UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

DAVID VIPOND, Plaintiff, v. DAVID DEGROAT, in his official capacity as Judge of White Earth Tribal Court, and DUSTIN ROY, in his official capacity as Director of White Earth Division of Natural Resources, Defendants.	Case No. 0:24-cv-03125-KMM-LIB

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT DUSTIN ROY'S MOTION TO STAY

INTRODUCTION

In August 2023, the White Earth Division of Natural Resources (WEDNR), a governmental agency of the federally recognized White Earth Band of the Minnesota Chippewa Tribe ("White Earth Nation" or "Nation"), commenced an action in White Earth Tribal Court against Plaintiff David Vipond seeking a declaration that Mr. Vipond's proposal to pump up to 65.2 million gallons of water from the Wild Rice River each summer to irrigate farmland on the White Earth Reservation ("Reservation") is subject to the White Earth Reservation Groundwater and Surface Water Protection Ordinance ("Water Protection Ordinance" or "Ordinance"). The Nation enacted the Ordinance to protect the Reservation's waters and wild rice, fish, and game resources—all guaranteed to the Nation by treaty in 1867—from the devastating and depleting effects of high-capacity groundwater wells and surface water pumps. Mr. Vipond disputes the Nation's authority under federal law to regulate his activities.

Plaintiff and WEDNR have been litigating in Tribal Court for more than a year. The parties have conducted discovery, exchanged expert reports, and agreed to numerous revisions of the case schedule to accommodate Plaintiff's counsel. A hearing to resolve Mr. Vipond's challenge to the jurisdiction of the Tribal Court is scheduled for February 2025. The parties will submit pre-hearing briefs on jurisdiction and post-hearing proposed findings of fact and conclusions of law. Plaintiff and WEDNR stipulated to all these deadlines. Nevertheless, Plaintiff now asks this Court to interfere and to enjoin further proceedings in the Tribal Court for want of jurisdiction. Plaintiff's lawsuit is premature. United States Supreme Court and Eighth Circuit precedent is clear that Mr.

Vipond may not collaterally attack the Nation's jurisdiction unless he first complies with the tribal court exhaustion rule set forth in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987). It is only once the Tribal Court proceedings are concluded—including appellate proceedings in the White Earth Court of Appeals—that this Court may consider Plaintiff's claim (in the event the Nation's courts uphold tribal jurisdiction) and will have the necessary factual record and analysis of tribal law to do so. Until such time, this Court is not empowered to hear the claim. Defendant Dustin Roy, in his official capacity as divisional director of WEDNR, therefore respectfully requests that the Court stay this action until Plaintiff exhausts his tribal court remedies.[1]

BACKGROUND

I. Plaintiff's Proposal To Pump 65.2 Million Gallons of Water from the Wild Rice River, and the White Earth Water Protection Ordinance.

Plaintiff alleges he owns 611 acres of farmland adjacent to the Wild Rice River on the White Earth Reservation. Am. Compl. (Dkt. 4) ¶ 8. The Reservation was reserved by and guaranteed to the Ojibwe people in the United States' Treaty with the Chippewa of the Mississippi, Mar. 19, 1867, 16 Stat. 719, and comprises approximately 830,000 acres in Mahnomen County and portions of Becker and Clearwater Counties, *Littlewolf v. Lujan*, 877 F.2d 1058, 1060 (D.C. Cir. 1989) (stating acreage). In March 2023, Plaintiff applied to the Minnesota Department of Natural Resources (MNDNR) for a permit to

[1] As set forth in the statement submitted herewith, the parties met and conferred in a good-faith effort to resolve the issues raised by this Motion.

pump up to 65.2 million gallons of surface water from the Wild Rice River each summer, at a rate of up to 1,000 gallons per minute, to irrigate 353 acres of agricultural land on the Reservation. Dkt. 4 ¶¶ 9-10. According to Plaintiff, this farm has produced crops for close to one hundred years with no supplemental irrigation, but Plaintiff now seeks to increase his crop yields.

When Defendant Roy received notice of the permit application, he contacted MNDNR to register the Nation's concerns with Plaintiff's proposed appropriation. Dkt. 4-1 at PDF p. 29 ¶¶ 19-21. Defendant Roy also provided MNDNR a copy of the White Earth Water Protection Ordinance. *Id.* ¶ 22. Concurrently, WEDNR notified Plaintiff by certified mail and hand delivery that his proposed high-capacity surface water pumping on the Reservation is subject to the Ordinance and tribal permitting requirement. *Id.* at PDF pp. 30-31 ¶¶ 25-30.

The Ordinance was enacted by the White Earth Nation Reservation Business Committee ("RBC") after significant analysis and coordination with scientific and community experts to protect the Reservation's natural resources against harm from existing, and the continued expansion of, "high-capacity" (capable of pumping more than 10,000 gallons per day or one million gallons per year) groundwater wells and surface water pumps. *Id.* at PDF pp.7, 9. The 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[.]

Id. at PDF p. 21. The Ordinance defines two categories of high-capacity groundwater wells and surface water pumps: (1) "New Source[s]" not in operation as of May 5, 2023 (the effective date of the Ordinance), and (2) "Existing Source[s]" already in operation on that date. *Id.* at PDF pp. 8-9.[2]

The Ordinance requires that operators of any proposed New Source, such as Mr. Vipond's, apply to WEDNR for a permit before commencing operations. *Id.* at PDF p.10. The operator must show, individually and cumulatively with other high-capacity appropriations, that the New Source will not significantly reduce the quantity of groundwater available for reasonable use by current groundwater users or adversely affect surface waters; will not exceed the sustainable yield of the aquifer; and will not reduce base flows or water levels and cause harm to aquatic species and habitats, including by changing water temperature. *Id.* at PDF pp. 13-14. New Sources present a unique threat to Reservation resources, as they compound the adverse impacts of existing high-capacity appropriations and may be located in areas where groundwater is slower to recharge or waters have not previously been subject to intensive pumping or study. *Id.* at PDF p. 22.[3]

---

[2] The Ordinance does not regulate all Reservation water uses, such as domestic wells. It only regulates high-capacity wells and pumps due to the outsized threat they present.

[3] While the Ordinance also included a permit requirement for Existing Sources, Existing Sources were not required to submit permit applications for one year after passage of the Ordinance. Dkt. 4-1 at PDF p. 10. On June 12, 2024, the RBC suspended indefinitely the permit requirement with respect to Existing Sources operating in compliance with

II. Plaintiff's Failure To Comply with the Water Protection Ordinance, and the Impact of High-Capacity Appropriations on the Nation's Treaty-Protected Waters and Natural Resources

While MNDNR ultimately issued a state permit to Plaintiff, MNDNR also acknowledged the Nation's regulatory authority over such appropriations, advising Plaintiff "of the need to obtain any other permits that may apply including any permits required by White Earth Nation." *Id.* at PDF p. 3 ¶ 17. Despite this direction from the State of Minnesota, and despite receiving multiple notices from WEDNR, *supra* p. 3, Plaintiff refused to respond or otherwise acknowledge the Nation's Ordinance and permit requirement. *Id.* at PDF p. 31 ¶ 31.

The Water Protection Ordinance is not red tape, and WEDNR has grave concerns with Plaintiff's non-compliance. The RBC enacted the Ordinance to safeguard the Nation's way of life and the rights and resources guaranteed to the Nation by the 1867 Treaty. *Id.* at PDF pp. 7, 20-21. When Chief Hole-In-The-Day proposed in a letter to the President of the United States what would become the 1867 Treaty and the Reservation, he explained that "good land, game, fish, rice, and sugar" were lacking in their location at that time, but that

> [i]f a treaty were made …, a tract of country of the best character for my people might be procured, without any outlay or expense to the government; say *that strip of land lying on the Wild Rice river*, between the 47˚ and 48˚ north latitude, and east of the Red river. *There is every*

MNDNR permits. It further directed WEDNR to submit a report no later than December 2026 on the status of its ongoing coordination and study with other governmental entities and stakeholders regarding Existing Sources' impacts on aquatic species and habitat and sustainable levels of consumptive use on the Reservation, and to recommend changes to the Ordinance to ensure its effective and efficient operation. *Id.* at PDF pp. 23-24.

> *advantage of good soil, game, fish, rice, sugar, cranberries, and a healthy climate*.

State v. Clark, 282 N.W.2d 902, 909 n.19 (Minn. 1979) (emphases added) (citation omitted). The Treaty reserved the aboriginal right of Ojibwe people to fish, hunt, and gather wild rice on the Reservation for sustenance and commercial purposes, free from interference. *Id.* at 909; *see also, e.g.*, *United States v. Dion*, 476 U.S. 734, 738 (1986) ("As a general rule, Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them[.]").[4]

The Treaty also guaranteed to the Nation a sufficient quantity of groundwater and surface water to fulfill the purposes of the Reservation, which included providing a home where Tribal members could sustain themselves from fishing, hunting, and gathering, *Clark*, 282 N.W.2d at 908-09. As the United States Supreme Court stated in *Arizona v. Navajo Nation*, 599 U.S. 555 (2023):

> Under this Court's longstanding reserved water rights doctrine, sometimes referred to as the *Winters* doctrine, the Federal Government's reservation of land for an Indian tribe also implicitly reserves the right to use needed water from various sources—such as groundwater, rivers, streams, lakes, and springs—that arise on, border, cross, underlie, or are encompassed within the reservation.

Id. at 561; *see also Cappaert v. United States*, 426 U.S. 128, 139 (1976) ("[W]hen the Federal Government reserves land, by implication it reserves water rights sufficient to

[4] The Ojibwe reserved these rights in earlier treaties in Minnesota as well. *See, e.g.*, Treaty with the Chippewa art. 5, July 29, 1837, 7 Stat. 536, 537 ("The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied to the Indians, during the pleasure of the President of the United States.").

accomplish the purposes of the reservation."); *Winters v. United States*, 207 U.S. 564, 576-77 (1908). The Nation's *Winters* rights include sufficient water for current and future consumptive uses (such as household, commercial, agricultural, and industrial uses) and for non-consumptive uses (such as instream flows to protect fisheries). *See, e.g.*, *Navajo Nation*, 599 U.S. at 561; *United States v. Adair*, 723 F.2d 1394, 1410-11 (9th Cir. 1983).

In the decades after the 1867 Treaty, the Nation was dispossessed of much of its Reservation land base through the policy of "allotment," which nationwide resulted in the loss and transfer to non-Indians of approximately ninety million acres of Indian lands. *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650 n.1 (2001); *Clark*, 282 N.W.2d at 905-06. All lands within the boundaries of the White Earth Reservation, however, including formerly allotted lands now owned in fee by non-Indians, such as Plaintiff, retain their "Indian country" status under federal law. *Clark*, 282 N.W.2d at 906; *see also, e.g.*, *McGirt v. Oklahoma*, 591 U.S. 894 (2020).

Fishing, hunting, and gathering wild rice are no less central to the physical sustenance and economic survival of the Nation's people today than they were 150 years ago when they entered the Treaty. Hundreds of Tribal members provide healthy food for their families throughout the year with wild rice, fish, and game harvested on the Reservation and generate a substantial portion of their annual income from the commercial sale of wild rice and baitfish (minnows and leeches). Answer ¶ 76. Tribal members harvest these resources throughout the entire Reservation, including in the Wild Rice River (named in Chief Hole-In-The-Day's letter) and Rice Lake and White Earth Lake (named in Article 2 of the 1867 Treaty), as well as in off-reservation areas. The

Nation has also worked for twenty-five years to restore a self-sustaining lake sturgeon population to the Wild Rice River and other Reservation waters. *Id.* ¶ 67. All these resources are critical to Ojibwe cultural identity and spiritual practices. Dkt. 4-1 at PDF p. 29 ¶ 15.

Wild rice, baitfish, sturgeon, and the habitats they depend on require sufficient levels of surface water and groundwater to thrive. *Id.* at PDF p. 28 ¶ 14. Reservation waters—including 530 lakes over ten acres in size, more than 300 miles of rivers and streams, and more than 150,000 acres of wetlands, Answer ¶ 55—are a single, interconnected resource. Unfortunately, they have been subject to rapidly increasing and permanent depletion by industrial agriculture for more than fifty years. There are approximately eighty-four high-capacity wells and pumps in total on the Reservation, pumping up to approximately 3.28 billion gallons of water annually. *Id.* ¶ 73. By drawing down water levels, these wells and pumps reduce the groundwater recharge and surface water in Reservation lakes, ponds, streams, and wetlands.[5] Plaintiff's proposal to withdraw another 65.2 million gallons of water from the Wild Rice River each summer compounds existing impacts and threatens substantial new harm to Reservation resources.

[5] The foregoing paragraphs are the subject of ongoing factual development by the parties in the Tribal Court action, including through expert reports and witness affidavits, in preparation for the impending jurisdictional hearing. *Infra* pp. 10-12. Defendant Roy does not submit those materials here because, as discussed below, controlling precedent dictates that the factual record must be established and reviewed in the Nation's court system before this Court considers Plaintiff's claim. *Infra* pp. 12-18.

III. Ongoing Proceedings in White Earth Tribal Court Regarding WEDNR's Enforcement of the Ordinance Against Mr. Vipond

On August 23, 2023, WEDNR filed an action for declaratory and injunctive relief against Mr. Vipond in White Earth Tribal Court. Dkt. 4 ¶ 25. WEDNR filed a second amended complaint on March 28, 2024. Dkt. 4-1 at PDF pp. 26-34. WEDNR requests a declaration from the Tribal Court that the Ordinance applies to Mr. Vipond's proposed high-capacity pumping of Reservation waters from the Wild Rice River and that he must obtain a permit from WEDNR before installing and operating a pump. *Id.* at PDF pp. 26, 33. WEDNR also requests an injunction enjoining Mr. Vipond from installing or operating a high-capacity pump on the Wild Rice River within the Reservation without a WEDNR permit. *Id.* at PDF pp. 26-27, 33-34. WEDNR alleges:

- Mr. Vipond'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." *Id.* at PDF p. 31 ¶ 34.

- "By imperiling streamflow and treaty resources, [Mr. Vipond'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." *Id.* at PDF p. 32 ¶ 35.

Mr. Vipond answered WEDNR's complaint, pleading numerous affirmative defenses, including lack of subject matter jurisdiction, lack of personal jurisdiction, lack of regulatory jurisdiction under federal common law, lack of ripeness, failure to join a necessary and indispensable party, and failure to state a claim upon which relief can be granted. *Id.* at PDF pp. 44-47. Mr. Vipond further alleges that his proposed pumping

activities will not harm or threaten the health and welfare of the Nation or the Reservation's natural resources. *Id.* at PDF p. 46.

Concurrent with filing its complaint, WEDNR moved for a preliminary injunction to enjoin Mr. Vipond from installing or operating a high-capacity pump during the pendency of the action. The Tribal Court granted the motion on September 12, 2023. *Id.* at PDF pp. 37-38. Mr. Vipond appealed the order of injunction to the White Earth Court of Appeals, arguing among other things that tribal jurisdiction over his proposed pumping "does not meet the requirements for jurisdiction over a nonmember for his activities on fee lands as established by the United States Supreme Court in *Montana v. United States*, 450 U.S. 544 (1981)[.]" *Id.* at PDF p. 51.

The Court of Appeals' decision emphasized the judicial obligation to answer threshold questions of jurisdiction, *id.* at PDF p. 60:

> The Court notes that [Mr. Vipond] challenges the Court's authority to exercise subject matter jurisdiction over [WEDNR'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.

Id. at PDF p. 61. The Court of Appeals also concluded that the White Earth Rules of Civil Procedure (WERCP) require that the Tribal Court conduct a hearing before issuing a preliminary injunction. *Id.* at PDF pp. 60-61. The Court of Appeals accordingly construed the order as a temporary restraining order and remanded to the Tribal Court with directions to provide the parties a full opportunity to present evidence and arguments

regarding Mr. Vipond's jurisdictional challenge, and to enter detailed findings regarding the same. *Id.* at PDF pp. 61-62.

On remand, the Tribal Court dissolved the temporary restraining order and entered a scheduling order providing for fact discovery, the exchange of expert reports, expert depositions, briefing on the question of jurisdiction, and a jurisdictional hearing in June 2024. *Id.* at PDF pp. 74-75. On February 7, 2024, the parties jointly moved for a four-month extension of the deadlines due to Mr. Vipond's counsel's health. Decl. of Cory J. Albright in Support of Def. Roy's Mot. to Stay ("Albright Decl."), Ex. B. The Tribal Court granted the parties' motion and rescheduled the jurisdictional hearing for October 2024. *Id.* Ex. C.

On June 14, 2024, WEDNR disclosed five expert witness reports and several related affidavits, including reports on surface water, groundwater, aquatic species, economics, and cultural resources. *Id.* Ex. D; Answer ¶ 38. On July 11, 2024, the parties jointly moved the court to extend the case schedule by two weeks in light of Mr. Vipond's counsel's ongoing medical concerns. The parties also stipulated to additional deadlines, including for the exchange of exhibits and witness lists for the jurisdictional hearing and for the submission of post-hearing proposed findings of fact and conclusions of law. Albright Decl. Ex. E. The Tribal Court granted the parties' motion on July 12, 2024. *Id.* Ex. F. Mr. Vipond disclosed three expert witness reports and one witness affidavit to WEDNR on July 29, 2024. *Id.* Ex. G. Four days later, on August 2, 2024, Mr. Vipond filed the instant action in this Court. Compl. (Dkt. 1).

On August 15, 2024, in light of Mr. Vipond's counsel's upcoming medical treatment, the parties again agreed to extend all deadlines, this time by one month. Albright Decl. Ex. H. The Tribal Court granted the parties' motion on August 20, 2024, and rescheduled the jurisdictional hearing for December 2024. *Id.* Ex. I. The same day, citing Plaintiff's lawsuit against him in this Court, Judge David DeGroat recused himself from the Tribal Court action, and the matter was reassigned to Judge B.J. Jones. *Id.* Ex. J. On September 11, 2024, counsel for WEDNR in the Tribal Court action withdrew, *id.* Ex. K, and undersigned counsel filed a notice of appearance the next day, *id.* Ex. L. "[D]ue to the transition in [WEDNR's] counsel and the Parties' ongoing efforts to schedule and conduct a total of approximately twenty-three depositions," nineteen requested by Mr. Vipond, the parties jointly moved for an additional extension of the case deadlines. *Id.* Ex. M. The Tribal Court granted the motion, ordering jurisdictional briefing to be completed by December 20, 2024, and scheduling the jurisdictional hearing for February 24-25, 2025. *Id.* Ex. N.

ARGUMENT

Despite these ongoing proceedings and the impending jurisdictional hearing, Plaintiff's claim asks this Court to enjoin the Tribal Court action in midstride. Clear and voluminous precedent prohibits Plaintiff's eleventh-hour attack on the Nation's right of self-government and the authority of its court system. This Court must stay Plaintiff's claim until he exhausts in the Nation's court system his challenge to the Nation's regulatory and adjudicatory jurisdiction. If the Nation's courts uphold tribal jurisdiction, then this Court may proceed, at which time it will have the benefit of the factual record

developed in the Tribal Court and of the Nation's courts' construction of Nation law and explanation for accepting jurisdiction. Indeed, it is black letter law that a tribal court's findings must be given due deference. Plaintiff's attempts to escape the exhaustion rule and the orderly administration of justice are without merit.

I. Plaintiff's Claim Must Be Stayed Until He Exhausts His Challenge to the Nation's Regulatory and Adjudicatory Jurisdiction in Tribal Court.

The United States Supreme Court has long recognized that "Tribal courts play a vital role in tribal self-government," that "the Federal Government has consistently encouraged their development," and that "[a] federal court's exercise of jurisdiction over matters relating to reservation affairs can … impair the authority of tribal courts[.]" *Iowa Mut.*, 480 U.S. at 14-15; *see also, e.g.*, *WPX Energy Williston, LLC v. Jones*, 72 F.4th 834, 837 (8th Cir. 2023). Accordingly, while "federal law defines the outer boundaries of an Indian tribe's power over non-Indians," *Nat'l Farmers Union*, 471 U.S. at 851, a non-Indian's access to the federal courts to challenge a tribe's assertion of jurisdiction is limited. A non-Indian must first exhaust his or her jurisdictional challenge in the tribal court system, and a federal court must "stay[] its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction[.]" *Id.* at 856-57; *see also, e.g.*, *Reservation Tel. Coop. v. Three Affiliated Tribes of Fort Berthold Reservation*, 76 F.3d 181, 184 (8th Cir.1996).

"Exhaustion is mandatory[.]" *Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 849 (8th Cir. 2003). Thus, although the exhaustion of tribal court remedies "is required as a matter of comity, not as a jurisdictional

prerequisite," *Iowa Mut.*, 480 U.S. at 16 n.8, it operates as "an inflexible bar" to a federal court's exercise of jurisdiction, *Granberry v. Greer*, 481 U.S. 129, 131 n.4 (1987); *e.g.*, *Duncan Energy Co. v. Three Affiliated Tribes of Fort Berthold Reservation*, 27 F.3d 1294, 1300 (8th Cir. 1994); *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1241 (10th Cir. 2014). "Exhaustion includes both an initial decision by the tribal trial court and the completion of appellate review." *DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 882 (8th Cir. 2013); *see also, e.g.*, *Iowa Mut.*, 480 U.S. at 17 ("At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts."); *Nguyen v. Gustafson*, Civil No. 18-522 (SRN/KMM), 2018 WL 1413463, at *4 (D. Minn. Mar. 21, 2018) (same). Until exhaustion is complete, "it would be premature for a federal court to consider any relief." *Nat'l Farmers Union*, 471 U.S. at 857.

In addition to promoting tribal self-government and the development, authority, and integrity of tribal courts, the rule advances important prudential policies. First, exhaustion ensures "the orderly administration of justice"—"the forum whose jurisdiction is being challenged [should have] the first opportunity to evaluate the factual and legal bases for the challenge." *Nat'l Farmers Union*, 471 U.S. at 856. Second, exhaustion "allow[s] a full record to be developed in the Tribal Court" before any review by a federal court. *Id.*; *see also Duncan Energy*, 27 F.3d at 1300 ("[T]ribal exhaustion contemplates the development of a factual record[.]"). Third, exhaustion ensures that the tribal court will decide questions of tribal law. "Adjudication of [reservation affairs] by any nontribal court … infringes upon tribal law-making authority, because tribal courts

are best qualified to interpret and apply tribal law." *Iowa Mut.*, 480 U.S. at 16; *see also Basil Cook Enters. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 66 (2d Cir. 1997) ("The Supreme Court has long recognized the exclusive responsibility of Native American tribes to construe their own law, and with that responsibility comes the parallel responsibility of federal courts to abide by those constructions." (citations omitted)). Exhaustion thus "provid[es] federal courts with the benefit of tribal expertise, and clarif[ies] the factual and legal issues that are under dispute and relevant for any jurisdictional evaluation." *DISH Network*, 725 F.3d at 882.

The exhaustion rule unquestionably controls here. In response to WEDNR's lawsuit, Plaintiff has challenged the Nation's regulatory jurisdiction over his activities, as well as the Tribal Court's adjudicatory jurisdiction over his dispute with WEDNR. The Tribal Court accordingly has ordered jurisdictional briefing, a jurisdictional hearing, and the submission of proposed findings of fact and conclusions of law, as contemplated by the Court of Appeals. *Supra* pp. 11-12. The parties have engaged in discovery, exchanged expert reports and witness affidavits, and negotiated multiple schedule extensions to accommodate counsel's medical treatment. *Id*. Plaintiff's request that this Court declare the Tribal Court lacks jurisdiction and enjoin those proceedings invites the "'procedural nightmare,'" *Nat'l Farmers Union*, 471 U.S. at 856, and "direct competition" between tribal and non-tribal courts, *Iowa Mut.*, 480 U.S. at 16, that the rule forbids.[6] *See Gaming*

[6] Indeed, Plaintiff's collateral attack has already triggered the recusal from the Tribal Court action of White Earth Tribal Court Judge David DeGroat, a named defendant in this action. *Supra* p. 12.

World, 317 F.3d at 852 (ordering exhaustion of tribal court remedies where plaintiff's claim "was a clear attempt to evade tribal court jurisdiction").

Moreover, Plaintiff's claim strikes at the very heart of the Nation's self-government. The Nation deemed the Ordinance necessary to protect its 1867 Treaty rights to fish, hunt, and gather and its reserved water rights. *Supra* pp. 3-6. The Ordinance seeks to prevent the depletion and further destruction of the hydrologic system, wild rice, fisheries (including hatchery and restoration programs), and other natural resources upon which Tribal families rely for their physical sustenance, income, and cultural and spiritual welfare. *Supra* pp. 3-4, 7-9. Resolution of Plaintiff's challenges to the Nation's jurisdiction hinges on its inherent sovereign authority to protect the Reservation's natural resources. In short, this is "a dispute arising on the Reservation that raises questions of tribal law and jurisdiction that should first be presented to the tribal court," *Duncan Energy*, 27 F.3d at 1300 (requiring exhaustion in dispute over tribal authority to regulate non-Indian oil and gas company on fee lands).

The exhaustion rule applies with particular force in this case because it involves the interpretation of White Earth Nation law and the resolution of complex factual issues. It is incumbent on the Nation's courts to provide an authoritative construction of the Water Protection Ordinance.[7] *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa*, 609 F.3d 927, 934 (8th Cir. 2010) (stating that federal courts

[7] To the extent Plaintiff challenges the Tribal Court's jurisdiction under Nation law, his claim also requires an analysis of the White Earth Rules of Civil Procedure, White Earth Judicial Code, and any other applicable tribal law. *See* Albright Decl. Exs. A, O.

must "defer to [tribal courts'] interpretation of tribal law"); *Burlington N. R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1246 (9th Cir. 1991) ("Had the federal district court proceeded further in this case, … it would have interpreted the disputed ordinance and ruled on tribal jurisdiction before tribal authorities themselves had a chance to declare what tribal law means."). The parties already have exchanged expert reports and witness affidavits addressing the hydrology of the Wild Rice River and other Reservation waters; the impact of high-capacity wells and pumps, including Mr. Vipond's proposal, on wild rice, sturgeon, and baitfish resources; the role of these resources in the subsistence of Tribal members and the White Earth economy; and the cultural and spiritual importance of these resources to the Ojibwe people. The exhaustion rule demands that the development of this factual record be completed in the Tribal Court. *DISH Network*, 725 F.3d at 883; *Duncan Energy*, 27 F.3d at 1300.

While the district court has discretion to dismiss or stay an action pending the exhaustion of tribal court remedies, *Iowa Mut.*, 480 U.S. at 20 n.14; *Nat'l Farmers Union*, 471 U.S. at 857, a stay is the proper course where, as here, the plaintiff files a duplicative action that would interfere with ongoing tribal court proceedings. *See Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1422 (8th Cir. 1996) ("[T]he orderly administration of justice requires the District Court to stay its proceedings pending a determination by the Tribal Court of that court's jurisdiction and discussion regarding the legal validity of the management contract."); *see also, e.g.*, *Calumet Gaming Grp.-Kan., Inc. v. Kickapoo Tribe of Kan.*, 987 F. Supp. 1321, 1330 (D. Kan. 1997) (stating "general preference" for issuance of a stay (citation omitted)). Both WEDNR and Mr. Vipond have

sought resolution of the Nation's regulatory jurisdiction over his proposed pumping, and Defendant Roy has answered Plaintiff's amended complaint. Once Plaintiff exhausts his tribal court remedies, this Court may review a finding of jurisdiction by the Nation's court system. If Plaintiff fails to exhaust available remedies, however, his claim must be dismissed. *See Davis v. Mille Lacs Band of Chippewa Indians*, 193 F.3d 990, 991-92 (8th Cir. 1999).

II. No Exception to the Tribal Court Exhaustion Rule Applies in This Case.

Despite litigating this dispute in the Nation's courts for over a year, Plaintiff now seeks to circumvent the exhaustion rule. Dkt. 4 ¶¶ 119-122. Exhaustion, however, is excused in only three circumstances: (1) "where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith," (2) "where the action is patently violative of express jurisdictional prohibitions," or (3) "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction," *Nat'l Farmers Union*, 471 U.S. at 856 n.21 (citation omitted); *Iowa Mut.*, 480 U.S. at 19 n.12. The Supreme Court stated a fourth exception in *Strate v. A-I Contractors*, 520 U.S. 438, 459 n.14 (1997), which applies in the limited circumstances where "the assertion of tribal court jurisdiction is *frivolous or obviously invalid* under clearly established law," *DISH Network*, 725 F.3d at 883 (emphasis added); *see also WPX Energy Williston*, 72 F.4th at 838 (same).

None of these exceptions is present here, and each of Plaintiff's scattershot arguments misses the mark. Plaintiff, moreover, has raised *all the same arguments* as affirmative defenses in the Tribal Court action. Dkt. 4-1 at PDF pp. 44-47 ¶¶ 35-50.

Plaintiff will have a full and fair opportunity to litigate his defenses at the Tribal Court jurisdictional hearing and in subsequent proceedings in the White Earth Court of Appeals. *Supra* pp. 9-12. This is precisely what the exhaustion doctrine commands. Only after tribal court proceedings have concluded would it be appropriate for this Court to consider Plaintiff's jurisdictional claim.

A. The Bad Faith Exception Does Not Apply.

Plaintiff does not allege that the Nation's assertion of regulatory jurisdiction over Mr. Vipond or the Tribal Court action is motivated by a desire to harass or is being conducted in bad faith. Nor could he. In enacting the Ordinance, the RBC exercised the Nation's sovereignty to safeguard the natural resources that sustain the Reservation community from the devastating impacts of high-capacity water appropriations. When Mr. Vipond disputed WEDNR's authority to enforce the Ordinance against his proposed pumping, WEDNR filed an appropriate action in Tribal Court to resolve the jurisdictional dispute. Mr. Vipond has challenged the Tribal Court's jurisdiction, and the parties are actively preparing for the jurisdictional hearing. There could be no credible claim of bad faith or harassment.

B. The Tribal Court Action Does Not Violate Any Express Jurisdictional Prohibition.

Under the second exception, exhaustion is not required when a federal law expressly vests jurisdiction over a dispute in the federal courts to the exclusion of other forums. *See, e.g.*, *El Paso Nat. Gas v. Neztsosie*, 526 U.S. 473, 483-87 (1999) (finding that tribal court lacks jurisdiction over Price-Anderson Act claim); *Blue Legs v. United*

States Bureau of Indian Affairs, 867 F.2d 1094, 1097-98 (8th Cir. 1989) (finding that tribal court lacks jurisdiction over Resource Conservation and Recovery Act claim). Plaintiff suggests that certain federal statutes prohibit the Tribal Court's exercise of jurisdiction to resolve the dispute over the Nation's jurisdiction to regulate his proposed pumping activities. Plaintiff is incorrect.

1. Public Law 280.

First, Public Law 83-280, 67 Stat. 588 (1953) ("P.L. 280"), does not vest Minnesota with exclusive regulatory authority over Plaintiff's activities on the Reservation, and Plaintiff's claim to the contrary, Dkt. 4 ¶¶ 105-106, defies controlling law—not to mention the plain language of P.L. 280. Through P.L. 280, Congress granted jurisdiction to Minnesota only over certain enumerated criminal matters and civil causes of action arising in Indian country. 18 U.S.C. § 1162(a); 28 U.S.C. § 1360(a). P.L. 280 did not grant the State *general* civil regulatory authority over Indian reservations. *See Bryan v. Itasca Cty.*, 426 U.S. 373, 388 (1976) (stating that Congress did not intend to extend to the States the "full panoply of civil regulatory powers"). Nor did P.L. 280 divest Indian tribes of their own inherent civil jurisdiction. *See, e.g.*, *Walker v. Rushing*, 898 F.2d 672, 675 (8th Cir. 1990) ("Nothing in the wording of Public Law 280 or its legislative history precludes concurrent tribal authority."); *Native Vill. of Venetie v. Alaska*, 944 F.2d 548, 560 (9th Cir. 1991) (stating that P.L. 280 was not designed "to supplant tribal institutions" and "is not a divestiture statute"). Accordingly, nothing in P.L. 280 eliminates the Nation's regulatory authority over Reservation natural resources or the Tribal Court's jurisdiction to adjudicate the extent of that authority. *See, e.g.*,

Colville Confederated Tribes v. Walton, 647 F.2d 42, 53 (9th Cir. 1981) ("Public Law 280 … did not delegate this regulatory power [over Indian reservation waters] to the state."). P.L. 280, moreover, expressly protects the Nation's reserved water rights and treaty hunting and fishing rights from state regulation. 18 U.S.C. § 1162(b); 28 U.S.C. § 1360(b); *Clark*, 282 N.W.2d at 908.

2. McCarran Amendment.

Second, Plaintiff cites the so-called McCarran Amendment, Dkt. 4 ¶¶ 108-109, 122(d), but the Amendment is entirely inapplicable. The McCarran Amendment, 43 U.S.C. § 666, waives the *United States'* sovereign immunity for purposes of its joinder as a defendant to a "comprehensive water right adjudication" quantifying the respective rights in a given water system of all persons, including the United States and Indian tribes. *United States v. Idaho ex rel. Dir., Idaho Dep't of Water Res.*, 508 U.S. 1, 3 (1993); *see also S. Delta Water Agency v. U.S., Dep't of Interior, Bureau of Reclamation*, 767 F.2d 531, 542 (9th Cir. 1985) (explaining that the McCarran Amendment was "a response to particular state court water rights suits, i.e., general stream[] adjudications, not an attempt to resolve the whole field of water rights litigation"). The McCarran Amendment does not address, let alone restrict, tribal authority to regulate water use to protect the health, welfare, and economic security of its members, or the jurisdiction of tribal courts.[8] In any

[8] *N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458 (8th Cir. 1993), illustrates a type of federal statute that, in contrast to P.L. 280 and the McCarran Amendment, *does* deprive a tribe of regulatory jurisdiction. There, the court found that the Hazardous Materials Transportation Act *expressly preempted* any tribal regulation conflicting with federal regulations governing radioactive waste. *Id.* at 461-62.

event, WEDNR is not suing the United States or asking the Tribal Court to quantify any party's water rights. WEDNR's claim in the Tribal Court action is limited to the Nation's authority to regulate the high-capacity pumping of Reservation waters in order to safeguard the Nation's treaty rights and natural resources.[9]

C. Exhaustion Is Not Futile.

Nor may Plaintiff reasonably argue that exhaustion would be futile for lack of an adequate opportunity to challenge the Tribal Court's jurisdiction. *See Nat'l Farmers Union*, 471 U.S. at 856 n.21. The futility exception applies only in circumstances where no tribal court exists. *Krempel v. Prairie Island Indian Cmty.*, 125 F.3d 621, 622 (8th Cir. 1997). "As long as a tribal forum is arguably in existence, as a general matter, [the federal court] [is] bound by *National Farmers* to defer to it." *Basil Cook*, 117 F.3d at 66. Thus, if "the availability of a remedy at tribal law is facially apparent," federal plaintiffs "must direct their arguments to the Tribal Court in the first instance." *Id*. Here, there is no question the Tribal Court is available to hear Plaintiff's jurisdictional challenge, and the Court of Appeals is available to hear any appeals from the lower court's decision.

Plaintiff likewise has no legitimate basis to impugn the integrity or neutrality of the Nation's court system, Dkt. 4 ¶¶ 122(a), (k), 134. This Court should always reject this and other "unfounded stereotypes" about tribal courts, *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 34 (1st Cir. 2000) ("[A] party

[9] The question in the Tribal Court action is whether Plaintiff is properly subject to the Ordinance. WEDNR has made no determination as to whether it would grant, grant with conditions, or deny a permit to Mr. Vipond to pump water from the Wild Rice River.

cannot skirt the tribal exhaustion doctrine simply by invoking unfounded stereotypes."). The Supreme Court has unequivocally rejected general attacks on the integrity and impartiality of tribal courts. *See Iowa Mut.*, 480 U.S. at 19 ("The alleged incompetence of tribal courts is not among the exceptions to the exhaustion requirement established in [*Nat'l Farmers Union*], and would be contrary to the congressional policy promoting the development of tribal courts."). While the Tribal Court entered an order granting preliminary injunctive relief against Mr. Vipond, he successfully appealed that decision to the Court of Appeals, which ordered the lower court to hear his jurisdictional challenge and to make jurisdictional findings before considering injunctive relief. *Supra* pp. 10-11. In any event, the exhaustion rule ensures that the tribal court system has a full opportunity "to rectify any errors" that may be made in the course of proceedings, *Nat'l Farmers Union*, 471 U.S. at 857. Plaintiff's argument must be rejected.

D. The Tribal Court's Jurisdiction To Adjudicate the Nation's Authority To Enforce the Ordinance Against Plaintiff Is Not Frivolous or Obviously Invalid.

Plaintiffs' complaint is littered with theories why tribal regulatory and adjudicatory jurisdiction over his activities is barred by federal law, but these theories uniformly lack merit. "[T]he exhaustion requirement should be waived only if the assertion of tribal court jurisdiction is frivolous or obviously invalid under clearly established law." *DISH Network*, 725 F.3d at 883. "[T]he bar is quite high" to avoid exhaustion, *id.*, and Plaintiff falls far short of clearing it here.

1. Necessary and Indispensable Party.

Plaintiff argues that the Tribal Court action should not proceed because the State of Minnesota is a necessary and indispensable party to that action. *E.g.*, Dkt. 4 ¶¶ 122(f), (n), 130, 135. This argument fails for several reasons.

First, this exception applies only where "it is plain that tribal *jurisdiction* does not exist[.]" *DISH Network*, 725 F.3d at 883 (emphasis added) (quotation marks omitted). Yet "[t]he issue of want of indispensable parties *is not a jurisdictional one*." *Clim-A-Tech Indus., Inc. v. Ebert*, Civil No. 14-1496 (MJD/SER), 2015 WL 2195115, at *12 n.9 (D. Minn. May 11, 2015) (emphasis added) (quoting *Warner v. First Nat'l Bank of Minneapolis*, 236 F.2d 853, 857 (8th Cir. 1956)); *see also Kansas City S. Ry. Co. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 824 n.2 (8th Cir. 1980); Charles Alan Wright, et al., Federal Practice and Procedure § 1611 (3d ed.) (collecting cases). Thus, the issue of indispensability is not a proper basis for exempting a party from the tribal exhaustion requirement.

Second, the Tribal Court's rules control as to who is a required party to the Tribal Court action. WERCP Rule § 9.04 (Joinder of Parties) provides:

> 1. To the extent possible, all persons or parties interested in a particular action shall be joined in the action.
> 2. The failure to join a party over whom the Court has no jurisdiction will not require dismissal of the action unless it would be impossible to reach a just result without such party.
> 3. Where joinder of an interested person is not possible, the Court shall attempt to fashion a resolution so as to do the greatest justice possible under the circumstances.

Albright Decl. Ex. O. Plaintiff must present his joinder argument to the Tribal Court, and he has stated his intent to do so, Dkt. 4-1 at PDF pp. 45-46 ¶¶ 42-43. The exhaustion rule makes clear that it is not for this Court to interpret and apply the WERCP and to make determinations, for example, regarding whether and how the Tribal Court can "reach a just result" or "fashion a resolution" in the State's absence. *Supra* pp. 16-17.

Third, Plaintiff's allegations on this non-jurisdictional issue mischaracterize the Tribal Court action. Plaintiff asserts the State is an indispensable party because "WEDNR claims it has exclusive jurisdiction over the Wild Rice River[.]" Dkt. 4 ¶ 122(f). But WEDNR's sole claim is that Plaintiff's proposed high-capacity pumping from the Wild Rice River is subject to the Ordinance and that Plaintiff must obtain a permit from WEDNR before installing or operating a pump. WEDNR does not ask the Tribal Court to adjudicate any rights of Minnesota or to make any determination regarding the State's regulatory authority.[10] If Minnesota were an indispensable party simply by virtue of asserting overlapping jurisdiction, nearly *every* case involving an assertion of tribal regulatory jurisdiction over non-Indians would entail an indispensable party (either a state or the federal government)—and if that could defeat tribal court exhaustion, the rule would be a nullity.

[10] WEDNR's second amended complaint speaks for itself, Dkt. 4-1 at PDF pp. 26-34; a preliminary status report filed earlier by Mr. Vipond's former counsel in the context of case scheduling is of no moment, Dkt. 4 ¶ 34.

2. Equal Footing Doctrine.

Plaintiff also argues that the Wild Rice River is a navigable water body under Minnesota law, *id.* ¶¶ 100-103; that the State of Minnesota therefore owns the bed of the Wild Rice River pursuant to the equal footing doctrine (which creates a rebuttable presumption that title to submerged lands of "navigable waters" passed to the state upon statehood), *id.* ¶¶ 92-102; and that Minnesota thus enjoys exclusive regulatory jurisdiction over the waters of the Wild Rice River *to the exclusion of* the White Earth Nation and the United States, *id.* ¶¶ 97, 104, 122(d). But Plaintiff's contention that state ownership of submerged *lands* would give the State exclusive jurisdiction over reservation *waters* defies over a century of black letter law.[11] *See, e.g.*, *John v. United States*, 720 F.3d 1214, 1224-25 (9th Cir. 2013) ("Since 1908, the courts have … recognized that a federal reservation of land carries with it the right to use water necessary to serve the purposes of federal reservations," including where the state holds "title to [the] submerged lands[.]" (citation omitted)). For instance, in *Montana v. United States*, 450 U.S. 544 (1981), the state owned the riverbed, *id.* at 556, yet the Court answered the question of tribal regulatory authority by assessing whether the river-based activity being regulated—non-Indian fishing—was threatening "the political integrity, the economic security, or the health or welfare of the tribe," *id.* at 566. That jurisdictional

[11] Plaintiff makes multiple other errors of law. For example, navigability for purposes of the equal footing doctrine is *not* determined by reference to state law standards, as Plaintiff alleges. Rather, "questions of navigability for determining state riverbed title [under the equal footing doctrine] are governed by federal law" and require a fact-intensive assessment of whether the river was usable as a "highway[] for commerce" at the time of statehood. *PPL Mont., LLC v. Montana*, 565 U.S. 576, 591-92 (2012).

inquiry is likewise relevant here, *supra* p. 10, regardless of whether the state holds title to the bed of the Wild Rice River, which is not at issue in the Tribal Court action, Dkt. 4-1 at PDF pp. 26-34. An Indian tribe's regulatory authority over waters within its reservation is simply distinct from the question of who owns the land beneath those waters.

3. Federal Common Law and the Second *Montana* Exception.

Finally, Plaintiff alleges that federal common law precludes the Nation's regulatory jurisdiction over his pumping activities and adjudicatory jurisdiction over his dispute with WEDNR. Plaintiff is badly mistaken. The starting point is the Supreme Court's oft-repeated command that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Iowa Mut.*, 480 U.S. at 18 (citations omitted); *see also, e.g.*, *Gaming World*, 317 F.3d at 849; *Bruce H. Lien*, 93 F.3d at 1419-20. Thus, "a tribe retains inherent sovereign authority to address 'conduct [that] threatens or has some direct effect on … the health or welfare of the tribe,'" *United States v. Cooley*, 593 U.S. 345, 347 (2021) (brackets and ellipsis in original) (quoting *Montana*, 450 U.S. at 566), so long as it has not been divested of such authority by the United States. No such divesture has occurred here. Quite the opposite—the 1867 Treaty guaranteed to the Nation rights to the waters and fishing, hunting, and gathering resources to make the Reservation a permanent homeland.

In *Montana*, the Supreme Court held a tribe "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." 450 U.S. at 566. The Court also made clear that this authority, commonly referred to as the second *Montana* exception, is a "corollary" to the rule that "Indian tribes retain rights to river waters necessary to make their reservations livable." *Id.* n.15 (citing *Arizona v. California*, 373 U.S. 546, 599 (1963), in which the Court found the United States understood "that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised"). In other words, tribal authority includes the power to regulate activities that threaten a tribe's reserved rights—a principle the Court reaffirmed two years later when it held tribes retain inherent authority to protect their treaty-reserved fish and wildlife resources, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337 (1983).

The circuit courts of appeals have followed this guidance, confirming tribal regulatory authority to protect reservation resources from interference by non-Indian water users, including on fee lands. For example, in *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 44-47 (9th Cir. 1981), the court enjoined a farmer from diverting groundwater and surface water to irrigate his fee lands, notwithstanding that he had a state permit to do so. The court found the tribe held a right to waters sufficient to sustain itself from fishing and agriculture, including "sufficient water to permit natural spawning of the trout." *Id.* at 48. The court also recognized the tribe had regulatory authority because the irrigator, by depleting water levels, "imperiled the agricultural use of downstream tribal lands and the trout fishery, among other things." *Id.* at 52. It concluded

that tribal jurisdiction under the second *Montana* exception "includes conduct that involves the tribe's water rights," explaining why this is so important in the case of water:

> *A water system is a unitary resource. The actions of one user have an immediate and direct effect on other users*….
>
> Regulation of water on a reservation is critical to the lifestyle of its residents and the development of its resources…. *[W]ater is the lifeblood of the community. Its regulation is an important sovereign power*.

Id. (emphases added).

This is no less true for the Nation, whose regulation of high-capacity wells and pumps is driven by the same concerns. *Supra* pp. 3-9. Reservation-wide appropriations already surpass three billion gallons annually, and Plaintiff proposes to pump 65.2 million gallons each summer from the Wild Rice River in an area that is critical for wild rice, baitfish, and sturgeon habitat and that has not previously been subject to intensive pumping. *See supra* pp. 2-4, 7-9. It is well established, moreover, that agricultural irrigation can have devastating impacts on reservation waters, fisheries, and lands, even when located many miles away. *See Cappaert*, 426 U.S. at 133, 142-43 (enjoining ranch's operation of wells 2.5 miles away); *Winters v. United States*, 143 F. 740 (9th Cir. 1906) (enjoining non-Indian water withdrawal upstream of Indian reservation); *Colville Confederated Tribes*, 647 F.2d at 52.

Other cases confirm that the application of the exhaustion rule and the Nation's Ordinance stand on solid ground. *See, e.g.*, *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 929, 935, 944 (9th Cir. 2019) (after exhaustion of tribal court remedies, upholding tribal regulation of non-Indian company storing hazardous waste on fee lands, including $1.5 million annual tribal permit fee, and upholding tribal court judgment

against company, reasoning that "[t]hreats to tribal natural resources, including those that affect tribal cultural and religious interests, constitute threats to tribal self-governance, health and welfare" under second *Montana* exception); *Attorney's Process & Investigation Servs.*, 609 F.3d at 932-33, 937-40 (requiring exhaustion of tribal court remedies and upholding tribal court jurisdiction under second *Montana* exception); *Montana v. U.S. E.P.A.*, 137 F.3d 1135, 1139-41 (9th Cir. 1998) (affirming tribal regulatory authority over water pollution on the reservation, including on non-Indian fee lands, under second *Montana* exception); *Duncan Energy*, 27 F.3d at 1299-1300 (requiring exhaustion of tribal court remedies in dispute under second *Montana* exception); *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951, 964 (9th Cir. 1982) (holding tribal ordinance regulating riparian structures, as applied to non-Indian waterfront property, "falls squarely" within second *Montana* exception because of potential harm to lake ecology; the tribal economy, health, and welfare; and treaty fishing rights).

While it would be premature at this stage for the Court to conduct a full jurisdictional analysis, *see DISH Network*, 725 F.3d at 884—that job is for the Nation's courts in the first instance, following development of a complete factual record—the Nation's assertion of jurisdiction over high-capacity water appropriations "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," Dkt. 4-1 at PDF p. 28 ¶ 14, is not remotely "frivolous or obviously invalid," *DISH Network*, 725 F.3d at 883. The absence of frivolity is plain to see from the course of proceedings between

WEDNR and Mr. Vipond in the Nation's courts over the past year. *Supra* pp. 9-12. Even the State of Minnesota has acknowledged the Nation's regulatory authority over such appropriations, advising Mr. Vipond "of the need to obtain any other permits that may apply including any permits required by White Earth Nation." *Supra* p. 5.

CONCLUSION

The exhaustion rule bars Plaintiff's overt attempt to circumvent the jurisdiction of the White Earth Nation courts through this duplicative action. Defendant Roy respectfully requests that the Court stay this action until Plaintiff exhausts all remedies available in the Nation's court system.

Respectfully submitted on this 8th day of October, 2024.

/s/ Cory J. Albright
Cory J. Albright, WSBA #31493
(*Pro Hac Vice*)
Jane G. Steadman, WSBA #44395
(*Pro Hac Vice*)
KANJI & KATZEN, P.L.L.C.
811 1st Avenue, Suite 630
Seattle, WA 98104
(206) 344-8100
calbright@kanjikatzen.com
jsteadman@kanjikatzen.com

Sara K. Van Norman, MN #339568
VAN NORMAN LAW, PLLC
400 South 4th Street, Ste. 401
Minneapolis, MN 55415
(612) 299-1794
sara@svn.legal

Counsel for Defendant Dustin Roy, in his official capacity as Director of White Earth Division of Natural Resources