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. 24-cv-03125

PLAINTIFF'S MEMORANDUM IN SUPPORT OF HIS MOTION FOR PRELIMINARY INJUNCTION

Plaintiff David Vipond ("Vipond") submits this memorandum in support of his motion for preliminary injunction against Defendants David DeGroat, in his official capacity as Judge of White Earth Tribal Court[1], and Dustin Roy, in his official capacity as Director of White Earth Division of Natural Resources. Plaintiff seeks to enjoin the action initiated by the White Earth Division of Natural Resources ("WEDNR") in the White Earth Tribal Court, for the reasons set forth herein.

INTRODUCTION

This case concerns the fundamental right of an American citizen to be regulated on his land, where he resides, only by a government in which he can participate. "Tribal

[1] After Vipond filed his complaint in this matter, Judge DeGroat recused himself from presiding over the Tribal Court Action. Judge B.J. Jones is now the presiding judge and should be automatically substituted for Judge DeGroat under Fed. R. Civ. P. 25(d).

sovereignty, it should be remembered, is 'a sovereignty outside the basic structure of the Constitution.'" *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008) (quoting *United States v. Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring in judgment)). Because nonmembers have no say in tribal government and its laws and regulations, the laws and regulations of a tribe may be fairly imposed on a nonmember only if one of the two limited exceptions articulated first in *Montana v. United States*, 450 U.S. 544 (1981), applies. *See Plains Commerce Bank*, 554 U.S. at 337. Although WEDNR claims it has authority to regulate Vipond's actions under the second *Montana* exception, neither the circumstances here nor applicable legal precedent support this overreach of tribal sovereignty.

David Vipond has brought this action to enjoin the proceedings initiated by the White Earth Band of Ojibwe in the White Earth Tribal Court, in which White Earth seeks to require Vipond to apply for a permit from WEDNR before installing a high-capacity pump to irrigate his crops on his farmland, and in the absence of a tribal permit, to enjoin him from installing the pump for which he has received a permit from the State of Minnesota. After Vipond applied for his state permit to install such a pump from the Minnesota Department of Natural Resources ("MDNR"), White Earth passed a Water Protection Ordinance, which requires that a person wishing to irrigate property within the boundaries of the White Earth Reservation and over a five-mile buffer around the Reservation must apply for and receive a permit from WEDNR. The original Ordinance

applied to both Band members and non-Indians and purported to regulate land both privately-owned by non-Indians and land that is outside the boundaries of the Reservation.[2]

After being issued the permit by MDNR, Vipond was sued by WEDNR in White Earth Tribal Court. WEDNR simultaneously filed a motion for preliminary injunction. Before his time to answer had run and before a hearing date had been obtained by WEDNR, White Earth Tribal Court Judge David DeGroat issued an *ex parte* order granting WEDNR's preliminary injunction. The White Earth Court of Appeals later converted the order for injunction into a temporary restraining order, to remain in place during further proceedings in the tribal court, ordered that a hearing to determine whether a preliminary injunction should issue be held within 30 days, and to make detailed findings regarding the tribal court's jurisdiction over the matter. The White Earth Court of Appeals remanded the matter back to the Tribal Court for further proceedings.

Since that time, the Tribal Court matter has largely been put on hold, primarily because of the serious health challenges of Vipond's lead counsel, Randy Thompson.[3] Further proceedings in the Tribal Court regarding its jurisdiction will be costly and subject to further hearing by the federal court. WEDNR submitted five expert reports and fourteen additional lay witness affidavits just in support of its claim of jurisdiction under the second *Montana* exception. Vipond is currently scheduling depositions for WEDNR's nineteen

[2] After being sued in this Court in May 2024 by R.D. Offutt Farms Co., 024-cv-01600-JMB-LIB, White Earth's Reservation Business Committee modified the Ordinance to remove its application to lands within the five-mile exterior area as well as for individuals or businesses who previously had obtained a permit from the State of Minnesota. The Ordinance now purports to apply only to "new" permits for water usage.

[3] *See* Declaration of Randy V. Thompson, filed herewith.

witnesses. Vipond retained four experts to refute WEDNR's expert reports regarding the ecological impact of the proposed appropriation to counter WEDNR's claim of jurisdiction.

Vipond has always disputed the jurisdiction of the Tribal Court over him in this matter, having raised it from his first responsive pleading. Nevertheless, the proceedings in the Tribal Court have continued. The White Earth Court of Appeals, though reversing Judge DeGroat's *ex parte* order granting WEDNR's preliminary injunction, converted the injunction to a temporary restraining order, with the central question of whether the Tribal Court has jurisdiction over Vipond still pending.

The Tribal Court lacks jurisdiction over Vipond for several reasons. First, the rule established by the Supreme Court is that tribal courts presumptively *lack* jurisdiction over nonmembers on nonmember-owned fee land within a reservation *unless* one of two limited exceptions are satisfied. *Montana*, 450 U.S. at 565-66. Second, neither of the two *Montana* exceptions applies to the present matter, as the parties are not engaged in a consensual, commercial relationship and WEDNR cannot show that Vipond's water pumping—pursuant to his state-issued permit—causes "catastrophic harm" that "'imperil[s] the subsistence' of the tribe." *Plains Commerce Bank*, 554 U.S. at 341 (quoting *Montana*, 450 U.S. at 566). Finally, the State of Minnesota is a necessary and indispensable party to this matter, as the State has sovereign authority, including regulatory authority and jurisdiction over navigable bodies of water within the State, such as the Wild Rice River, and because the Tribal Court lacks jurisdiction over the State of Minnesota. The State has sovereign immunity from suit in tribal court. Continuing to litigate this matter in the Tribal Court

without the joinder of a necessary party is futile, which squarely falls under one of the four recognized exceptions to the prudential exhaustion rule. Vipond should not be required to exhaust his remedies in Tribal Court.

For these reasons, the Tribal Court Action should be enjoined by this Court.

FACTUAL BACKGROUND

David Vipond is a farmer in Mahnomen County, Minnesota. He has been farming his land, located within the boundaries of the White Earth Reservation, for thirty-five years. Vipond farms corn, dry beans, soybeans, wheat, sugar beets, and alfalfa. His land comprises a combined 611 riparian acres of farmland adjacent to the Wild Rice River.

On March 27, 2023, Vipond submitted a water appropriation permit to the Minnesota Department of Natural Resources ("MDNR"), allowing for the appropriation of up to 65.2 million gallons of surface water per year, for the agricultural irrigation of 353 acres of land. The permit application was for the installation of one high-capacity surface water pump, to pump water from the Wild Rice River. Minnesota state law requires a permit from MDNR to install such a pump. *See* Minn. Stat. § 103G.271, subd. 4. Vipond's proposed appropriation would be approximately one percent of the average daily flow evaluated at the Twin Valley stream gauge. (Am. Compl. ¶ 61, ECF No. 4; Declaration of Courtney E. Carter ("Carter Decl.") Ex. 1, ¶ 24.)

Vipond followed the requirements of the permitting process, which included providing: (1) a statement of justification supporting the reasonableness and practicality of use with respect to the adequacy of the water source; (2) data on proposed water conservation practices in compliance with Minn. Rule 6115.0660, subp.3F; and (3) a

contingency plan describing the alternatives Vipond 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. As a contingency plan, Vipond said he would implement a low flow irrigation system, soil moisture monitoring, and buffer strips. He also agreed to not pump water if water levels were too low.

MDNR held a request for comments period regarding Vipond's permit application from April 24, 2023 through May 25, 2023. The White Earth Nation was specifically included in the request for comments. Nevertheless, White Earth Nation did not submit any written comments to MDNR during this process. By August 11, 2023, no comments had been received from White Earth, even though MDNR called White Earth directly on August 8, 2023, seeking their comment. Accordingly, on August 11, MDNR emailed White Earth and indicated that the permit for which Vipond had applied would be issued.

During the comment period, the White Earth Reservation Business Committee ("RBC") passed Resolution No. 057-23-017, enacting the White Earth Reservation Groundwater and Surface Water Protection Ordinance, effective May 5, 2023.[4] (Carter Decl. Ex. 2.)

The Ordinance requires a permit from WEDNR before the installation of a high-capacity surface water pump. It imposes a $5,000 application fee. And it requires a cost-

[4] It is curious that White Earth did not comment on Vipond's permit application, given WEDNR's position that the pumping would harm its interests sufficient to satisfy *Montana*'s second exception. It appears that all White Earth did to oppose Vipond's application was to pass a new water ordinance and then sue him in its Tribal Court.

reimbursement agreement for the completion of WEDNR's permit review, which could impose additional fees.[5]

Vipond received his permit from MDNR in August 2023. Later that month, on August 23, 2023, he was sued by WEDNR in White Earth Tribal Court. WEDNR's complaint seeks (1) a declaration that Vipond 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 Water Protection Ordinance without a validly-issued permit from WEDNR in accordance with the Ordinance; (2) a declaration that the Water Protection Ordinance governs the extent of Vipond'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; and (3) a temporary and permanent injunction enjoining Vipond 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 Ordinance. (Carter Decl. Ex. 4.)

Simultaneous with the Summons and Complaint, WEDNR filed a Motion for Preliminary Injunction, Supporting Memorandum, and Proposed Order, along with affidavits in support of the Motion.

[5] Resolution No. 057-24-030, discussed at n.2, *supra*, suspends the permit requirement and the other regulatory provisions of the Water Protection Ordinance for existing sources that are duly permitted by the MDNR as of May 5, 2023 and operating in compliance with that permit. That Resolution was effective June 12, 2024. (Carter Decl. Ex. 3.)

On September 13, 2023, before the time to Answer had run and before a hearing date had been obtained, as required under the White Earth Rules of Civil Procedure, Judge DeGroat issued an *ex parte* order granting WEDNR's Motion for Preliminary Injunction.

Specifically, the order provided 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 Water Protection Ordinance absent a validly issued permit from the White Earth Department of Natural resources [sic] issued in accordance with the Water Protection Ordinance." (Carter Decl. Ex. 5.[6])

On September 20, 2023, Vipond filed his Special Appearance Answer, denying that WEDNR is entitled to the relief sought, and asserting several affirmative defenses, including that WEDNR lacks jurisdiction over Vipond. (Carter Decl. Ex. 6.)

On October 10, 2023, Vipond filed his Notice of Appeal to the White Earth Court of Appeals regarding the Tribal Court's order. The Notice of Appeal asserted that the Order for Injunction was entered without scheduling a hearing as required, without an opportunity for Vipond to respond to the Motion and before any response was due and was entered without a hearing. The Notice of Appeal also asserted that the Tribal Court determined it had jurisdiction without meeting the requirements for jurisdiction over a nonmember for

[6] Most exhibits to the Declaration of Courtney E. Carter are also exhibits to the Amended Complaint, ECF. No. 4, but are included here for ease of reference.

activities on fee lands, as set forth in *Montana*. Lastly, Vipond asserted that no basis for an injunction existed. (Carter Decl. Ex. 7.)

On October 26, 2023, the White Earth Court of Appeals ordered that: (1) the appeal was dismissed without prejudice and the case remanded to the Tribal Court for further proceedings; (2) the Order for Injunction be treated as a temporary restraining order under Rule XI of the Rules of Civil Procedure, remaining in place pending further proceedings of the Tribal Court; (3) WEDNR's motion for preliminary injunction be set for a hearing date within 30 days; and (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. (Carter Decl. Ex. 8.)

After the matter was returned to the Tribal Court, the parties met and conferred in an attempt to agree to an efficient resolution of issues relating to the jurisdictional and preliminary injunction issues, pursuant to the White Earth Appellate Court's order. The parties were unable to come to an agreement on what each considered to be a reasonable amount of discovery on the issues of jurisdiction and the preliminary injunction. Accordingly, the parties submitted separate status reports to the Tribal Court in advance of its Status Conference on November 14, 2023.

The morning of the Status Conference, WEDNR filed its Initial Status Report with the Tribal Court, setting out its positions and its argument for why WEDNR requested a

proposed schedule for discovery beginning immediately, expert reports, depositions, and a hearing *solely* to determine jurisdiction to take place in June 2024.[7] (Carter Decl. Ex. 9.)

In its Status Report, WEDNR asserted its argument regarding jurisdiction and its basis for the water rights possessed by White Earth in greater detail. WEDNR asserted that the State of Minnesota's actions in environmental regulation of bodies of water are preempted as they relate to waters on and appurtenant to the Reservation under the *Winters* doctrine and its progeny. (*Id*. at 4; Carter Decl. Ex. 4 ¶ 36.)

WEDNR had not before asserted its position that the State of Minnesota's authority to issue permits to citizens of the State of Minnesota on navigable bodies of water within the State is preempted by tribal authority because of White Earth's federal reserved water rights.

Judge DeGroat granted WEDNR's proposed schedule for discovery and briefing on the issues of jurisdiction and the preliminary injunction.[8]

On June 14, 2024, WEDNR delivered extensive written expert witness reports, including numerous affidavits. The Tribal Court Action has upcoming depositions and discovery, and Mr. Vipond's expert reports were served on July 29th, 2024.

Vipond filed suit in this Court on August 2, 2024, seeking injunctive and declaratory relief. (Am. Compl., ECF No. 4.)

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[7] The hearing to determine jurisdiction is now scheduled for February 2025.

[8] The Scheduling Order has been subsequently modified by joint motion, with deadlines for discovery and the hearing on jurisdiction pushed back by several months, due to health issues of Vipond's lead counsel and the withdrawal and subsequent substitution of WEDNR's counsel.

ARGUMENT

I. The *Dataphase* factors weigh in favor of issuance of a preliminary injunction.

Vipond seeks a preliminary injunction under Federal Rule of Civil Procedure 65(a) to enjoin the tribal court proceedings in the lawsuit brought by WEDNR. A preliminary injunction functions to preserve the status quo until a court can grant full and effective relief upon a final hearing. *Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589, 593 (8th Cir. 1984). Whether a preliminary injunction is an appropriate remedy is determined by an evaluation of four factors: (1) the threat of irreparable harm to the movant in the absence of relief; (2) the balance between that harm and harm that the relief would cause the other litigants; (3) the likelihood of the movant's ultimate success on the merits; and (4) the public interest. *Dataphase Sys. Inc. v. C.L. Sys. Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). "None of these factors by itself is determinative; rather, in each case the four factors must be balanced to determine whether they tilt toward or away from granting a preliminary injunction." *Leonhardt v. Holden Business Forms Co.*, 828 F. Supp. 657, 664 (D. Minn. 1993) (quoting *West Pub. Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1222 (8th Cir. 1986)). The most significant factor is the probability that the movant will succeed on the merits. *DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 882 (8th Cir. 2013). Here, the factors weigh in favor of issuing the preliminary injunction.

A. Vipond is likely to succeed on the merits.

When considering a party's probability of success on the merits, a court should "flexibly weigh the case's particular circumstances to determine 'whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the

status quo until the merits are determined.'" *Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc.*, 815 F.2d 500, 503 (8th Cir. 1987). The court does not decide whether the movant will ultimately win. *PCTV Gold, Inc. v. SpeedNet, LLC*, 508 F.3d 1137, 1143 (8th Cir. 2007). The movant must only demonstrate a fifty percent likelihood of success. *Id*. (quoting *Dataphase*, 640 F.2d at 113).

The issue before this Court is whether the Tribal Court has jurisdiction over Vipond in WEDNR's suit against him. For the reasons explained below, the Tribal Court does not have jurisdiction over Vipond in this matter, and further, a necessary and indispensable party—the State of Minnesota—has sovereign immunity from an action in Tribal Court. These factors necessarily preclude continued litigation in the Tribal Court.

1. Tribal courts presumptively lack jurisdiction over nonmembers on nonmember fee lands unless one of the *Montana* exceptions applies.

Under circumstances like the present matter, when a tribe seeks to regulate the activities of a nonmember on the nonmember's fee lands, the presumption is that the tribal court lacks jurisdiction. *Montana*, 450 U.S. at 565; *Plains Commerce Bank*, 554 U.S. at 328. The rule established by *Montana* is that the "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U.S. at 565. This presumption comports with the principle that "citizens who are not tribal members be 'protected. . .from unwarranted intrusions on their personal liberty.'" *Nevada v. Hicks*, 533 U.S. 353, 384 (2001) (Souter, J. concurring) (quoting *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 210 (1978)). *Montana* sets out two exceptions to this rule.

The first is that a tribe may regulate, "through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements." 450 U.S. at 565. The second exception states a tribe may "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, economic security, or the health or welfare of the tribe." *Id*. at 565-66. The Supreme Court has explained that these exceptions are limited and should not be construed in a way that "swallows the rule." *Plains Commerce Bank*, 554 U.S. at 330.

WEDNR asserts that the second *Montana* exception applies to this matter, claiming that 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." But even a showing of injury to the Band by a nonmember's activities is not enough to warrant tribal jurisdiction under the second *Montana* exception. *Id.* at 341. The tribe must demonstrate that the impact of the nonmember's conduct be "catastrophic." *Id*. And WEDNR can make no such showing.

a. Vipond's proposed, state-permitted pumping cannot catastrophically harm White Earth.

By obtaining a State permit for a high-capacity pump, a nearly insurmountable presumption has been created that WEDNR cannot meet the second *Montana* exception. *Id*. Application of the second *Montana* exception has been limited, consistent with the Supreme Court's overall guidance that the exceptions must not "swallow the rule" that

generally prohibits tribal jurisdiction over nonmembers. *Id*. *United States v. Cooley*, 141 S. Ct. 1638 (2021), was the first time the Supreme Court had ever found the second *Montana* exception satisfied. Importantly, *Cooley* is wholly unlike the present matter. *Cooley* involved the temporary detention and initial investigation of a non-Indian criminal suspect on a highway running through a reservation. Driving under the influence, child endangerment, and drug and weapons possession were all factors at play—factors that necessitated an urgent law enforcement response to handle a potential public safety matter. What we have here is a civil matter involving a farmer who applied for and obtained a state permit to pump surface water onto his crops. Although WEDNR asserts that the proposed pumping would catastrophically harm its interests, the facts belie such a claim.

WEDNR's position on its civil regulatory authority is sweeping. WEDNR subverts the second *Montana* exception into the rule, with the language of the Ordinance declaring its application over nonmembers on nonmember fee lands. It imposes severe financial and legal penalties for noncompliance. The Ordinance assumes civil authority over nonmembers, precisely in contravention with the central holding of *Montana*. This goes far beyond the tribal authority contemplated in *Montana* and its progeny, which expressly holds that the civil authority of tribes and their courts over non-Indian lands generally does not extend to the activities of nonmembers of the tribe. *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) (citing *Montana*, 450 U.S. at 565).

(i) The location of the pumping site alone precludes it from affecting more than 99% of the relevant waters.

Vipond's proposed appropriation site is entirely downstream from *all* of the White Earth-owned land on the Reservation and downstream from the baitfishing and wild rice gathering operations of tribal members. (Def.'s Answers to Pl.'s Interrog. Nos. 15, 19; Carter Decl. Ex. 10.) The proposed water appropriation can only affect 1.13 stream miles between the pumping site and the western boundary of the White Earth Reservation. (Am. Compl. ¶ 71.) The proposed appropriation, therefore, does not affect 99.992% of the drainage area and 98.7% of the stream channel length within the White Earth Reservation boundaries. (*Id*. ¶ 72.)

(ii) Sturgeon reintroduction is unlikely to be affected at all, let alone harmed.

WEDNR asserts that the proposed appropriation will harm sturgeon reintroduction efforts in the Wild Rice River. This is extremely unlikely. First, sturgeon migration occurs from mid-May through June, while the anticipated appropriation would likely occur from June to mid-September. (*Id*. ¶ 67.) Lowest water flows in the Wild Rice River typically occur in August and September, and sturgeon migration is not happening during these times. (*Id*. ¶ 68.) Importantly, the MDNR permit requires a suspension of pumping at 18 cubic feet per second ("cfs"), which is a level MDNR has deemed sufficient to protect the aquatic resources within the River. (*Id*. ¶¶ 57, 63-64.) Further, successful sturgeon population of the River is wholly speculative at this stage, as sturgeon are not presently

spawning in these waters. (*Id*. ¶ 67.) WEDNR cannot demonstrate that Vipond's proposed appropriation will thus injure its effort to establish a population of sturgeon in the River.

(iii) Little or no baitfishing occurs downstream of the pump site.

WEDNR also claims that its baitfishers will be economically injured by the proposed appropriation, claiming that a lower water level will reduce the ability of baitfishers to harvest sufficient quantities of bait. But no baitfishing within the Reservation occurs downstream of the proposed pumping site. (Def.'s Answer to Pl.'s Interrog. No. 19, Carter Decl. Ex. 10.) The pump will shut off if water levels reach 18 cfs. And no activities that are upstream of the pump can be affected. These claims are unsupported by the facts.

(iv) There is no wild ricing downstream of the pump site.

Finally, WEDNR asserts that its wild rice growth and harvesting will be injured by the proposed appropriation. But there is no wild rice growing downstream of Vipond's pump site within the Reservation. (*Id*.) Wild ricing by White Earth members primarily occurs in Lower Rice Lake, not the Wild Rice River. White Earth Wild Rice Manager Clifford Crowell recently declared that White Earth had a record season of wild rice harvesting and attributed it to White Earth's "control" of the lake levels through water releasing and damming in the Lake. Megan Buffington, *Through management, White Earth overcomes poor wild rice conditions*, KAXE.org, Sept. 26, 2024, https://www.kaxe.org/local-news/2024-09-26/white-earth-brainerd-mn-wild-rice-conditions. The same fundamental factors of pump location, pump shut off, and the reality that no wild rice within the Reservation is grown downstream of the pump site, make a

catastrophic impact—or indeed, any impact—on the wild rice harvesting of White Earth members extremely unlikely.

b. MDNR considered the ecological and environmental impact of the proposed appropriation before granting the permit.

MDNR is charged with conserving and managing the State's natural resources. Its mission statement states, in part, "DNR manages the state's water resources, sustaining healthy waterways and ground water resources." (Am. Compl. ¶ 84.) Under Minnesota Statutes section 103G.315, subd. 3, MDNR 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 given in the statute. (Carter Decl. Ex. 1 ¶ 30.) Based on its findings of fact and the record on file, MDNR concluded that Vipond's water appropriation permit was consistent with state water appropriation statutes and recommended that his permit be issued. (*Id*.) A state agency, entrusted with managing the natural resources of the state, equipped with experts in their respective fields, evaluated the criteria to receive a high-capacity pump and determined that the pump would not negatively impact the area's natural resources. This fact makes satisfaction of the second *Montana* exception nearly impossible. MDNR did not conclude that the pump would cause harm at all, let alone "catastrophic" harm. Surely, if the pump would cause such harm, MDNR would not have granted it.[9]

[9] WEDNR and its counsel met with MDNR representatives in July 2024 and shared WEDNR's expert reports from the Tribal Court Action. The reports claim that the pumping would injure the river and its ecology. After reviewing WEDNR's expert reports, MDNR neither revoked nor modified Vipond's permit.

c. WEDNR's claims of catastrophic harm by water appropriation are wholly undermined by White Earth's revised Water Protection Ordinance.

After being sued in this Court by R.D. Offutt Farms over its Water Protection Ordinance in May 2024, White Earth's Reservation Business Committee passed a Resolution modifying the Ordinance. (Carter Decl. Ex. 3.) That Resolution, number 057-24-030, suspended the permit requirement and other regulatory provisions of the Ordinance for "existing sources" that were already permitted by MDNR and operating in compliance with a valid permit. It left in place the application of the Ordinance to new sources, like Vipond's proposed appropriation.

The passage of this Resolution entirely undercuts WEDNR's claims that Vipond's pumping would cause catastrophic harm. To accept WEDNR's position, one also has to accept that, one year after passing the original Ordinance, the RBC decided that although it believed all of the appropriation sources on or within a five-mile buffer of the Reservation needed to be managed and regulated by WEDNR, because absent such regulation, those sources could catastrophically harm the Band's natural resources and cultural practices, it now only needed to look to regulate any potentially new sources. The existing sources, therefore, must no longer pose a threat—or at least must not pose such a threat to warrant present regulation.

Further, the revised Ordinance *defers* to the judgment and permitting process of MDNR. In the Tribal Court Action, WEDNR's position is that MDNR's approval process for Vipond ignored significant cultural and ecological harms that would result from the appropriation. But the revised Ordinance allows for continued appropriating, *provided that*

the existing source is duly permitted by MDNR and is operating in compliance with its MDNR permit. The MDNR permitting process can be either inadequate or adequate for protecting the natural resources at issue, but it cannot be both. To accept WEDNR's position, in other words, one must accept that the existing sources comprise the absolute limit on the natural resources at issue, and a single additional appropriation would cause catastrophic harm.[10]

d. The Ordinance operates as an unlawful tax on nonmembers.

Unless Congress has authorized a tribe's taxation of nonmember though treaty or statute, when the taxation falls upon nonmembers on non-Indian fee land, a tribe must establish that the tax satisfies one of the *Montana* exceptions. *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 654 (2001). WEDNR cannot satisfy the *Montana* exceptions, as explained above, rendering the Ordinance an unlawful tax on nonmembers on nonmember fee land.

Section 6.2(b) of the Ordinance states, "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." (Carter Decl. Ex. 2, at 5.) Though the Ordinance states that "any unused amounts shall be returned within 30 days of completion of initial review," Section 6.2(c) also states:

> 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

[10] To be able to regulate nonmembers on nonmember land, *Montana*'s second exception must first be satisfied.

> determine a proposed Operation's conformance with the Ordinance. The Permit applicant is responsible for any additional costs necessary to complete Permit review […]

and must enter into a cost-reimbursement agreement with WEDNR before its application will be processed. (*Id*.) Further, renewal of the Permit requires an annual, non-refundable "$1,000 renewal fee in addition to any amount in accordance with the reimbursement provisions set forth in Section 6."[11] (*Id*. Section 9.3(b), at 8.) Section 10.3 further provides that WEDNR may enforce a penalty of $5,000 per violation, with each day a violation exist[ing] constituting a separate violation, along with court costs and attorney's fees. (*Id*. at 10.)

Atkinson is clear: a tribe's sovereign power to tax reaches no further than tribal land. 532 U.S. at 653. The Ordinance here is operating as a tax on nonmembers: in order to pump water onto nonmember land, a nonmember must apply for a WEDNR Permit and pay $5,000 for initial assessment. The Ordinance explicitly does not limit the potential costs involved to the nonmember, but notes that a "Retained Expert" may do the assessment of the application. To renew the Permit, the nonmember must pay $1,000 for the "renewal fee." If a nonmember is found to be in noncompliance with the Ordinance, the nonmember faces penalties of $5,000 *per day*, a suit in tribal court, costs and attorneys' fees.

In *Atkinson*, the Supreme Court held that a nonmember's operation of a hotel on nonmember owned land within the Navajo Nation's Reservation was insufficient to satisfy the first *Montana* exception. The Court expressly said such a broad reading of *Montana's*

[11] The MDNR water appropriation permit application fee was $150. The permit does not have an expiration date.

exception "swallow[s] the rule" and "ignores the dependent status of Indian tribes and subverts the territorial restriction upon tribal power." 532 U.S. at 655.

The Court also rejected the application of the second *Montana* exception. "*Montana's* second exception grants Indian tribes nothing 'beyond what is necessary to protect tribal self-government or to control internal relations.'" *Id*. at 658-59 (quoting *Strate*, 520 U.S. at 459). Even though the nonmember petitioner in *Atkinson* operated a trading post that employed almost 100 Navajo Indians, derived business from tourists visiting the reservation, and was surrounded by tribal-owned property, none of those factors were sufficient to satisfy *Montana*: "Whatever effect petitioner's operation of the Cameron Trading Post might have upon surrounding Navajo land, it does not endanger the Navajo Nation's political integrity." 532 U.S. at 659.

Although the nonmember conduct at issue here is different from *Atkinson*, the required analysis is the same. If anything, the nonmember in *Atkinson* would have taken far more actions that could have had an impact on the tribe than Vipond, whose only action has been to apply for the MDNR permit. WEDNR claims that the appropriation itself will cause a series of catastrophic harms, but the so-called fees imposed on the nonmember prior to any appropriation operate as a tax without the required showing of jurisdiction and regulatory authority. The Ordinance as written plainly violates the limits on tribal sovereignty set forth in *Montana* and cannot lawfully be enforced against Vipond.

WEDNR cannot show that the second *Montana* exception applies and gives it jurisdiction to enforce its Ordinance over Vipond in Tribal Court. *Nevada v. Hicks*, 533 U.S. 353, 367 (2001) ("[A] tribe's inherent adjudicative jurisdiction over nonmembers is

at most only as broad as its legislative jurisdiction.") Vipond is likely to prevail on the merits that the Tribal Court lacks jurisdiction.

B. Vipond will suffer irreparable harm absent a preliminary injunction.

It is long-established that the basis for injunctive relief in federal court is irreparable harm and the absence of adequate remedies at law. *Bandag, Inc. v. Jack's Tire & Oil, Inc.*, 190 F.3d 924, 926 (8th Cir. 1999). A district court may presume irreparable harm if the movant is likely to succeed on the merits. *Calvin Klein Cosmetics Corp. v. Lenox Labs, Inc.*, 815 F.2d 500, 503 (8th Cir. 1987).

Continuing to litigate in the Tribal Court forces Vipond to expend time, money, and effort in a forum that lacks jurisdiction over him. The Eighth Circuit has held that such circumstances tip the balance of harms in favor of the party moving for injunctive relief against the tribal court: "Without the injunction, the oil and gas companies would be forced to expend the time and cost associated with continuing litigation in a tribal court that lacks jurisdiction over them, whereas the only possible injury to the tribal court plaintiffs and tribal court officials from the injunction is delay." *Kodiak Oil and Gas (USA), Inc. v. Burr*, 932 F.3d 1125, 1139 (8th Cir. 2019) (affirming preliminary injunction against tribal court).

WEDNR has turned what was supposed to be the determination of a threshold issue—jurisdiction—into full-scale litigation. WEDNR sought and received an order under Judge DeGroat to schedule a five-day hearing solely on the issue of jurisdiction.[12] WEDNR submitted five expert reports in support of its claims that Vipond's proposed appropriation

[12] Judge B.J. Jones has reduced the hearing to two days.

causes harm under the second *Montana* exception. The parties are presently scheduling depositions for *nineteen* WEDNR witnesses who submitted either expert reports or lay affidavits in support of its claims. Exhaustion of tribal court remedies is not intended to require a determination of the merits of the issue: "Since the United States Supreme Court's decision in [*Strate v. A-1 Contractors*, 520 U.S. 438, 450 (1997)], the Eighth Circuit has not required litigants to adjudicate the full merits of a case in tribal court before a federal court can exercise its jurisdiction." *Kodiak Oil & Gas (USA), Inc. v. Burr*, 303 F.Supp.3d 964, 972 (D. N.D. 2018) (*aff'd*., *Kodiak Oil and Gas (USA), Inc.,* 932 F.3d 1125). But WEDNR has taken the determination of tribal jurisdiction under the second *Montana* exception as license to fully litigate the merits of the matter and develop a voluminous factual record before the Tribal Court. This is plainly in contravention with the spirit of the prudential exhaustion rule established in *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985). The time, money, and effort Vipond is having to expend to allow the Tribal Court to determine whether it has jurisdiction over this matter weighs in favor of granting a preliminary injunction.

C. The balance of harms created by continuing litigation in the Tribal Court favors Vipond.

The next *Dataphase* factor requires the consideration of the balance of harm to the movant and the harm that the issuance of the injunction would inflict on other parties. *Pottgen v. Mo. State High Sch. Activities Ass'n*, 40 F.3d 926, 929 (8th Cir. 1994). This factor goes beyond the harms weighed in determining irreparable harm and also considers

the harm to all parties in the dispute and other interested parties, including the public. *See Dataphase*, 640 F.2d at 114.

Here, the analysis is simple. If the Court does not issue a preliminary injunction from continued litigation in the Tribal Court, then Vipond must continue to defend against the underlying action in a court which lacks jurisdiction over the matter. But if the preliminary injunction is issued, WEDNR is not left with nothing; it could file suit in federal district court under 28 U.S.C. § 1331. In short, WEDNR may not have its preferred forum, but it can still challenge Vipond's proposed appropriation.

Second, the Tribal Court and the Tribal Court of Appeals have already found that they have jurisdiction over Vipond—even though the hearing for jurisdiction has not yet taken place—and continuing to litigate the matter in the Tribal Court disproportionately harms Vipond. In its Order granting WEDNR's motion for preliminary injunction *ex parte*, the Tribal Court determined it had jurisdiction over Vipond. (Carter Decl. Ex. 5 ¶¶ 1-2.) And in the language of the Resolution passing the Water Protection Ordinance, the RBC expressly cited the *Winters* doctrine and *Montana* as the bases for jurisdiction by White Earth over nonmembers and nonmember fee lands. (Carter Decl. Ex. 2, at 1-2.) The Tribal Court here is not an independent branch of government; it was created by the RBC, which passed the Ordinance determining it has authority to regulate nonmember water allocation on fee lands. *See* David Thorstad, White Earth Nation Adopts New Constitution, MR Online (Nov. 21, 2013), https://mronline.org/2013/11/21/thorstad211113-html/ ("Since the Indian Reorganization Act of 1934, [Minnesota Chippewa Tribe] members have operated under constitutions that lacked separation of powers, [and] an independent judicial system

(judges were beholden to tribal councils) [. . .]"). This is a factor not to be discounted. Tribal courts "differ from traditional American courts in a number of significant respects [. . .] in their structure, in the substantive law they apply, and in the independence of their judges." *Nevada*, 533 U.S. at 383-84 (Souter, J., concurring.) It is unclear that the Tribal Court can make a different determination than what the RBC has already decided. This factor also weighs in favor of granting a preliminary injunction.

D. A preliminary injunction serves the public interest.

Preliminary injunctive relief is only proper if the moving party establishes that entry of an injunction serves the public interest. *Dataphase*, 640 F.2d at 113. Here, the public interest is not served by continuing to allow WEDNR to litigate against Vipond in a forum that lacks jurisdiction over him. *See Crowe v. Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1158 (10th Cir. 2011) ("We simply are not persuaded the exertion of tribal authority over Crowe, a non-consenting, nonmember, is in the public's interest."). This factor also weighs in Vipond's favor.

II. The State of Minnesota is a required party to be joined.

The State of Minnesota's sovereign interests over its waters are directly at issue in the Tribal Court Action. WEDNR has asserted that the State's regulatory authority over the Wild Rice River is preempted and of no force and effect because of the Band's federal reserved water rights. (Carter Decl. Ex. 9 at 4.) As set forth in his Complaint, Vipond disputes this assertion. (Am. Compl. ¶¶ 92-111.) But regardless of the merits of either argument, the State's interests in its navigable waters are being adjudicated in its absence.

This is precisely when the courts consider a party required to be joined under Fed. R. Civ. P. 19. *Hood ex rel. Mississippi v. City of Memphis, Tenn.*, 570 F.3d 625 (5th Cir. 2009).

In *Hood*, the Fifth Circuit held that the State of Tennessee was a party required to be joined in an action between the State of Mississippi and the City of Memphis. Mississippi had sued Memphis, alleging that the City was wrongfully appropriating groundwater from an interstate aquifer. The Fifth Circuit held that the State of Tennessee was required to be joined because determining Tennessee's sovereign water rights without its participation in the suit would be prejudicial. 570 F.3d at 629-30.

Like the State of Tennessee in *Hood*, the State of Minnesota has sovereign interests in the navigable bodies of water within its borders. The Wild Rice River is a navigable body of water. MDNR must believe it possesses regulatory authority over the River, or it would not require and issue permits to appropriate water from the River. Which government is the proper regulatory authority here and over which citizens are the central questions in this action. Excluding one of the governments from that determination would be prejudicial to its sovereign interests. *See id.; see also Pueblo of Sandia v. Babbitt,* 47 F. Supp. 2d 49 (D.D.C. 1999) (holding that the State of New Mexico was an indispensable party in the Indian tribes' suit; the State had a legitimate interest in the regulation of gambling within its territory, and would be prejudiced by the invalidation of the revenue-sharing and regulatory-fee provisions being challenged by the tribes); *Native American Mohegans v. U.S.*, 184 F. Supp. 2d 198 (D. Conn. 2002) (holding that Connecticut was an indispensable party with respect to claims raised by a faction of an Indian tribe seeking to render void the state's rights under the Mohegan Nation of

Connecticut Land Claims Settlement Act and the agreements entered into by the State and the competing tribal faction extinguishing the Mohegan land claims against it).

The State's sovereign authority over and interest in its natural resources is clear. In *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204-05 (1999), the Court explained that "Indian treaty rights can coexist with state management of natural resources [. . .] This 'conservation necessity' standard accommodates both the State's interest in management of its natural resources and the Chippewa's federally guaranteed treaty rights." The State's sovereign interests are squarely at issue and must be addressed to avoid prejudice to the State and relitigation of these matters.

III. Vipond is not required to exhaust tribal court remedies here because it would be futile and would serve no purpose other than to delay resolution of this matter.

Exhaustion of tribal court remedies is not a required step in tribal court litigation. It is a prudential rule, not a prerequisite. *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997). It is well-established that exhaustion is not required where it would be futile for the action to continue in the tribal court or serve no purpose other than delay. *Id*. at 459 n.14. "[T]he exhaustion rule is based upon 'prudential' policies and is not jurisdictional." *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1092 (8th Cir. 1998) (quoting *Strate*, 520 U.S. at 459 n.14.). Further, exhaustion "must be interpreted narrowly in light of the 'virtually unflagging obligation of federal courts to exercise the jurisdiction given them.'" *Garcia v. Akwesasne Hous. Auth*., 268 F.3d 76, 80 (2d Cir. 2001) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

Strate is controlling: "When, as in this case, it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct [. . .] Therefore, when tribal-court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement, must give way, for it would serve no purpose other than delay." 520 U.S. at 459 n.14. If *Montana*'s narrow exceptions are not met, the tribe lacks civil authority over nonmembers on fee land, and the tribe's adjudicatory authority is not broader than its regulatory authority. *Nevada*, 533 U.S. at 367. Such is the case here.

To continue to litigate in the Tribal Court is futile. As explained at Part II, *supra*, the State of Minnesota is a required party to be joined. The State of Minnesota, like all states, has absolute sovereign immunity from suit in the courts of other states or in tribal courts. *Franchise Tax Bd. of California v. Hyatt*, 587 U.S. 230 (2019). Continuing to proceed in a forum in which an indispensable party cannot be joined due to sovereign immunity is futile. *See Pueblo of Sandia,* 47 F. Supp. 2d 49 (holding that the action by a tribe required dismissal as the party required to be joined had sovereign immunity). To allow or even require the Tribal Court Action to proceed further in the absence of the State would be tremendously prejudicial to the State's interests, wastes the parties' resources, and runs counter to principles of judicial economy. As noted on page 3, *supra*, the depositions of nineteen WEDNR witnesses are presently being scheduled.[13] Should the

[13] Twenty-three total depositions are being scheduled.

Court later determine that the State is a required party to be joined, those depositions would need to be repeated so the State could participate in discovery. But no depositions have yet taken place in the Tribal Court Action, and enjoining the Tribal Court would allow the State to participate without having to re-call all of these deponents. The Action should be enjoined by this Court to prevent the prejudice to the State and avoid the tremendous inefficiencies that will occur should the Tribal Court Action continue in the State's absence.

A. The Tribal Court cannot adjudicate the water rights of Vipond, White Earth, and the State of Minnesota.

WEDNR, in both the language of the Resolution enacting the Water Protection Ordinance and in its filings in the Tribal Court Action, has asserted that its authority to regulate the Wild Rice River stems from the federally-reserved water rights as established in *Winters v. United States*, 207 U.S. 564 (1908). Under the *Winters* doctrine, when an Indian reservation is established, the federal government also reserves water sufficient "to the extent needed to accomplish the purpose of the reservation." *Arizona et al. v. Navajo Nation et al.*, 599 U.S. 555, 561 (2023) (quoting *Sturgeon v. Frost*, 587 U.S. 28, 43 (2019)). Federal courts have jurisdiction over federally-reserved water rights. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 808-09 (1976). The McCarran Amendment, 43 U.S.C.A. § 666, was enacted to waive sovereign immunity of the United States so that federal water rights could also be adjudicated in state court. Accordingly, either the state court or the federal court is the appropriate forum to adjudicate the rights that WEDNR raises, but the Tribal Court is not. *See Nevada*, 533 U.S. at 367 (holding that

tribal courts are not courts of general jurisdiction, as "a tribe's inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction"); *see also Colville Confederated Tribes v. Walton*, 647 F.2d 42, 51 (9th Cir. 1981) (reversing the district court's finding that the non-Indian owner of fee land within a reservation had no right to share in the water reserved to the tribe when the reservation was created and remanding for a determination by the federal court of the extent of his right to share in the reserved water). The District Court is the proper forum to determine Vipond's water rights, which are derived from both the state law rights of a riparian landowner and the tribal allotments of the White Earth Reservation that became nonmember fee lands. *See Colville*, 647 F.2d at 51.

In *Nevada*, the Supreme Court held that exhaustion of tribal remedies "would serve no purpose other than delay" as the tribal court at issue plainly lacked jurisdiction over state officials for causes of action arising out of their official state duties. *Id*. at 369. In *Strate*, the Supreme Court also held that exhaustion of tribal remedies was not required: "When, as in this case, it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana*'s main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct [. . .] Therefore, when tribal-court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement [. . .] must give way, for it would serve no purpose other than delay." 520 U.S. at 459 n.14. Here, too, exhaustion is not required, as the Tribal Court plainly lacks jurisdiction. The Tribal Court lacks the authority to declare that the State of Minnesota's interests in the navigable waters of the

Wild Rice River are "preempted" and "of no force and effect." It cannot adjudicate the water rights of the necessary and indispensable parties involved. And it lacks jurisdiction over Vipond, as the proposed water allocation does not satisfy the second *Montana* exception because it does not and would not imperil White Earth's government or subsistence. Continuing to proceed in the Tribal Court when it lacks jurisdiction would be both inefficient and an injustice.

CONCLUSION

For the aforementioned reasons, Vipond respectfully requests that the Court enter an injunction preliminarily enjoining Defendants from continued litigation in the Tribal Court pending further order of this Court.

Respectfully submitted,

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