sampling results and any other test results required by WEDNR to ensure compliance with this Ordinance shall be undertaken at the Operator's expense and provided to the WEDNR. All monitoring data, sampling results and any other test results shall be provided to the WEDNR within fifteen days of receipt and included in the Operation's annual report as provided below.

9.2 Annual Report. No later than November 30th of each calendar year, the Operator shall submit an annual report to the WEDNR for all active Operations for which the Operator has a Permit. The reporting period shall be from the date of the issuance of the first Permit to November 30th, and thereafter from January 1st to November 30th.

a. Contents of the Annual Report. The annual report shall include the following information: (1) An identification of the Operator and Operation; (2) A description of activities including the total amount of water appropriated during the reporting period; (3) A written report demonstrating how the Operator has been in compliance with all terms and conditions of its Permit and this Ordinance, including a discussion of all groundwater, surface water, and other monitoring results required by WEDNR; (4) Copies of any required monitoring data specified in the Permit; and (5) A summary of any non-compliance and remedial action or a plan for addressing the same.

9.3 Permit Renewal.

a. Written Request. The Operator shall make written request to the WEDNR for a renewal of a Permit no later than June 1 of the year in which the Permit will expire.

b. Fee. A written request for Permit renewal shall be accompanied by the payment of a non-refundable \$1000 renewal fee in addition to any amount in accordance with the reimbursement provisions set forth in Section 6.

c. Contents of Permit Renewal Application. The written request for Permit renewal shall incorporate by reference the annual report from the previous calendar year. The WEDNR or a Retained Expert may request a Permit renewal applicant to submit additional information if the WEDNR or Retained Expert determines that the Permit renewal application is incomplete or fails to provide sufficient information to enable the WEDNR or Retained Expert to determine whether a proposed High-capacity well or High-capacity pump meets the standards of this Ordinance.

d. Permit Renewal Application Review. The WEDNR shall grant the request for Permit renewal if it finds:

- i. The Permit renewal application meets the standards of this Ordinance;
- ii. There have not been multiple or recurring violations of the Ordinance or Permit;
- iii. There have been no material violations of the Ordinance or Permit which have not been appropriately remedied or for which a remedial plan is not in place;
- iv. All additional information necessary to ensure compliance with this Ordinance has been submitted and reviewed; and
- iv. All applicable fees as provided for herein have been paid.

Section 10- Inspection, Enforcement, Procedures and Penalties

10.1 **Inspection.** After reasonable notice, the WEDNR or a Retained Expert may make inspections of an Operation to determine Permit compliance and to safeguard the health and safety of the public. If, as a result of any inspections or investigations, the WEDNR or a Retained Expert determines that a Retained Expert should undertake further inspection or investigation, the WEDNR may hire a Retained Expert, which expense shall be paid by the Operator. If the Operator fails to provide access or reimbursement, the WEDNR may take enforcement action under Section 10.3.

10.2 **Violations.** The following are violations under this Ordinance:

- a. Operating Without a Permit. Engaging in High-capacity well or High-capacity pump operations within the exterior boundaries of the White Earth Reservation or the appurtenant five-mile buffer area without a Permit granted by the WEDNR.
- b. Non-compliance. Failure to comply with the applicable minimum standards or other terms of this Ordinance.
- c. Providing False Information. Making an incorrect or false statement in the information and documentation submitted during the Permitting process, annual reporting or during an Operation inspection by the WEDNR or a Retained Expert.

d. Failure to Submit Required Information. Failure to timely provide a notice, annual report or monitoring data required to be submitted to WEDNR.

e. Failure to Remedy Violations. Failure to take appropriate and timely action in response to a notice of violation, citation, or other order issued by the WEDNR.

10.3. **Enforcement Actions.** The WEDNR may take any appropriate enforcement action against any Landowner or Operator in violation of this Ordinance. The remedies provided herein shall not be exclusive of other remedies. Possible enforcement actions for violations of this Ordinance include: Issuance of a notice of violation and remedial action order; Suspension or revocation of a Permit; Issuance of a monetary penalty of not more than \$5,000 per violation, with each day a violation exists constituting a separate violation; Referral of a violation to legal counsel for consideration and commencement of legal action, with any Landowner or Operator adjudicated for violation of this Ordinance being held responsible for court costs and reasonable attorney's fees.

a. Non-Waiver. A failure by the WEDNR to take action on any past violation(s) shall not constitute a waiver of the WEDNR's right to take action on any present or future violation(s).

10.4 Judicial Review.

a. Right to Judicial Review. Any Person affected by a Permit decision, notice, order or other final action taken pursuant to this Ordinance may request and shall be granted an evidentiary hearing on the matter before the White Earth Tribal Court. Such person shall file with the Court, a written petition requesting the hearing including name, address, telephone number and a brief statement of the grounds for the hearing. Such petition shall be filed within thirty days of the date a Permit decision, notice, order or other final action is taken. Parties to the hearing include the petitioner and the WEDNR. Parties may present evidence, cross examine witnesses, and submit post-hearing briefs. A record of oral proceedings shall be made.

b. Decision. After the hearing, the White Earth Tribal Court shall sustain, modify, or reverse a Permit decision, notice, order or other final action taken pursuant to this Ordinance based on the evidence provided at the hearing. The decision shall include findings of fact and conclusions of law and shall be issued in writing.

Section 11- Effective Date

11.1 This Ordinance shall take effect on the date of passage by the White Earth Reservation Business Committee.

Section 12- Severability

12.1 If any part or provision of this Code is held invalid, the remainder of this Code shall remain in effect.

We do hereby certify that the foregoing resolution was adopted by a vote of 3 for, 0 against, 0 silent, a quorum being present at a regular meeting of the White Earth Reservation Business Committee held on May 5, 2023 in Mahnomen, Minnesota.



Michael Fairbanks, Chairman



Michael LaRoque, Secretary/Treasurer

EXHIBIT 3

**WHITE EARTH RESERVATION BUSINESS COMMITTEE
WHITE EARTH BAND OF CHIPPEWA INDIANS**

Resolution No. 057-24-030

- WHEREAS,** the White Earth Reservation Business Committee is the duly elected governing body of the White Earth Reservation pursuant to Article VI, Section 1, of the revised constitution of the Minnesota Chippewa Tribe, as amended, and organized under Section 16, of the Act of June 18, 1934 (48 Stat. 984), and
- WHEREAS,** the White Earth Reservation Business Committee is the duly authorized governing body of the White Earth Band, and
- WHEREAS,** it is the intent of the White Earth Reservation Business Committee to effectively, efficiently, and properly manage the natural resources of the reservation, and
- WHEREAS,** the White Earth Reservation Business Committee has established the Natural Resources Division, which consists of: Conservation/Enforcement, Environmental Affairs, Forestry, Land Office, Fisheries, Wildlife, Wild Rice, Agriculture, Permitting, and Emergency Management, and
- WHEREAS,** the White Earth Division of Natural Resources is the expert agency within the White Earth Nation with the delegated authority to protect, restore and regulate the natural resources of the White Earth Nation, in order to ensure environmental and human health and spiritual, cultural and economic sustainability of the Nation and its members, and
- WHEREAS,** the White Earth Reservation Business Committee recognizes that there is a water crisis in the region and throughout the State of Minnesota, and
- WHEREAS,** the White Earth Reservation Business Committee understands the waters of the region and beyond are inter-connected, impacting both water quality and quantity, and
- WHEREAS,** the White Earth Reservation Business Committee desires to take an active role in protecting the water resources in order to protect the health, welfare, and economic status of the White Earth Nation and its people, and
- WHEREAS,** the White Earth Reservation Business Committee recognizes that protecting the Nation's waters also benefits everyone in the region, and
- WHEREAS,** with the establishment of the White Earth Reservation, the White Earth Nation obtained federally protected property rights to a sufficient quantity and quality of water to fulfill the purposes of the Reservation now and in the future, *Winters v. United States*, 207 U.S. 564 (1908), and

- WHEREAS,** the White Earth Nation is entitled to a sufficient quantity and quality of water to make the Reservation livable, to enable tribal members to maintain customary ways of life, including hunting, fishing, and gathering, and to permit tribal members to change and adapt to new ways of life, *Arizona v. California*, 373 U.S. 546 (1963); *Menominee Tribe v. United States*, 391 U.S. 404 (1968), *Winters v. United States*, 207 U.S. 564 (1908), and
- WHEREAS,** the White Earth Nation and its members hold treaty protected rights to hunt, fish, and gather wild rice and other plants, and
- WHEREAS,** the White Earth Nation possesses inherent sovereignty and plenary authority over its members and the White Earth Reservation, subject only to limitations imposed by federal law, and
- WHEREAS,** the White Earth Nation “retain[s] inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe,” *Montana v. United States*, 450 U.S. 544, 565-66 (1981), and
- WHEREAS,** the White Earth Reservation Business Committee understands that scientific research and capacity building is necessary to inform and refine legislative action as well as other strategies to better protect and safeguard the water resources of the White Earth Reservation and the region, and
- WHEREAS,** on May 5, 2023, after significant scientific study, the White Earth Reservation Business Committee adopted the White Earth Reservation Groundwater and Surface Water Protection Ordinance, Resolution No. 057-23-017, to regulate high-capacity surface and ground water pumping (more than 10,000 gallons per day or one million gallons per year), and
- WHEREAS,** the Water Protection Ordinance is necessary to protect against substantial threats to the Nation’s reserved water rights and treaty-protected natural resources and to ensure that high-capacity ground water wells and high-capacity surface water pumps, individually and cumulatively, do not deplete the quantity or impair the quality of Reservation waters; harm water-dependent resources critical to the White Earth way of life, including wild rice, lake sturgeon, and other fisheries; and imperil the physical, cultural, and spiritual health and welfare, the economic security, and the political integrity of the White Earth Nation and its members, and
- WHEREAS,** the Water Protection Ordinance addresses New Sources (new high-capacity pumping proposed after May 5, 2023) and provides that persons with proposed New Sources on the White Earth Reservation must, before conducting high-

capacity pumping, apply to the White Earth Division of Natural Resources for a permit effective immediately upon the passage of the Ordinance, and

WHEREAS, the White Earth Division of Natural Resources has taken affirmative steps to implement and enforce the provisions of the Water Protection Ordinance that apply to New Sources on the White Earth Reservation, and

WHEREAS, this implementation and enforcement of the Water Protection Ordinance as to New Sources on the White Earth Reservation is of critical importance because New Sources are located in areas of the Reservation where ground water is complex and slow to recharge and where surface and ground water has not previously been subject to intensive pumping or extensive study. New sources will compound and exacerbate the substantial adverse impacts of existing high-capacity surface and ground water pumping on the water-dependent resources of the Reservation and on the White Earth Nation and its members, and

WHEREAS, the Water Protection Ordinance addresses Existing Sources (high-capacity pumping existing as of May 5, 2023) and provided that persons with Existing Sources on the White Earth Reservation must apply to the White Earth Division of Natural Resources for a permit within one year of the passage of the Ordinance, and

WHEREAS, the White Earth Division of Natural Resources has not taken any steps to implement or enforce any of the provisions of the Water Protection Ordinance that apply to Existing Sources, including the permit requirement, and

WHEREAS, due to the inter-connected nature of surface and ground water on and off Reservation, the Water Protection Ordinance also addressed high-capacity pumping in an appurtenant five-mile impact (or buffer) area outside the boundaries of the White Earth Reservation in the 1855 Treaty Territory, and

WHEREAS, the White Earth Division of Natural Resources has not taken any steps to implement or enforce any of the provisions of the Water Protection Ordinance as applied to high-capacity pumping within the five-mile impact (or buffer) area, including the permit requirement, and

WHEREAS, the White Earth Division of Natural Resources is engaged in ongoing and further scientific study of the hydrology of the White Earth Reservation and related issues, including the inter-connectedness of surface and ground water, ground water monitoring, the source and timing of aquifer recharge and the effects of aquifer dewatering, aquifer contamination from human sources, and the substantial adverse impacts of high-capacity pumping on aquatic species and habitat critical to sustaining the White Earth Nation and its members, and

WHEREAS, the White Earth Division of Natural Resources is coordinating with the Minnesota Department of Natural Resources, regional watershed commissions, and other stakeholders regarding the study, protection, and management of waters in the region, including through the collection and review of data regarding the impacts of Existing Sources permitted by the Minnesota Department of Natural Resources on water quantity, water quality, and aquatic resources on the White Earth Reservation, and

WHEREAS, the White Earth Reservation Business Committee has directed the White Earth Division of Natural Resources to develop a regional task force with neighboring counties, Tribal Nations, State and Federal agencies, and regional watershed commissions so that the Nation can work collaboratively and expand its efforts to comprehensively address the quantity and quality of water within, adjacent to, and well beyond the reservation, and

WHEREAS, the White Earth Reservation Business Committee, in consultation with the White Earth Division of Natural Resources, has determined that further analysis of Existing Sources permitted by the Minnesota Department of Natural Resources on the White Earth Reservation, informed by these ongoing scientific studies and cooperative efforts, would be beneficial to the effective implementation of the Water Protection Ordinance as to those Existing Sources in the future, and

WHEREAS, the White Earth Reservation Business Committee, in consultation with the White Earth Division of Natural Resources, has determined that further scientific study, regional coordination, and analysis is necessary to evaluate and manage the impact of high-capacity pumping occurring outside the boundaries of the White Earth Reservation, including in the adjacent five-mile area, on Reservation waters and on the White Earth Nation's treaty protected resources.

THEREFORE, BE IT RESOLVED, that the White Earth Reservation Business Committee hereby directs the White Earth Division of Natural Resources to continue study and analysis of the hydrology of the White Earth Reservation, the inter-connectedness of surface and ground water on and adjacent to the Reservation, the impact of high-capacity pumping on water levels and aquatic species, and related issues.

BE IT FURTHER RESOLVED, the White Earth Reservation Business Committee hereby directs the White Earth Division of Natural Resources to continue coordination with the Minnesota Department of Natural Resources, regional watershed commissions, and other stakeholders to develop cooperative strategies for the study, protection, and management of waters in the region, including the regulation of high-capacity pumping on, adjacent to, and beyond the White Earth Reservation.

BE IT FURTHER RESOLVED, the White Earth Reservation Business Committee hereby directs the White Earth Division of Natural Resources to submit a report to the Reservation Business Committee no later than December 1, 2026, (a) reporting on the status and results of the

Division of Natural Resources' scientific study; (b) reporting on the status and results of the Division of Natural Resources' coordination with the Minnesota Department of Natural Resources and other State and Federal agencies, neighboring counties, regional watershed commissions, and other Tribal Nations; (c) recommending for consideration by the Reservation Business Committee any amendments to the provisions of the Water Protection Ordinance, including to the provisions regulating Existing Sources, to fulfill the purposes of the Ordinance and to improve its effective and efficient operation; and (d) recommending any further issues for study or for regional coordination.

BE IT FURTHER RESOLVED, the White Earth Reservation Business Committee hereby suspends the permit requirement and other regulatory provisions of the Water Protection Ordinance with respect to Existing Sources duly permitted by the Minnesota Department of Natural Resources as of May 5, 2023, and operating in compliance with a valid permit. The White Earth Division of Natural Resources shall take no action to implement or enforce the provisions of the Water Protection Ordinance as to such Existing Sources.

BE IT FURTHER RESOLVED, the White Earth Reservation Business Committee intends to provide Existing Sources duly permitted by the Minnesota Department of Natural Resources as of May 5, 2023, and operating in compliance with a valid permit with at least one year's notice before implementing or enforcing any current or amended provisions of the Water Protection Ordinance as to such Existing Sources.

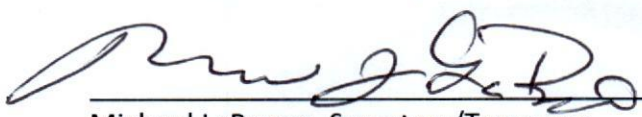
BE IT FURTHER RESOLVED, the White Earth Reservation Business Committee hereby repeals all provisions of the Water Protection Ordinance, or portions thereof, that refer to, apply to, or regulate high-capacity pumping in the appurtenant five-mile impact (or buffer) area around the White Earth Reservation in the 1855 Treaty Territory, including permitting requirements.

BE IT FINALLY RESOLVED, that the White Earth Reservation Business Committee hereby directs the Director of Natural Resources, in coordination with the White Earth Legal Department, to prepare and make publicly available a revised version of the Water Protection Ordinance as amended by this resolution within two weeks of the date of this resolution.

We do hereby certify that the foregoing resolution was adopted by a vote of 3 for, 0 against, 1 silent, a quorum being present at a special meeting of the White Earth Reservation Business Committee held on June 12, 2024 in White Earth, Minnesota.



Michael Fairbanks, Chairman



Michael LaRoque, Secretary/Treasurer

EXHIBIT 4

IN THE WHITE EARTH TRIBAL COURT

White Earth Division of Natural Resources,

Case No. GC2023-000001

Plaintiff,

v.

David Vipond,

Defendant.

SECOND AMENDED COMPLAINT

NOW COMES the White Earth Division of Natural Resources (“Plaintiff” or “WEDNR”), by its attorneys, Stafford Rosenbaum LLP, as and for a cause of action against David Vipond (“Defendant” or “Vipond”) alleges the following:

NATURE OF ACTION

1. This is a declaratory judgment action in which the WEDNR seeks (1) a declaration that Defendant may not install or operate a pump on the Wild Rice River within the boundaries of the White Earth Reservation that pumps more than 10,000 gallons of water per day or more than one million gallons of water per year (“High-Capacity”) for any purpose without a validly issued permit from WEDNR issued in accordance with the White Earth Reservation Groundwater and Surface Water Protection Ordinance, Resolution No. 057-23-017 (“Water Protection Ordinance”), attached as **Exhibit A** to this Complaint; and (2) a declaration that the extent of Defendant’s right, if any, to pump more than 10,000 gallons of water per day or more than one million gallons of water per year from the Wild Rice River for any purpose within the boundaries of the White Earth Reservation is subject to the Water Protection Ordinance; (3) an injunction enjoining Defendant from installing or operating a High-Capacity pump on the Wild Rice River within the boundaries

of the White Earth Reservation without a validly issued permit from WEDNR issued in accordance with the Water Protection Ordinance.

PARTIES

2. Plaintiff White Earth Division of Natural Resources is an administrative agency organized under the laws of the White Earth Band of the Minnesota Chippewa Tribe (the “Band”) and located within the White Earth Reservation. The WEDNR is located at 102 3rd Street, Mahnomen, MN 56557.

3. Defendant David Vipond is, upon information and belief, a Minnesota resident who resides at 1395 210th Street, Mahnomen, MN 56557, on the White Earth Reservation.

JURISDICTION

4. Plaintiff realleges all prior paragraphs and incorporates them by reference.

5. This Court has jurisdiction over the subject matter of this dispute pursuant to White Earth Band of Chippewa Judicial Code (“Jud. Code”) Ch. II, §§ 1(b) and (j).

6. This Court has jurisdiction over Defendant in this dispute pursuant to Jud. Code Ch. II, §§ 1(b) and (c).

7. This Court’s jurisdiction over the subject matter of this dispute and Defendant is consistent with applicable principles of federal law, including *Montana v. United States*, 450 U.S. 544, 565-66 (1981) and *Winters v. United States*, 207 U.S.564 (1908).

BACKGROUND FACTS

The Band Issues the Water Protection Ordinance

8. Plaintiff realleges all prior paragraphs and incorporates them by reference.

9. On May 5, 2023, the White Earth Reservation Business Committee passed the Water Protection Ordinance, which covers ground and surface waters on and appurtenant to the White Earth Reservation.

10. Through the Water Protection Ordinance, the WEDNR administers a permitting program, similar to the State of Minnesota's program, for High-Capacity groundwater and surface water appropriations.

11. The WEDNR permitting program covers appropriations of more than 10,000 gallons of water per day or more than 1,000,000 gallons of water per year within the exterior boundaries of the Reservation and the surrounding five-mile impact area.

12. Pursuant to the Water Protection Ordinance, persons desiring to install or operate a High-Capacity groundwater well or surface water pump on the White Earth Reservation or within the appurtenant five-mile impact area must apply to the WEDNR for a permit.

13. As stated in the Resolution accompanying the Water Protection Ordinance, working with relevant scientific and community experts, and WEDNR officials, the Band has identified significant threats to the Band's health and welfare, spiritual subsistence, water rights, hunting, fishing and gathering rights, and treaty-protected natural resources from the individual and cumulative operation of High-Capacity wells and High-Capacity surface water pumps on the White Earth Reservation, as well as in the five-mile impact area immediately surrounding the White Earth Reservation.

14. As further stated in the Resolution accompanying the Water Protection Ordinance, the Band has a right to maintain sufficient levels of groundwater and surface water, to support and protect fish, game, wild rice, and other aquatic treaty resources on the White Earth Reservation.

15. These Reservation resources are a critical source of food and a critical means of generating income for Band members and their families. These resources are also critical to Chippewa cultural identity and spiritual practices. The White Earth Band is engaged in comprehensive long-term projects to protect and restore these resources, and the Band has managed natural resources on the Reservation since the establishment of its conservation department in 1978.

Defendant Has Obtained a Water Appropriation Permit from the State of Minnesota

16. Plaintiff realleges all prior paragraphs and incorporates them by reference.

17. On or about March 27, 2023, Defendant applied to the State of Minnesota, through MPARS, for a surface water appropriation permit to pump up to 65.2 million gallons of water per year to irrigate 353 acres of adjacent agricultural crop fields.

18. Both Defendant's proposed pumping location on the Wild Rice River and his proposed irrigation fields are located within the boundaries of the White Earth Reservation.

19. WEDNR's director, Dustin Roy, received notice of Defendant's permit application through an automatically generated MPARS notice on, April 25, 2023.

20. In response to the MPARS notice of application, Mr. Roy contacted Josh Prososki, Groundwater Appropriation Hydrologist with the Minnesota Department of Natural Resources ("MNDNR") and expressed the Band's opposition to Defendant's proposed water withdrawal.

21. Mr. Prososki contacted Mr. Roy again on June 20, 2023, regarding Defendant's water appropriation permit application, and Mr. Roy returned Mr. Prososki's call on June 22, 2023. Mr. Roy again reiterated the Band's objection to Mr. Vipond's proposed appropriation.

22. Additionally, on June 22, 2023, Mr. Roy emailed Mr. Prososki a copy of the Band's Water Protection Ordinance.

23. On August 11, 2023, disregarding the Band's multiple objections, the MNDNR issued Defendant a permit to install and start pumping up to 65.2 million gallons of water per year from the Wild Rice River within the boundaries of the White Earth Reservation. At the same time, MNDNR notified Defendant that he should contact WEDNR regarding additional and separate requirements that may apply under the Water Protection Ordinance.

WEDNR Notified Defendant That He Must Comply with the Water Protection Ordinance

24. Plaintiff realleges all prior paragraphs and incorporates them by reference.

25. Mr. Roy drafted a notice to Defendant and his son, Aaron Vipond (listed as agent on the Minnesota permit application), on June 30, 2023. The notice to Aaron Vipond was delivered by certified mail on June 30, 2023, and White Earth conservation officers hand delivered the notice to Defendant at his personal residence on the White Earth Reservation on July 13, 2023.

26. The notices delivered informed the Viponds of the Water Protection Ordinance and the associated permit requirement for Defendant's proposed water appropriation.

27. When Mr. Roy received notice that the MNDNR had issued a state permit, Mr. Roy drafted a second notice to Defendant on August 15, 2023.

28. This second notice again explained to Defendant that he is prohibited from installing or operating a High-Capacity pump on the Wild Rice River within the boundaries of the White Earth Reservation without first receiving a permit from the WEDNR.

29. On August 15, 2023, conservation officers for the WEDNR hand-delivered the second notice to Defendant, listed as the sole permittee on the permit issued by MNDNR, at his personal residence.

30. In addition to having WEDNR's conservation officers hand-deliver two notices to Defendant at his personal residence, Mr. Roy also twice attempted to reach Defendant by phone.

31. Despite these repeated attempts by WEDNR to reach Defendant and secure his voluntary compliance with the Band's Water Protection Ordinance, Defendant has not responded to WEDNR or applied for the required WEDNR permit.

32. On information and belief, based on Defendant's seeking of a permit from the MNDNR for a High-Capacity pump on the White Earth Reservation and his refusal to seek a permit from the Band, Defendant intends to violate the Water Protection Ordinance and pump up to 65.2 million gallons of water from the Wild Rice River within the boundaries of the White Earth Reservation without complying with the terms of the Water Protection Ordinance.

COUNT I: CLAIM FOR DECLARATORY JUDGMENT

33. Plaintiff realleges all prior paragraphs and incorporates them by reference.

34. Defendant's proposed pumping of up to 65.2 million gallons of water per year from the Wild Rice River on the White Earth Reservation, individually and cumulatively with other existing High-Capacity surface water pumps and groundwater wells on and immediately adjacent to the White Earth Reservation, would have serious and substantial adverse impacts on the wild rice, baitfish, sturgeon, and other treaty resources by reducing streamflow in the Wild Rice River below levels necessary to protect those resources.

35. By imperiling streamflow and treaty resources, Defendant's proposed High-Capacity pumping from the Wild Rice River on the White Earth Reservation threatens the subsistence, health and welfare, political integrity, and economic security of the White Earth Band and its members.

36. Plaintiff's regulatory jurisdiction to apply and enforce the Water Protection Ordinance against Defendant with respect to his proposed High-Capacity pumping is consistent with federal law, including the principles set forth in *Montana*, 450 U.S. 544 and *Winters v. United States*, 207 U.S.564.

37. WERCP § 1.02(2) provides that, for those practices or procedures not addressed in the White Earth Rules of Civil Procedure, the applicable Federal Rule of Civil Procedure shall be used ("FRCP").

38. FRCP 57 governs the procedure for obtaining a declaratory judgment under 28 U.S.C. § 2201.

39. 28 U.S.C. § 2201 permits any court of the United States, upon the filing of an appropriate pleading, to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

40. Plaintiff seeks a declaration from this Court, pursuant to WERCP § 1.02(2), FRCP 57, and 28 U.S.C. § 2201, that (1) Defendant may not install or operate a High-Capacity pump (over 10,000 gallons of water per day or one million gallons of water per year) for any purpose on the Wild Rice River within the boundaries of the White Earth Reservation without a validly issued permit from WEDNR issued in accordance with the Water Protection Ordinance; and (2) the extent of Defendant's right, if any, to pump over 10,000 gallons of water per day or one million gallons

of surface water per year from the Wild Rice River for any purpose within the White Earth Reservation is subject to the Water Protection Ordinance.

41. A justiciable controversy exists between WEDNR and Vipond because Defendant has sought, and received, a permit from the MNDNR to pump 65.2 million gallons of water per year from the Wild Rice River on the White Earth Reservation to irrigate adjacent agricultural cropland also located on the Reservation but has not sought a permit from the WEDNR pursuant to the Water Protection Ordinance. The decision on this justiciable controversy can only be determined by a declaration from this Court.

42. Therefore, this matter is ripe for adjudication.

WHEREFORE, Plaintiff respectfully requests the following relief:

- A. A declaratory judgment pursuant to WERCP § 1.02(2), FRCP 57, and 28 U.S.C. § 2201 that Defendant may not install or operate a High-Capacity pump for any purpose on the Wild Rice River within the boundaries of the White Earth Reservation without a validly issued permit from WEDNR issued in accordance with the Water Protection Ordinance;
- B. A declaratory judgment pursuant to WERCP § 1.02(2), FRCP 57, and 28 U.S.C. § 2201 that the extent of Defendant's right, if any, to pump over 10,000 gallons of water per day or one million gallons of surface water per year from the Wild Rice River for any purpose within the White Earth Reservation is subject to the Water Protection Ordinance;
- C. An injunction enjoining Defendant from installing or operating a High-Capacity pump on the Wild Rice River within the boundaries of the White

Earth Reservation without a validly issued permit from WEDNR issued in accordance with the Water Protection Ordinance;

- D. An award of costs, disbursements, and attorneys' fees to Plaintiff incurred in this action; and
- E. For such other relief as the Court deems just and appropriate.

Dated: March 28, 2024

STAFFORD ROSENBAUM LLP

/s/ Jamie Lynn Konopacky

Jamie Lynn Konopacky
Wisconsin State Bar No. 1092665
Carly Gerads
Wisconsin State Bar No. 1106808
Licensed in White Earth Tribal Court
1200 N. Mayfair Road, Suite 430
Milwaukee, WI 53226-3282
jkonopacky@staffordlaw.com
414.982.2850

Jessica C. Mederson
Wisconsin State Bar No. 1087910
Licensed in White Earth Tribal Court
222 W. Washington Ave., Suite 900
PO Box 1784
Madison, WI 53701-1784
jmederson@staffordlaw.com
608.256.0226

EXHIBIT 5

**White Earth Band of Ojibwe
Tribal Court**

Date: September 13, 2023
Regarding Case: General Civil
File No. GC2023-00001

To:

White Earth Division of Natural Resources
102 3red St
Mahnomen, MN 56557

via email

David Vipond
1395 210th St
Mahnomen, MN 56557

Enclosed Documents: **Order for Injunction**

JE

By: _____

Jodie Erb, Clerk of Court
White Earth Tribal Court
PO Box 289
White Earth, MN 56591
Phone: (218) 983-4648 ext. 5757
Fax: (218) 983-3294
Jodie.Erb@whiteearth-nsn.gov

WHITE EARTH TRIBAL COURT

White Earth Division of Natural Resources,
102 3rd Street
Mahnomen, MN 56557
Plaintiff,

File no. GC2023-00001

ORDER FOR INJUNCTION

v.

David Vipond
1395 210th Street Mahnomen, MN 56557,
Respondent.

The undersigned, having reviewed the complaint and exhibits (including exhibits filed September 11, 2023) finds that Plaintiff is entitled to an immediate preliminary injunction.

1. This Court has jurisdiction over the subject matter of this dispute pursuant to White Earth Band of Chippewa Judicial Code ("Jud. Code") Ch. II, §§ I (b) and J).
2. This Court has jurisdiction over Defendant in this dispute pursuant to Jud. Code Ch. 11, §§ I (b) and (c).
3. Rule 11 of the White Earth Nation Rules of Civil Procedure provides that:
 3. An injunction may be granted:
 - (a) When it appears by the pleadings on file that a party is entitled to the relief demanded, and such relief, or any part thereof, consists of restraining the commission or continuance of some act complained of, either for a limited period or perpetually;
 - (b) When it appears from the pleadings or by affidavit that the commission or continuance of some act during the litigation would produce irreparable injury to the party seeking injunctive relief;
 - (c) When it appears during the litigation that either party is doing or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of another party respecting the subject matter of the action, and tending to render the judgment ineffectual;
 - (d) In all other cases where an injunction would be proper in equity.

Defendant was served with the complaint and motion to enjoin on September 01, 2023.

It appears from the pleadings that Plaintiff is entitled to relief based on the White Earth Water Protection Ordinance and the "Winters Doctrine", as developed by the Federal Courts. It

furthermore appears that “such relief, or any part thereof, consists of restraining the commission or continuance” of the act complained of. Dustin Roy’s affidavit specifically states that maintaining the natural flow of the Wild Rice River is key to the Bands restoration goals for the river, and reseeding.

It also appears from the pleadings that if the action is not enjoined a judgement may be rendered ineffectual due to the damage to the River and attendant Ricing harvest.

IT IS THEREFORE ORDERED that, during the pendency of the above-captioned action, Defendant David Vipond is enjoined from installing or operating a high-capacity pump (defined as any pump that can pump more than 10,000 gallons of water per day or more than one million gallons of water per year) on the Wild Rice River within the geographic scope covered by the White Earth Reservation Groundwater and Surface Water Protection Ordinance, Resolution No. 057-22-017 (the “Water Protection Ordinance”) absent a validly issued permit from the White Earth Department of Natural resources issued in accordance with the Water Protection Ordinance.

This injunction will be removed, modified, or permanently issued only upon a joint motion of the parties or as set forth in the final judgment for the above-captioned matter.



Dated: September 12, 2023

David DeGroat, Judge
White Earth Nation

EXHIBIT 6

**WHITE EARTH BAND TRIBAL COURT
WHITE EARTH BAND OF OJIBWE**

White Earth Division of Natural Resources,
102 3rd Street
Mahnomen, MN 56557

Plaintiff,

Case No: GC2023-00001

v.

David Vipond
1395 210th Street
Mahnomen, MN 56557

Defendant.

**SPECIAL APPEARANCE ANSWER OF
DAVID VIPOND TO SECOND AMENDED COMPLAINT**

Defendant David Vipond hereby appears specially by and through his counsel to Answer the Second Amended Complaint of the White Earth Division of Natural Resources (hereinafter “WEDNR”) by special appearance and to seek dismissal by special appearance of that action for lack of jurisdiction. Defendant alleges and states as follows:

1. Except as hereinafter specifically admitted, modified or otherwise answered, denies each and every allegation of the Second Amended Complaint.
2. Admits that the Plaintiff brought an action seeking declaratory and injunctive relief against Defendant, but denies any other allegations or implications of Paragraph 1.
3. On information and belief admits the allegations of Paragraph 2.
4. As to Paragraph 3, state that Defendant David Vipond lives on fee lands he owns at the stated address, and admits the remaining allegations of Paragraph 3.
5. As to Paragraph 4, Defendant realleges his prior response to the previous paragraphs of the Second Amended Complaint.

6. Denies the allegations of Paragraphs 5, 6 and 7.

7. As to Paragraph 8, Defendant realleges his answers to the previous paragraphs of the Second Amended Complaint.

8. As to Paragraph 9, admits, on information and belief, that the White Earth Reservation Business Committee passed the Band's Water Protection Ordinance, which purports to govern ground and surface waters on and appurtenant to the White Earth Reservation, but denies that the White Earth Reservation Business Committee had jurisdiction to enact an ordinance that exercises jurisdiction over Defendant, his land, and the waters in question.

9. As to Paragraph 10, admits that through the Water Protection Ordinance the WEDNR purports to administer a permitting program, but allege that the passage of the Water Protection Ordinance was in response to Defendant's application to the Minnesota Department of Natural Resources for a water pump and was passed while Defendant was in the process of obtaining a permit from the Minnesota DNR, and denies any other allegations or implications of Paragraph 10.

10. Admits that the WEDNR permitting program purports to cover appropriations of more than 10,000 gallons of water per day or 1,000,000 gallons of water per year within the area stated, but denies any further allegations or implications in Paragraph 11 including the applicability of the permitting program to Defendant, his land, and the waters in question.

11. As to Paragraph 12, admits that the Water Protection Ordinance purports to require all persons desiring to install or operate a High-Capacity groundwater well or surface water pump in the identified area to apply to the WEDNR for a permit, but deny that the Water Protection Ordinance is applicable to all persons and all lands within the identified area.

12. As to Paragraphs 13 and 14, admits the Resolution makes claims but denies the allegations and implications of said Paragraphs 13 and 14.

13. Denies the allegations of Paragraph 15 including any implication or allegation that Plaintiff has jurisdiction over Defendant based on these allegations.

14. As to Paragraph 16, Defendant realleges his answers to the previous paragraphs of the Second Amended Complaint.

15. Admits the allegations of Paragraphs 17 and 18.

16. On information and belief, admits the allegations of Paragraph 19.

17. As to Paragraphs 20, 21 and 22, Defendant is without sufficient information to admit or deny the allegations of Paragraphs 20, 21 and 22 and puts Plaintiff to its strict proof thereof.

18. As to Paragraph 23, Defendant admits that the Minnesota DNR issued a permit to Defendant on August 11, 2023 to install and begin pumping up to 65.2 million gallons per year from the Wild Rice River, and that the Minnesota DNR's August 11, 2023 cover letter informed Defendant about White Earth Nation Resolution No. 057-23-017, and denies any further allegations or implications of Paragraph 23. Defendant further alleges that the Band failed to file written comments in response to Defendant's application for a Minnesota DNR permit with the Minnesota DNR, despite having notice and an opportunity to do so.

19. As to Paragraph 24, Defendant realleges his previous answers to the prior paragraphs of the Second Amended Complaint.

20. As to Paragraph 25, Defendant is without sufficient information to admit or deny the first sentence of Paragraph 25 and puts Plaintiff to its strict proof thereof. As to the second sentence of Paragraph 25, Defendant admits that a notice to Aaron Vipond was delivered by certified mail and further admits that a notice was delivered to Defendant at his personal residence on fee lands Defendant owns on July 13, 2023, but denies any other allegations or implications of the second sentence of Paragraph 25.

21. As to Paragraph 26, Defendant admits the notices identified the existence of the Band's

Water Protection Ordinance and the Band's claim for a requirement of a permit, but denies any other allegations or implications of Paragraph 26.

22. As to Paragraph 27, denies that the Band had followed the appropriate procedure for comment and opposition to the permit application to the Minnesota DNR. Defendant is without sufficient information to admit or deny the remaining allegations of Paragraph 27 and puts Plaintiff to its strict proof thereof.

23. As to Paragraph 28, Defendant admits that a notice dated August 15, 2023 advised Defendant that he is required to obtain a permit from the WEDNR to install or operate a High-Capacity pump on the Wild Rice River, but denies any other allegations or implications of Paragraph 28 including that the ordinance and permit requirement are applicable to Defendant, his land, or the waters in question.

24. Defendant admits that on August 15, 2023 Defendant received a hand delivered notice letter of said date, but denies any other allegations or implications of Paragraph 29.

25. As to Paragraph 30, Defendant is without sufficient information to admit or deny the allegations of Paragraph 30 and puts Plaintiff to its strict proof thereof.

26. As to Paragraph 31, Defendant admits that Defendant has not responded to WEDNR or applied for a WEDNR permit, but denies any other allegations or implications of Paragraph 31 including the claim that Defendant is required to obtain a permit from the WEDNR.

27. As to Paragraph 32, Defendant admits that the Defendant has obtained a permit from the Minnesota DNR for a High-Capacity pump, admits that Defendant has not sought a permit from the Band for such High-Capacity pump, denies that Defendant is required to obtain a permit from the Band, and alleges that Defendant has taken no steps to install a High-Capacity pump as allowed by the permit from the Minnesota DNR nor has Defendant made any final determination that he will install such a High-Capacity pump.

28. As to the allegations of Paragraph 33, Defendant realleges his previous answers to the previous paragraphs of Plaintiff's Second Amended Complaint.

29. Denies the allegations of Paragraphs 34, 35 and 36.

30. Defendant admits the allegations of Paragraph 37, except that the citation to WERCP § 1.02(2) appears to refer to WERCP § 1.2(b).

31. As to the allegations of Paragraph 38, Defendant admits that FRCP 57 governs the procedure for obtaining declaratory relief, but denies that 28 U.S.C. § 2201 is incorporated into the Federal Rules of Civil Procedure and denies any other allegations or implications of Paragraph 38.

32. As to Paragraph 39, Defendant admits that 28 U.S.C. § 2201 governs declaratory relief in courts of the United States, and alleges that the Statute speaks for itself and denies any other allegations or implications of Paragraph 39.

33. As to Paragraph 40, Defendant admits that Plaintiff is seeking declaratory relief pursuant to the cited Tribal Court and Federal Rules of Civil Procedure, and 28 U.S.C. § 2201, but denies that declaratory relief is incorporated under the White Earth Tribal Court Rules of Civil Procedure, which does not reference and incorporate 28 U.S.C. § 2201, and denies any other allegations or implications of Paragraph 40, including that Plaintiff is entitled to declaratory relief against Defendant or that the Water Protection Ordinance governs Defendant's right to pump water from the Wild Rice River.

34. Denies the allegations of Paragraphs 41 and 42.

AFFIRMATIVE DEFENSES

35. Defendant is a citizen of the United States and the State of Minnesota, and the land for which Defendant sought and obtained a permit from the Minnesota DNR for water pumping from the Wild Rice River for irrigation purposes is non-member fee owned land.

36. Plaintiff lacks jurisdiction over Defendant or his land.

37. Plaintiff lacks jurisdiction over Defendant for his activities on fee owned lands, including waters adjacent thereto on which Defendant has riparian rights, under *United States v. Montana* and other Supreme Court precedent, unless Plaintiff can meet one of the two exceptions for jurisdiction under *United States v. Montana*. Plaintiff has failed to plead or prove that either of the *Montana* exceptions to jurisdiction over Defendant are applicable here.

38. Defendant does not need to obtain a permit from the WEDNR for activities authorized under state law on his lands.

39. The Wild Rice River is a navigable body of water that is under the jurisdiction of the State of Minnesota.

40. The State of Minnesota issued a permit in this matter to Defendant with the right to pump water from the Wild Rice River for irrigation purposes. The permit requirements considered or contained in the permit conditions from the Minnesota DNR provide for and protect the waters, the fishery and vegetation in the Wild Rice River.

41. Plaintiff had the opportunity to provide comment and objection through the Minnesota DNR process, and failed to comment and object to Defendant's application for a permit that governs Defendant's permitted activities regarding the pumping of water from the Wild Rice River for irrigation purposes. Plaintiff has waived its right to object to Defendant's pumping activities under the permit issued by the Minnesota DNR.

42. The State of Minnesota and the Minnesota DNR are necessary and indispensable parties to the litigation in this matter, and unless joined in the litigation, dismissal of this action is required. The Second Amended Complaint fails to join a necessary and indispensable party whose participation in this action is mandated because it affects the rights of the State of Minnesota as the owner of the bed of the Wild Rice River, a navigable body of water and because the State of

Minnesota has the jurisdiction and authority to issue the permit for the pumping activities of the Defendant that are the subject matter of the Second Amended Complaint. Further, the State of Minnesota is a necessary and indispensable party because the Plaintiff claims that the State of Minnesota's jurisdiction is preempted as it relates to waters on and appurtenant to the Reservation under *Winters* and the White Earth Band's federal reserved water rights.

43. Plaintiff has failed to join a party pursuant to WERCP IX.

44. The White Earth Band is a tribal government in which Defendant cannot participate because he is not a Band member and Defendant is ineligible for membership in the White Earth Band or the Minnesota Chippewa Tribe.

45. The pumping activities of Defendant pursuant to a Minnesota DNR permit, even if engaged in by Defendant, do not threaten or have an impact on the health and welfare of the White Earth Band and its members. The Defendant neither intends nor will engage in pumping activities that would damage the Wild Rice River and its natural resources, should Defendant determine that he will install the irrigation pumping equipment as permitted by the Minnesota DNR permit.

46. Defendant's pumping location on the Wild Rice River, near the western border of the White Earth Reservation, is downstream from, and would not affect, any wild rice activities by White Earth Band members within the White Earth Reservation.

47. Defendant, as a riparian landowner with land that adjoins the Wild Rice River, has a right to draw water from the Wild Rice River as an interest in land and as a riparian landowner, subject to regulation by the State of Minnesota and its political subdivisions.

48. The Court lacks subject matter jurisdiction for the matters alleged in the Second Amended Complaint.

49. The Court lacks personal jurisdiction over the Defendant for the activities alleged in the Second Amended Complaint.

50. The Second Amended Complaint fails to state a claim upon which relief can be granted. Plaintiff's reliance on FRCP 57 is insufficient to assert a declaratory judgment action against Defendant. FRCP 57 makes actions for declaratory relief under 28 U.S.C. § 2201 subject to the Civil Rules and is not itself a statutory remedy for declaratory relief. The Second Amended Complaint cites no other authority for a declaratory judgment. *Blankenship v. E. Band of Cherokee Indians*, No. CSC-16-03, 2019 WL 4280163, at n.4 (E. Cherokee Sup. Ct. Feb. 1, 2019).

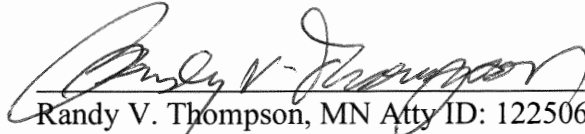
51. The claim by Plaintiff against Defendant is not ripe for adjudication.

WHEREFORE, Defendant respectfully requests the following relief:

1. Dismissing Plaintiff's Second Amended Complaint, and denying any requests for relief sought by Plaintiff in its Second Amended Complaint, with prejudice and on the merits.
2. Determining that the State of Minnesota is a necessary and indispensable party to this suit and dismissing this action on that basis.
3. Determining that the WEDNR and the White Earth Band Tribal Court lacks jurisdiction over Defendant and his land for the irrigation pumping activities alleged in the Second Amended Complaint.
4. Awarding Defendant his costs and disbursements in this action.
5. For such other relief as the Court deems just and appropriate.

Dated: May 9, 2024

**NOLAN, THOMPSON, LEIGHTON &
TATARYN, PLC**



Randy V. Thompson, MN Atty ID: 122506

Licensed in White Earth Tribal Court

Courtney E. Carter, MN Atty ID: 0390284

Licensed in White Earth Tribal Court

1011 1st Street South, Suite 410

Hopkins, MN 55343

Email: rthompson@nmtlaw.com

ccarter@nmtlaw.com

Phone: 952-405-7171

Fax: 952-224-0647

HANSON & LIEBL LAW OFFICE, P.C.

/s/ Levi Liebl

Levi Liebl

MN Atty ID: 0402573

Licensed in White Earth Tribal Court

P.O. Box 340

Mahnomen, MN 56557

Email: levi@mahnomenlaw.com

Phone: 218-935-2266

ATTORNEYS FOR DEFENDANT

EXHIBIT 7

Case No. _____

WHITE EARTH BAND OF OJIBWE

IN TRIBAL COURT OF APPEALS

David Vipond,

Defendant-Appellant,

vs.

White Earth Division of Natural Resources,

Plaintiff-Respondent.

NOTICE OF APPEAL

Pursuant to White Earth Band of Ojibwe Rules of Appellate Procedure 2, Notice is given that Defendant David Vipond appeals to the White Earth Band of Ojibwe Tribal Court of Appeals from the Tribal Trial Court's original Order for Injunction dated September 12, 2023, which is attached. Defendant requests that this Court reverse the Tribal Trial Court's Order for Injunction and enter an order requiring that the Tribal Trial Court dismiss the Complaint against Defendant David Vipond because the Order was entered before the time to respond to the Plaintiff's Motion had expired and Defendant was not allowed an opportunity to be heard, in violation of his due process rights. The Motion was also filed before receiving a hearing date from the Tribal Trial Court, in contravention of White Earth Rule of Civil Procedure XIII, Sec.

3. Lastly, the Order was entered *ex parte*, without a hearing.

The Defendant-Appellant David Vipond, in connection with this Notice of Appeal, provides the following additional information pursuant to White Earth Band of Ojibwe Rules of Appellate Procedure 2:

1. Original Decision/Order being Appealed. Copy attached as **Exhibit A**.
2. Short Statement of Relief Sought. The Defendant-Appellant David Vipond respectfully requests that the Court reverse and vacate the Order for Injunction entered by Judge David DeGroat.
3. Statement Explaining the Legal Grounds for Seeking the Appeal and Justification for the Relief Requested. David Vipond was served with the Complaint and the Plaintiff's Motion for Preliminary Injunction on August 24, 2023. The Motion did not set forth a scheduled hearing date as required by White Earth Rule of Civil Procedure XIII, Sec. 3. The Order for Injunction was entered by Judge DeGroat without a hearing scheduled by Plaintiff on its Motion for an Injunction as required under the White Earth Band of Chippewa Rule of Civil Procedure XIII, Sec. 3; the Order for Injunction was issued without an opportunity for Defendant-Appellant to respond to the Motion and before any response was due; and the Order for Injunction was entered without a hearing. Additionally, the Court's determination that it had jurisdiction over the subject matter of the dispute and jurisdiction over Defendant-Appellant does not meet the requirements for jurisdiction over a non-member for his activities on fee lands as established by the United States Supreme Court in *Montana v. United States*, 450 U.S. 544 (1981); and no basis for an

injunction against Defendant-Appellant exists.

4. The Plaintiff-Appellee White Earth Division of Natural Resources is a unit of White Earth government, with its address at 102 3rd Street, Mahnomen, Minnesota 56557.
5. The Plaintiff-Appellee is represented by:

Jamie Lynn Konopacky
Stafford Rosenbaum LLP
1200 No. Mayfair Rd., Suite 430
Milwaukee, WI 53226
jkonopacky@staffordlaw.com

Jessica C. Mederson
Stafford Rosenbaum LLP
222 W. Washington Ave., Suite 900
P.O. Box 1784
Madison, WI 53701-1784
jmederson@staffordlaw.com

6. The Defendant David Vipond resides at 1395 210th Street, Mahnomen, Minnesota 56557.
7. David Vipond is represented by:

Levi Liebl
Hanson & Liebl Law Office, P.C.
Admitted to the White Earth Tribal Court
P.O. Box 340
304 NE Main St
Mahnomen, MN 56557

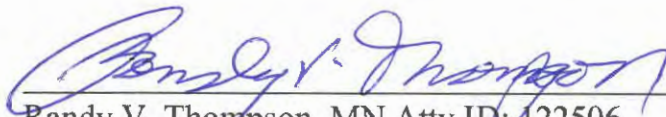
Randy V. Thompson
Application to White Earth Tribal Court Admission Pending
Courtney E. Carter
Application to White Earth Tribal Court Admission Pending
Nolan, Thompson, Leighton & Tataryn, PLC
1011 1st Street South, Suite 410
Hopkins, MN 55343

Dated: October 10, 2023

HANSON & LIEBL LAW OFFICE, P.C.

Levi Liebl, MN Atty ID: 0402573
Licensed in White Earth Tribal Court
P.O. Box 340
Mahnomen, MN 56557
Email: levi@mahnomenlaw.com
Phone: (218) 935-2266

**NOLAN, THOMPSON, LEIGHTON &
TATARYN, PLC**



Randy V. Thompson, MN Atty ID: 122506
*Application to White Earth Tribal Court Admission
Pending*

Courtney E. Carter, MN Atty ID: 0390284
*Application to White Earth Tribal Court Admission
Pending*

1011 1st Street South, Suite 410
Hopkins, MN 55343
Email: rthompson@nmtlaw.com
ccarter@nmtlaw.com

Phone: 952-405-7171

Fax: 952-224-0647

**ATTORNEYS FOR DEFENDANT-
APPELLANT**

**White Earth Band of Ojibwe
Tribal Court**

Date: September 13, 2023
Regarding Case: General Civil
File No. GC2023-00001

To:

White Earth Division of Natural Resources
102 3rd St
Mahnomen, MN 56557

via email

David Vipond
1395 210th St
Mahnomen, MN 56557

Enclosed Documents: **Order for Injunction**

JE

By: _____

Jodie Erb, Clerk of Court
White Earth Tribal Court
PO Box 289
White Earth, MN 56591
Phone: (218) 983-4648 ext. 5757
Fax: (218) 983-3294
Jodie.Erb@whiteearth-nsn.gov

EXHIBIT A

WHITE EARTH TRIBAL COURT

White Earth Division of Natural Resources,
102 3rd Street
Mahnomen, MN 56557
Plaintiff,

File no. GC2023-00001

ORDER FOR INJUNCTION

v.

David Vipond
1395 210th Street Mahnomen, MN 56557,
Respondent.

The undersigned, having reviewed the complaint and exhibits (including exhibits filed September 11, 2023) finds that Plaintiff is entitled to an immediate preliminary injunction.

1. This Court has jurisdiction over the subject matter of this dispute pursuant to White Earth Band of Chippewa Judicial Code ("Jud. Code") Ch. II, §§ I (b) and J).
2. This Court has jurisdiction over Defendant in this dispute pursuant to Jud. Code Ch. 11, §§ I (b) and (c).
3. Rule 11 of the White Earth Nation Rules of Civil Procedure provides that:
 3. An injunction may be granted:
 - (a) When it appears by the pleadings on file that a party is entitled to the relief demanded, and such relief, or any part thereof, consists of restraining the commission or continuance of some act complained of, either for a limited period or perpetually;
 - (b) When it appears from the pleadings or by affidavit that the commission or continuance of some act during the litigation would produce irreparable injury to the party seeking injunctive relief;
 - (c) When it appears during the litigation that either party is doing or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of another party respecting the subject matter of the action, and tending to render the judgment ineffectual;
 - (d) In all other cases where an injunction would be proper in equity.

Defendant was served with the complaint and motion to enjoin on September 01, 2023.

It appears from the pleadings that Plaintiff is entitled to relief based on the White Earth Water Protection Ordinance and the "Winters Doctrine", as developed by the Federal Courts. It

furthermore appears that “such relief, or any part thereof, consists of restraining the commission or continuance” of the act complained of. Dustin Roy’s affidavit specifically states that maintaining the natural flow of the Wild Rice River is key to the Bands restoration goals for the river, and reseeded.

It also appears from the pleadings that if the action is not enjoined a judgement may be rendered ineffectual due to the damage to the River and attendant Ricing harvest.

IT IS THEREFORE ORDERED that, during the pendency of the above-captioned action, Defendant David Vipond is enjoined from installing or operating a high-capacity pump (defined as any pump that can pump more than 10,000 gallons of water per day or more than one million gallons of water per year) on the Wild Rice River within the geographic scope covered by the White Earth Reservation Groundwater and Surface Water Protection Ordinance, Resolution No. 057-22-017 (the “Water Protection Ordinance”) absent a validly issued permit from the White Earth Department of Natural resources issued in accordance with the Water Protection Ordinance.

This injunction will be removed, modified, or permanently issued only upon a joint motion of the parties or as set forth in the final judgment for the above-captioned matter.



Dated: September 12, 2023

David DeGroat, Judge
White Earth Nation

EXHIBIT 8

White Earth Band of Ojibwe
Tribal Court

Date: October 26, 2023
Regarding Case: Appeals
File No. AP2023-00003

To:

White Earth Division of Natural Resources
102 3rd St
Mahnomen, MN 56557

via email

David Vipond
1395 210th St
Mahnomen, MN 56557

Lori McGowan
E-mail: lmcgowan@nmtlaw.com

Levi Liebl
Email: levi@mahnomenlaw.com

Attorneys for Plaintiff:

Jamie Konopacky,
Jessica Mederson
Carly Gerads:

via email: jkonopacky@staffordlaw.com
via email jmederson@staffordlaw.com
via email egerads@staffordlaw.com

Enclosed Documents: Appellate Court Order dated 10-24-23

By: _____



Jodie Erb, Clerk of Court
White Earth Tribal Court
PO Box 289
White Earth, MN 56591
Phone: (218) 983-4648 ext. 5757
Fax: (218) 983-3294
Jodie.Erb@whiteearth-nsn.gov

WHITE EARTH BAND OF OJIBWE
IN TRIBAL COURT OF APPEALS

David Vipond,

Defendant-Appellant,

v.

ORDER

White Earth Division of Natural Resources,

GC2023-00001

Plaintiff-Respondent.

Ap 2023-00003

Respondent White Earth Division of Natural Resources (White Earth) sued David Vipond in Tribal Court, seeking:

(1) a declaration that Defendant may not install or operate a pump on the Wild Rice River that pumps more than 10,000 gallons of water per day or more than one million gallons of water per year (a "High Capacity Pump") within the geographic scope covered by the White Earth Reservation Groundwater and Surface Water Protection Ordinance, Resolution No. 057-22-017 ("Water Protection Ordinance") without a validly issued permit from WEDNR issued in accordance with the Water Protection Ordinance; (2) a declaration that the Water Protection Ordinance governs the extent of Defendant's right, if any, to pump water from the Wild Rice River for any purpose within the geographic scope covered by the Water Protection Ordinance; (3) an injunction enjoining Defendant from installing or operating a High-Capacity Pump on the Wild Rice River within the geographic scope covered by the Water Protection Ordinance without a validly issued permit from WEDNR issued in accordance with the Water Protection Ordinance.

Complaint, August 23, 2023, p.1-2. Defendant was served with the Summons and Complaint and Motion for Preliminary Injunction on September 1, 2023. The Summons required Defendant to serve an Answer to the Complaint within 30 days of service. On August 23, White Earth filed a Notice of Motion and Motion for Preliminary Injunction, pursuant to Rule 11 of the White Earth Band of Chippewa Rules of Civil Procedure. White Earth also filed affidavits and a memorandum in support of its Motion.

Before the date by which Defendant was required to answer the Complaint, and without notice, any response from Defendant, or a hearing, the Tribal Court issued an Order for Injunction as follows:

IT IS THEREFORE ORDERED that, during the pendency of the above-captioned action, Defendant David Vipond is enjoined from installing or operating a high-capacity pump (defined as any pump that can pump more than 10,000 gallons of water per day or more than one million gallons of water per year) on the Wild Rice River within the geographic scope covered by the White Earth Reservation Groundwater and Surface Water Protection Ordinance, Resolution No. 057-22-017 (the "Water Protection Ordinance") absent a validly issued Permit from the White Earth Department of Natural Resources issued in accordance with the Water Protection Ordinance.

This injunction will be removed, modified, or permanently issued only upon a joint motion of the parties or as set forth in the final judgment for the above-captioned matter.

Order for Injunction, September 12, 2023.

Appellant filed a Notice of Appeal of the Order for Injunction on October 10, 2023. Respondent filed a Motion to Deny Leave to Appeal on October 12, 2023. Appellant filed his Response to the Motion on October 16, 2023. Respondent filed a Reply in support of its Motion on October 18, 2023.

Respondent contends that Appellant's appeal should be dismissed because it is an Interlocutory Appeal, which must be filed "within ten (10) days of the receipt of the ruling, judgment, or order in question," White Earth Band of Ojibwe Court of Appeals Rules of Appellate Procedure, Rule 6(A)(1), and Appellant's "appeal does not meet the criteria needed to obtain permission for such an appeal under RAP 5(B)(1) [Appeal – By Permission]".

Appellant contends that his appeal is timely, citing Rule XXXI [APPEALABLE ORDERS] of the White Earth Band of Chippewa Rules of Civil Procedure, which provides that "An appeal may be taken to the White Earth Band of Chippewa Court of Appeals . . . (b) from an order which grants, refuses, dissolves or refuses to dissolve an injunction." The Rule also states that "The time period for appeals shall be thirty (30) days from the date of the entry of the order."

Given the conflict between Rule of Appellate Procedure 6(A)(1) and Rule of Civil Procedure XXXI, and the specific reference in Rule XXXI to appeals from the granting of an injunction, the Court will not dismiss Appellant's appeal based on late filing.

The Court will exercise its authority under Rule 9 of the Rules of Appellate Procedure to "answer threshold questions regarding the jurisdiction of the case" and to "determine if the case is ripe for appellate review."

The Court is troubled that a preliminary injunction was issued against Defendant before the date by which he was required to answer the complaint, without notice, an opportunity to file a response, or a hearing on the motion.

Respondent argues that the White Earth Rules of Civil Procedure do not require that the Tribal Court conduct a hearing before issuing a preliminary injunction. Reply in Support of Plaintiff-Respondent's Motion to Deny Leave to Appeal, p. 2 fn. 1. This Court concludes otherwise.

Rule XI [Injunctions] states that "No preliminary injunction shall be issued without notice to the adverse party." The reference to "notice" is to a hearing on the motion. Rule XIII [Motions] also makes it clear that the moving party must provide notice and the non-moving party is entitled to file a memorandum and affidavits in response to the motion.¹ Respondent contemplated a hearing on its motion when it

¹ Rule XIII(4)(c)(5) [Non-Dispositive Motions] states that the Court may decide a non-dispositive motion without oral argument. Given the rules' other references to "notice" and "hearing" with respect to a motion for injunction, we conclude that the Court must hold a hearing on a motion for preliminary injunction.

stated in Plaintiff’s Notice of Motion for a Preliminary Injunction that “This Motion will be heard at a date and time determined by the Court.”²

In contrast to the procedures required for a preliminary injunction, a temporary restraining order may be issued under specified circumstances “before notice can be served and a hearing thereon.” Rule XI(b). But a temporary restraining order has a limited duration because it can be issued without notice and an opportunity to be heard. Rule XI(b) provides:

. . . Every temporary restraining order granted without notice shall: . . .

(4) expire by its terms without such time after entry, not to exceed fifteen (15) days, as the Court fixes, unless within the time fixed the order, for good cause shown, is extended for a period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record.

In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for preliminary injunction and, if she/he does not do so, the Court shall dissolve the temporary restraining order. . . .³

The Tribal Court’s Order for Injunction is not limited in duration, but states that “This injunction will be removed, modified, or permanently issued only upon a joint motion of the parties or as set forth in the final judgment for the above-captioned matter.”

The Court notes that Appellant challenges the Court’s authority to exercise subject matter jurisdiction over Respondent’s claims under the *Montana* doctrine and other federal law. This issue is not addressed in the Court’s Order for Injunction. Without detailed findings on this issue and other criteria for whether to grant a preliminary injunction, this Court cannot conduct meaningful appellate review.

For these reasons, the Court concludes under Rule 9 that the case is not “ripe for appellate review.”

Because the Order for Injunction grants relief more suited for a temporary restraining order, the order will be treated as a temporary restraining order and the parties may litigate in the Tribal Court whether Respondent is entitled to a preliminary injunction (if Appellant does not agree to a restraining order pending the Court’s final resolution of the case).

² The requirement of notice and a hearing for a preliminary injunction is consistent with the Federal Rules of Civil Procedure, Rule 65, and Minnesota Rules of Civil Procedure, Rule 65.

³ The discussion in Rule XI with respect to temporary restraining order buttresses our view that a hearing is required on a motion for preliminary injunction. “In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for preliminary injunction and, if she/he does not do so, the Court shall dissolve the temporary restraining order. (Emphasis supplied).”

BASED ON THE FOREGOING, THE COURT ORDERS:

1. This appeal shall be dismissed without prejudice and the case shall be remanded to the Tribal Court for further proceedings consistent with this order.
2. The Tribal Court's Order for Injunction shall be treated as a temporary restraining order under Rule XI of the Rules of Civil Procedure. The injunction will remain in place pending further proceedings of the Tribal Court as described herein.
3. Respondent's motion for preliminary injunction shall be set for a hearing on a date within 30 days of issuance of this order (unless the parties or the Court agree to extend that period). Respondent may rely on its prior submissions or may provide additional support for its motion. Appellant shall be given an opportunity to file a memorandum and affidavits in opposition to the motion.
4. In determining whether a preliminary injunction should be issued, the Tribal Court shall enter detailed findings on jurisdiction and other criteria for issuance of an injunction.

Dated: October 24, 2023.

BY THE COURT:

George W. Soule

George W. Soule
Lenor Scheffler Blaeser
David Harrington

EXHIBIT 9

IN THE WHITE EARTH TRIBAL COURT

White Earth Division of Natural Resources,

Case No. GC2023-000001

Plaintiff,

v.

David Vipond,

Defendant.

PLAINTIFF'S INITIAL STATUS REPORT

In anticipation of the November 14, 2023, Status Conference, Plaintiff White Earth Division of Natural Resources (“WEDNR”) provides the Court with the following report on the status of the parties’ efforts to prepare this action for a prompt and expeditious resolution of jurisdictional and preliminary injunction issues, as required by the White Earth Appellate Court in its October 24, 2023, Order (the “Order”).

In the Order, the Appellate Court directed this Court to enter detailed findings on jurisdiction, along with other criteria for issuance of a preliminary injunction. While the Court directed that WEDNR’s motion for preliminary injunction be heard within 30 days of the Order being issued, it also gave the parties or this Court the right to extend that period.

The parties have consulted extensively regarding the proposed discovery schedule necessary to provide this Court with the evidence needed to make the required findings on the jurisdictional issues and preliminary injunction issues. The parties have not been able to reach agreement as to the scope and timing of discovery at this stage of the litigation and therefore WEDNR presents this status report on its proposed discovery and briefing schedule and the legal support for such schedule.

PROPOSED SCHEDULE

November 14, 2023: Factual discovery may commence.

February 14, 2024: WEDNR provides expert reports on this date and presents its expert witnesses for depositions over the course of the next month on mutually agreed upon dates.

March 11, 2024: Vipond provides rebuttal expert reports on this date and presents his expert witnesses for depositions over the course of the next month on mutually agreed upon dates.

April 22, 2024: WEDNR provides supplemental preliminary injunction briefing, including briefing on the jurisdictional issue.

May 13, 2024: Vipond provides response to WEDNR's briefing (original and supplemental) on preliminary injunction briefing, including jurisdictional briefing.

May 28, 2024: WEDNR provides a reply in support of its preliminary injunction brief (original and supplemental).

June 2024: Hearing on the preliminary injunction motion.

ARGUMENT IN SUPPORT OF PROPOSED SCHEDULE

As counsel for the WEDNR and Vipond discussed the above proposed schedule, WEDNR's counsel repeatedly explained the need for expert discovery in response to Vipond's challenge to the jurisdiction of this Court in the above-captioned case. After what at first seemed to be productive conversations regarding submission of a joint status report, the parties ultimately agreed yesterday afternoon to file separate status reports. In light of the issues raised in Vipond's status report regarding this Court's jurisdiction in the present matter, WEDNR addresses those issues here briefly but requests the Court set a formal briefing schedule if it

believes preliminary legal briefing is required on the legal issue of the extent of discovery needed to address the jurisdictional question in this case.

Vipond's arguments in support of its proposed schedule drastically oversimplify the jurisdictional issue in this case. First, Vipond only address one of the two grounds for jurisdiction this Court has in the present matter. Second, Vipond misconstrues the second ground for jurisdiction by omitting much of the relevant legal precedent and providing no factual support or evidence. As shown below, both grounds for jurisdiction support the WEDNR's proposed schedule above.

I. This Court Has Jurisdiction Based on The White Earth Band's Regulatory Authority to Protect Its Federal Water Property Rights, Which Include Water Sufficient to Sustain the Hunting, Fishing and Gathering Purpose of the White Earth Reservation Now and in the Future

Vipond's status report does not acknowledge the Court's right to exercise jurisdiction based on the Band's regulatory authority over its federal water property rights. Under the seminal United States Supreme Court case of *Winters v. United States*, 207 U.S. 564 (1908), which was recently reaffirmed in *Arizona v. Navajo Nation*, 599 US 555 (2023), the Supreme Court made clear that, with federal Indian Reservations, come superior federal water property rights sufficient to fulfill the purpose or purposes for which a federal Indian Reservation is established. *Winters v. United States*, 207 U.S. at 576. These water rights include non-consumptive water rights sufficient to protect tribal hunting, fishing, and gathering activities. *See, e.g., Colville Confederated Tribes v. Walton*, 647 F.2d 42 at 47-48 (9th Cir. 1981)(reserved water right includes right to development and replacement of fishing grounds or use in any other lawful manner); *United States v. Adair*, 723 F.2d 1394, 1411-1416, FN 19 (9th Cir. 1983)(reserved right to an amount of water sufficient to support a "moderate living" from exercise of hunting, fishing, and gathering rights, which survived allotment of appurtenant land

and termination of the reservation). As it relates to water rights provided to the Band by federal treaty, State regulatory authority—such as the MN DNR permit issued in the present case—is preempted and “of no force and effect.” *Colville Confederated Tribes*, 647 F.2d at 48, 51-52 (9th Cir. 1981).

This ground for the Band’s regulatory jurisdiction clearly supports the Court’s exercise of civil adjudicatory jurisdiction over Vipond. As set forth in the affidavits submitted in favor of the WEDNR’s preliminary injunction motion, Vipond’s proposed pumping directly threatens water necessary for exercise of the Band’s fishing and gathering activities. Vipond’s only attempt to address these concerns is to make a wholly unsubstantiated claim about what the Minnesota DNR considered before issuing his permit. But as set out above, under *Winters* and its progeny, the State of Minnesota’s actions in this area are preempted as they relate to waters on and appurtenant to the Reservation to which the Band has federal reserved water property rights.

II. The White Earth Band Has Regulatory Authority Over Non-Members on Fee Lands Within the Reservation If Their Actions Threaten the Political Integrity, Economic Security or Health and Welfare of the Band

In addition to having regulatory jurisdiction to protect its federal water rights, the Band has regulatory jurisdiction “over conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.” *Montana v. United States*, 450 U.S. 544, 566 (1984). For a Band to have regulatory jurisdiction over non-members on fee land within a federal Indian Reservation, the action of non-members must do more than injure a tribe, they must “imperil the subsistence of the tribal community.” *Plains Commerce Bank v. Long Family Land and Cattle Company, Inc., et al.*, 554 U.S. 316, 341 (2008)(internal quotations omitted).

Vipond argues that this burden is “nearly insurmountable” for the WEDNR. Accepting

Vipond’s argument at face value, the Band would have virtually no recourse when non-members act in a manner, as Vipond does, that imperils the subsistence of the Tribal community. While the WENDR concedes that its second ground for jurisdiction (known as the second exception to the *Montana* Rule) is a difficult one, the agency further contends that that is precisely why federal district courts—faced with these cases—repeatedly hold that jurisdictional questions in tribal court are fact-intensive and require commensurate discovery, and sometimes even a complete trial on the underlying merits, for proper disposition. *See, e.g., DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 883 (8th Cir. 2013) (providing that “prudence may caution a tribal appeals court to refrain from deciding jurisdictional questions until after trial is completed and the factual record developed and clarified.”)¹; *Nguyen v. Gustafson*, No. CV 18-522 (SRN/KMM), 2018 WL 1413463, at *4 (D. Minn. Mar. 21, 2018) (requiring an appeal of a final judgment to a tribal appellate court before tribal exhaustion is met because a fulsome record will best inform the Tribal Court of Appeals of the facts necessary for the determination of a jurisdictional appeal).

Indeed, while attempting to construe *Burlington N. Santa Fe R. Co. v. Assiniboine and Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767, a case supporting WEDNR’s schedule, against the Band, Vipond misleads the Court by leaving out the critical reasoning in that case, which underscores the gravity of what is at issue and the warranted discovery:

Montana set a critical boundary line between the sovereignty of Indian nations and the non-Indian populace that lives, works or interacts with tribes on their

¹ Vipond asserts, without explanation, that this case is inapplicable because it is a case addressing the first exception to the *Montana* Rule instead of the second exception. Yet both exceptions involve the question of whether a tribal court can exercise jurisdiction over a non-member and directly contradicts Vipond’s assertion that jurisdiction is a threshold matter or that it is unreasonable to require discovery or a trial before jurisdiction is determined. While the factors at issue under the two exceptions are different, the fundamental analysis—whether the factual record supports jurisdiction over a non-tribal member—is the same for both exceptions and this case is therefore squarely relevant to the present dispute.

territory. Our law governing the scope of the second *Montana* exception, now two decades old, is still in its infancy. Its sound development is vital if there are to be harmonious and stable relations between tribes and non-Indian interlocutors. We conclude in the context of this litigation that a more complete record is necessary to the resolution of the dispute at issue. The Tribes are entitled to some discovery, as framed by the district court, on the second *Montana* exception.

The concurring opinion in that case provided further, critical context:

I concur and comment on the *Montana* exceptions. Since *Montana* was declared the law of the land by the Supreme Court in 1981, Indian nations, non-Indians who live or do business on Indian lands, and others who interact with Indian nations have struggled to define the bounds for the consent and tribal integrity exceptions to *Montana*'s general rule restricting Indian nations' jurisdiction over non-Indians. We are not dealing with a frivolous position by the tribes, but with the line between Indian sovereignty and freedom of action of those whose lives cross Indian territory. ... Only on a full record can it fairly be decided whether *Montana*'s second exception can be satisfied.

Burlington N. Santa Fe R. Co. v. Assiniboine and Sioux Tribes of Fort Peck Reservation, 323 F.3d at 775-76.

The challenges of establishing jurisdiction under the second *Montana* exception are indeed significant and that is the very reason that WEDNR is seeking the time to develop the factual record, complete its expert reports, and depose Vipond's experts. Vipond cannot argue, on the one hand, that the burden is extremely high and then argue, on the other hand, that the WEDNR is not entitled to sufficient time to establish the severity of the peril posed by Vipond's pump.

Indeed, Vipond concedes the need for at least some discovery, recognizing the need for both parties to provide expert reports in support of their positions. Vipond merely wants to avoid the depositions that may call into question the assertions of his own experts. This imbalanced approach to discovery cannot stand when the water and the sovereignty of the White Earth Band are at stake. While WENDR acknowledges that the cost of depositions is significant, the cost

cuts both ways, and demonstrates the seriousness with which the Band is treating the threat to water, treaty rights, and human welfare in this case. As for discovery from Vipond himself or third parties, the need for that is established in Vipond's status report in which he claims, with zero factual support and tendering no response to the affidavits of three WEDNR senior staff, that the Minnesota DNR permitting process adequately considered any potential impact on the Band and its members. Vipond's knowledge of this process, as well as information regarding what the DNR actually considered, is directly relevant to this second ground for jurisdiction.

With no legal support, Vipond asserts that the issue of a tribal court's civil adjudicatory jurisdiction is a threshold matter. He further claims that it is unreasonable to require a non-tribal member to expend resources to defend his position on lack of tribal court jurisdiction. Unlike WEDNR, Vipond cannot cite any support for these positions, because his argument directly ignores the controlling federal precedent.

CONCLUSION

In light of the considerable rights at stake on both sides, including the federal water rights and sovereign authority of the White Earth Band, the WEDNR respectfully requests that the Court order the discovery schedule proposed above. If the Court and Vipond believe that it is more efficient to address the jurisdictional issue first and as a standalone matter, the WEDNR will agree to withdraw its pending motion for a preliminary injunction (reserving the right to move again for a preliminary injunction if any threatened action by Vipond warrants it) and use the proposed schedule above to address the jurisdictional issue solely before proceeding on the declaratory judgment action and permanent injunctive relief remedy.

Dated: November 14, 2023

STAFFORD ROSENBAUM LLP

s/ Jamie Lynn Konopacky
Jamie Lynn Konopacky
Wisconsin State Bar No.1092665
Licensed in White Earth Tribal Court
1200 N. Mayfair Road, Suite 430
Milwaukee, WI 53226-3282
jkonopacky@staffordlaw.com
414.982.2850

Jessica C. Mederson
Wisconsin State Bar No. 1087910
Licensed in White Earth Tribal Court
222 W. Washington Ave., Suite 900
PO Box 1784
Madison, WI 53701-1784
jmederson@staffordlaw.com
608.256.0226

Carly Gerads
Wisconsin State Bar No. 1106808
Licensed in White Earth Tribal Court
1200 N. Mayfair Road, Suite 430
Milwaukee, WI 53226-3282
cgerads@staffordlaw.com
414.928.2881

EXHIBIT 10

**White Earth Band of Ojibwe
Tribal Court**

Date: November 17, 2023
Regarding Case: General Civil
File No. GC2023-00001

To:

Jamie Konopacky
Jessica Mederson
Attorneys for White Earth Division of Natural Resources via email

Levi Libel
Randy Thompson
Attorneys for Respondent, David Vipond via email

Enclosed Documents: **Order on Discovery and Briefing Schedule**

JE

By: _____

Jodie Erb, Clerk of Court
White Earth Tribal Court
PO Box 289
White Earth, MN 56591
Phone: (218) 983-4648 ext. 5757
Fax: (218) 983-3294
Jodie.Erb@whiteearth-nsn.gov

IN THE WHITE EARTH TRIBAL COURT

White Earth Division of Natural Resources,

Plaintiff,

v.

David Vipond,

Defendant.

Case No. GC2023-000001

ORDER ON DISCOVERY AND BRIEFING SCHEDULE

This matter having come before the Court on November 14, 2023, for a status conference, and the Court having reviewed the reports of the parties and argument of counsel, HEREBY ORDERS that the parties may conduct discovery on the issue of this Court's jurisdiction over Defendant in the above-captioned case as follows:

- November 14, 2023: Factual discovery may commence.
- February 14, 2024: WEDNR must provide any expert reports submitted in support of its position on the jurisdictional issue by this date and thereafter make its expert witnesses available for depositions over the course of the next month on dates mutually agreed to by the parties.
- March 11, 2024: Vipond must provide any rebuttal expert reports submitted in support of its position on the jurisdictional issue by this date and thereafter make his expert witnesses for depositions over the course of the next month on dates mutually agreed to by the parties.

- April 22, 2024: WEDNR must provide its opening brief on the jurisdictional issue by this date.
- May 13, 2024: Vipond must provide its response to WEDNR's jurisdictional brief by this date.
- May 28, 2024: WEDNR must provide its reply brief in support of its brief on the jurisdictional issue by this date.
- June 2024: A Zoom hearing will be set by the Court in June 2024 to hear oral arguments on the issue of tribal court civil adjudicatory jurisdiction.

IT IS FURTHER ORDERED that the temporary restraining order currently in place, pursuant to the Tribal Appellate Court's October 24, 2023 Order, is hereby dissolved, with the WEDNR reserving its right to resubmit a motion for preliminary injunction in the above-captioned case if it believes such a motion is warranted.

Dated: November 17, 2023



David DeGroat, Chief Judge