UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

R.D. Offutt Farms Co.,

Plaintiff,

v.

White Earth Division of Natural Resources, Dustin Roy, in his official capacity as Director of White Earth Division of Natural Resources, and John Does in their official capacities as Conservation Officers for the White Earth Division of Natural Resources,

Defendants.

Case No.: 0:24-cv-01600-JMB-LIB

PLAINTIFF R.D. OFFUTT FARMS CO.'S OPPOSITION TO MOTION TO DISMISS

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Plaintiff R.D. Offutt Farms Co. (referred to herein as "Plaintiff" or "RDO"), by and through its undersigned counsel, hereby submits this Brief in Opposition to Defendants' Motion to Dismiss.

I. INTRODUCTION

The Court should reject Defendants' misguided attempts to distract from the central issue in RDO's Complaint: namely, that Defendants hastily passed an illegal ordinance in May 2023 (the "Pre-Complaint Ordinance" or the "Ordinance")[1] attempting to regulate RDO's and all other non-Indians' state-permitted groundwater withdrawal both on and off the White Earth Reservation ("Reservation") starting one year after the effective date of the Ordinance, or May 5, 2024, without any credible scientific justification for doing so. But the White Earth Nation ("White Earth") showed its hand when it reacted to RDO's filing of the Complaint by passing a resolution that *temporarily* suspended enforcement of *part*[2] of the Pre-Complaint Ordinance to allow Defendants to contrive a post hoc scientific justification for establishing a duplicative, unnecessary, and unlawful regulatory scheme to control existing state-permitted groundwater withdrawals. The resolution was passed by the White Earth Reservation Business Committee ("WERBC") on June 12, 2024 (the

[1] For the Court's convenience, RDO re-attaches the following exhibits to the Declaration of Erin Westbrook, filed concurrently with this Opposition: Ex. A: Straight River Groundwater Management Area Report; Ex. B: Expert Report of Jeffrey Davis; Ex. C: May 5, 2023 Pre-Complaint Ordinance; Ex. D: June 12, 2024 Resolution. This Opposition refers to these exhibits throughout as Ex. __.

[2] White Earth suspended enforcement only as to "Existing Sources," defined as high-capacity wells or pumps "in existence and operating" as of May 3, 2023. Ex. C, Ordinance § 4.3. It did not suspend or repeal enforcement as to "New Sources" defined as high-capacity wells or pumps not in existence as of May 3, 2023. *Id.* at § 4.9.

"Resolution"), just weeks after RDO filed its May 3, 2024 Complaint and just one day after the tribal election in which tribal members re-elected the incumbent Chairman under whom the illegal Pre-Complaint Ordinance was enacted in the first place. [3]

The Resolution has no teeth, and the temporary suspension of enforcement of the Pre-Complaint Ordinance does not remedy its constitutional infirmities. Indeed, the Resolution is more notable for what it does *not* do: (1) it does not repeal the Pre-Complaint Ordinance; (2) it does not suspend enforcement as to New Sources; (3) it does not define the length of the suspension of enforcement as to Existing Sources; and (4) it does not guarantee any notice before reinstating enforcement of the Ordinance[4]. Furthermore, the Resolution directed Defendants to make a "revised version" of the Ordinance publicly available within two weeks of the Resolution—by June 26, 2024. *See* Ex. D, Resolution, at 6. As of the date of this filing (October 1, 2024), more than three months after that deadline, RDO is not aware of any publicly available amended ordinance, and Defendants did not attach one to their motion.

[3] The relevant timeline is as follows:

- May 5, 2023: Pre-Complaint Ordinance enacted
- May 3, 2024: RDO's Complaint filed
- May 5, 2024: Effective date of Pre-Complaint Ordinance requiring "Existing Sources" to obtain permits from Defendants
- June 11, 2024: Tribal election, re-electing incumbent Chairman under whom Pre-Complaint Ordinance was enacted
- June 12, 2024: Resolution passed, suspending enforcement of the Pre-Complaint Ordinance

[4] The Resolution states the "*inten[tion]* to provide Existing Sources . . . with at least one year's notice before implementing or enforcing any current or amended provisions" of the Ordinance, but it does not mandate or guarantee notice.

As noted, the Resolution was passed only *after* RDO challenged the legality of the Ordinance by filing its Complaint in this action. That Defendants sought to retreat from enforcing an illegal regulation is not surprising in light of the definitive scientific conclusions set forth in both the Minnesota Department of Natural Resources' Straight River Groundwater Management Area Report (the "Straight River Report") and the expert report of Jeffrey Davis (the "Davis Report") finding that groundwater withdrawal levels in the relevant area are sustainable. Meanwhile, Defendants lack any credible scientific justification for their attempt to improperly regulate RDO and other non-Indians as evidenced by their belated attempt to conduct further studies.

For this reason, as well as those set forth below, the arguments in Defendants' Motion to Dismiss, which largely rely on the dilatory Resolution, fail on the merits for at least the six following reasons.

First, RDO has standing to pursue a claim to prevent the undeniable injury it is suffering as a result of the Pre-Complaint Ordinance. The Ordinance explicitly precludes landowners and operators from withdrawing groundwater without receiving an additional permit from defendant White Earth Division of Natural Resources ("WEDNR") despite the fact that landowners and operators are operating pursuant to validly issued permits from the Minnesota Department of Natural Resources ("MN DNR"). Defendants' improper attempt to proscribe RDO (and other non-Indians) from withdrawing groundwater without a WEDNR permit directly implicates RDO's constitutionally protected right to use its own land.

Defendants have created a scenario that fits squarely within the fact pattern at issue in the Eighth Circuit's ruling in *Alexis Bailly Vineyard, Inc. v. Harrington*, 931 F.3d 774 (8th Cir. 2019). In *Alexis Bailly*, the Eighth Circuit considered whether the plaintiff wineries could bring a pre-enforcement challenge to a statute that purportedly violated the dormant Commerce Clause. *Id*. at 776. The Eighth Circuit reversed the district court's dismissal of the case for lack of standing, explaining:

> Courts "do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat." *MedImmune v. Genentech, Inc.*, 549 U.S. 118, 128-129 (2007). In pre-enforcement cases like this one, injury in fact exist when the plaintiffs allege "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute, and there exists a credible threat of prosecution thereunder." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014).

Id. at 777-78. In short, "when a course of action is within the plain text of a statute, a 'credible threat of prosecution'" and, therefore, standing exists. *Id.* at 778 (quoting *North Dakota v. Heydinger*, 825 F.3d 912, 917 (8th Cir. 2016)).

Here, RDO's groundwater withdrawals on RDO's own land based on valid state permits, constitute a "course of action" falling within the plain text of the Pre-Complaint Ordinance, thereby creating a credible threat of prosecution. RDO, therefore, is suffering an injury-in-fact that the Court can, and should, redress now through this Declaratory Judgment action. The continuing threat of duplicative and inconsistent regulation—including the threat that RDO may not be able to use its own land due to Defendants' actions—is particularly acute given that RDO plans its farming operations on the almost

6000 acres it owns and operates five to seven years in advance, as described in detail below. Thus, RDO has standing to pursue this action.

Second, this case is ripe for review. A claim is ripe for review "[w]here the uncertainty resulting from . . . a situation creates a sufficiently substantial financial risk, or will force parties to modify their behavior significantly." *Nebraska Pub. Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1039 (8th Cir. 2000). Such harm is not limited to "the traditional concept of actual damages" but, rather, also includes "the heightened uncertainty and resulting behavior modification that may result from delayed resolution." *Id.* at 1038. RDO is suffering not only a "definite, tangible and significant future harm" through the uncertainty of the impact of the Pre-Complaint Ordinance on its operations, but also a "present harm on [its] ability to plan and to conduct business operations."[5] *See id.* at 1039. Such uncertainty renders RDO's claim ripe for review.

Third, RDO's claim was not rendered moot by the Resolution, which is nothing more than a self-serving and temporary decision to "suspend" enforcement of the Pre-Complaint Ordinance. A case is moot only if it is "'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, 203 (1968)). Here, the Resolution mandates further scientific study to assist with the "effective *implementation*" of the Ordinance as to Existing Sources in the future. Ex. D, Resolution, at 5 (emphasis added).

[5] *See infra*, at 16 (discussing RDO's farming planning and operational needs).

The Resolution further states the intention to notify RDO and other "Existing Sources . . . before implementing or enforcing any current or amended provisions" of the Ordinance. *Id.* at 6. Thus, the Resolution is far from "absolutely clear" that Defendants' wrongful behavior is not reasonably expected to recur—quite the opposite is true. It contemplates, and explicitly states, that it will recur.

Fourth, RDO's claims are not barred by sovereign immunity. The protection of sovereign immunity is subject to the well-established exception described in *Ex parte Young*, which applies to tribes as much as any other governmental entity. *See N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 460 (8th Cir. 1993) (citing *Ex parte Young*, 209 U.S. 123, 159-60 (1908)). Tribal sovereign immunity is *not* a defense when tribal officials have "acted beyond the amount of authority that the sovereign is capable of bestowing upon them," or when the sovereign did not have the authority to make the law the official is enforcing. *Id.* Here, Defendants' enforcement of the Ordinance falls well outside the scope of authority held by White Earth, and, as a result, sovereign immunity does not apply.

Fifth, RDO was not required to exhaust tribal remedies because "it is 'plain' the tribal court lacks jurisdiction" and because "exhaustion 'would serve no purpose other than delay.'" *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1133 (8th Cir. 2019) (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 459 n.14 (1997)). Here, it is plain that Defendants lack authority to regulate RDO. *See, e.g.*, *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 328 (2008) ("tribes do not, as a general matter, possess authority over non-Indians who come within their borders: '[T]he inherent

sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.'"). RDO, a Minnesota corporation, is a non-Indian entity that owns and operates land both on and off the Reservation. The rare circumstance where tribal regulation of non-Indian activity *might* be allowed if such activity is "*catastrophic* for tribal self-government," *see Plains Commerce*, 554 U.S. at 341 (emphasis added), is simply not present here. Indeed, both the Straight River Report and the Davis Report directly refute any argument that RDO's groundwater withdrawals are "catastrophic" to White Earth. Defendants have no credible evidence of *any* impact of RDO's conduct much less evidence of a *catastrophic* impact. Indeed, White Earth's own Resolution demonstrates that RDO's farming activity is not catastrophic for tribal self-government. Exhaustion is not required in this circumstance.

Finally, Defendants' effort to inject misleading "fact" arguments is misplaced and undermined by MN DNR's Straight River Report and the Davis Report. As an initial matter, in the Resolution passed shortly after RDO filed the Complaint in this matter, Defendants acknowledged the need for further scientific study to better inform any actions they may want to take. Ex. D, Resolution, at 3. Despite their own concession that additional scientific studies are needed, Defendants ask this Court to accept broad, conclusory, and unsubstantiated statements in their Motion to Dismiss about the alleged impact of groundwater withdrawals on the undefined, self-serving area they refer to as the Pine Point-Ponsford area—an area that is not aligned with what the MN DNR determined (and expert hydrologist Jeffrey Davis agreed) was the proper area "where groundwater users share a distinct aquifer system or groundwater resource." *See* Ex. A, Straight River Report, at 9.

Defendants also appear to rely on the Resolution as if the Resolution itself amended the Pre-Complaint Ordinance. It did not. The Resolution specifically mandated that Defendants make public an amended ordinance within two weeks of the date of the Resolution, by June 26, 2024. Defendants' failure to follow through on the Resolution's clear mandate to amend the Ordinance now months later reveals the disingenuity of their position in this lawsuit.

For these reasons, as set forth more fully below, the Court should deny Defendants' Motion to Dismiss with prejudice and allow RDO's claim to proceed.

II. BACKGROUND[6]

A. Defendants' Effort to Regulate Non-Tribal Members' Lawful, State Permitted Activities on Non-Indian Owned Lands Is Unconstitutional and Unnecessary.

As properly alleged in its Complaint, RDO has been engaged in sustainable farming in Minnesota on lands which its owns and operates ("RDO Lands") for approximately sixty years, including lands located within the Reservation. RDO operates its farming subject to comprehensive regulation by the MN DNR[7] and in accord with its validly issued groundwater withdrawal permits issued by MN DNR.

Despite MN DNR's longstanding, comprehensive regulation and permitting of groundwater withdrawals, on May 5, 2023, the WERBC passed the Pre-Complaint Ordinance, which requires Defendants WEDNR and its Director Dustin Roy to regulate

[6] RDO provides a background section to give the Court context for the lengthy background section included in Defendants' Memorandum of Law, which includes largely unsupported facts that are not relevant to the issues this Court must decide on a Motion to Dismiss.
[7] RDO's land both on and off the Reservation also is subject to regulation by the Minnesota Pollution Control Agency and the Minnesota Department of Agriculture.

the withdrawal of groundwater by non-Indians on non-Indian owned lands within the boundaries of the Reservation and a five-mile appurtenant area outside the Reservation's boundaries. The Pre-Complaint Ordinance not only establishes a duplicative, wholly unnecessary regulatory scheme seeking to control the very same groundwater withdrawals legislatively allocated to MN DNR's oversight, but it also violates dispositive Supreme Court precedent by regulating the withdrawal of groundwater by non-Indians on non-Indian owned lands. Compounding the issue, Defendants have made clear in tribal court filings in a separate case against another Minnesota farmer (Mr. David Vipond) that it views the Pre-Complaint Ordinance as *preempting* MN DNR's regulatory program, even on non-Indian owned lands.[8]

The Pre-Complaint Ordinance also is unnecessary because the State of Minnesota has effectively implemented a comprehensive groundwater regulatory program for almost 100 years and because expert analysis, including analysis by MN DNR, demonstrates that the area covered by the Pre-Complaint Ordinance has not experienced adverse impacts to the groundwater resources as a result of state-permitted withdrawals. *See* Exs. A and B.

Specifically, the Minnesota Legislature expressly authorized MN DNR to implement a comprehensive regulatory program, giving the MN DNR Commissioner the

[8] *See* Dkt. 1-5, at 4 ("As it relates to water rights provided to the Band by federal treaty, State regulatory authority . . . is ***preempted and 'of no force and effect***. . . .' [T]he State of Minnesota's actions in this area are preempted as they relate to waters on and appurtenant to the Reservation to which the Band has federal reserved water property rights.") (quoting *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 51-52 (9th Cir. 1981)).

authority to administer "the use, allocation, and control of waters of the state."[9] Minn. Stat. § 103G.255. The Legislature further gave MN DNR the power to "establish water appropriation limits to protect groundwater resources" (Minn. Stat § 103G.287, subd. 3), and specifically directed that permits not issue unless "the groundwater use is sustainable to supply the needs of future generations and . . . will not harm ecosystems, degrade water, or reduce water levels beyond the reach of public water supply and private domestic wells." *Id.* at subd. 5. As the baseline for its groundwater regulatory program, MN DNR requires entities seeking to withdraw groundwater for irrigation purposes to apply for and obtain groundwater appropriation permits from MN DNR.

As another piece of its comprehensive regulatory program, MN DNR has the authority to "designate groundwater management areas and limit total annual water appropriations and uses within a designated area to ensure sustainable use of groundwater." Minn. Stat. § 103G.287, subd. 4. It did so by specially designating the Straight River Groundwater Management Area ("SRGWMA") in 2017, which largely encompasses the area at issue in this action.[10]

The month before the Pre-Complaint Ordinance was to take effect against Existing Sources, in April 2024, MN DNR issued its 62-page Straight River Report. *See* Ex. A. MN DNR's Straight River Report analyzed, in depth, past and present groundwater withdrawals

[9] "'Waters of the state' means surface or underground waters, except surface waters that are not confined but are spread and diffused over the land," including "boundary and inland waters." Minn. Stat. § 103G.005, subd. 17.

[10] In 2017, MN DNR implemented the Straight River Groundwater Management Area Plan to guide MN DNR in managing the appropriation and use of groundwater within the SRGWMA for a five-year period. *See* Dkt. 1-3, Compl. Ex. 3.

and the sustainability of groundwater use for agricultural purposes in the area that includes RDO Lands located within the Reservation and the five miles outside the Reservation. MN DNR declared at the outset of the Straight River Groundwater Report that:

> [MN DNR] continues to work in the Straight River Groundwater Management Area (SRGWMA) to address groundwater-related resource challenges. The [MN] DNR is responsible for ensuring that groundwater use remains sustainable. The [MN] DNR recognizes that groundwater use is vital to the people and economy of the state of Minnesota including those within the SRGWMA. . . . The [MN] DNR has expanded hydrologic and climate monitoring to evaluate if groundwater use is sustainable within the SRGWMA. Combined with historical studies and analysis, recent data analyses provide an understanding of how current and past water use affects surface water and groundwater resources.

Ex. A, Straight River Report, at 7.

Tellingly, after conducting its thorough analysis in accord with the mandate set forth above, MN DNR concluded, in no uncertain terms, that:

> 1. Groundwater baseflow provides 93-97% of streamflow throughout the SRGWMA.
>
> 2. Summer streamflow at the outlet of the SRGWMA has shown no downward trend.
>
> 3. **Aquifer levels have been stable and resilient through the extensive period of record, and the DNR is not concerned about long-term aquifer sustainability.**

Id. at 58 (emphasis added).

Additional analysis by expert hydrogeologist, Jeffrey Davis of Integral Consulting further confirms the accuracy of MN DNR's conclusions in the Straight River Report that there is no valid, scientific evidence that RDO's state-authorized groundwater withdrawals

from RDO Lands for its farming operations have had a material adverse effect on groundwater resources, stream flows or lake levels. Specifically, Mr. Davis' expert analysis based on years of substantial and reliable data demonstrates:

- MN DNR is proactively managing the groundwater resource;
- Groundwater levels show no long-term decline despite increased irrigation in the Study Area[11];
- RDO's operations do not affect lake levels or stream flow; and
- RDO's current and historical groundwater withdrawals are sustainable.

See Ex. B, Davis Report, at 6.1-6.4.

These scientific facts, coupled with continued and focused oversight by MN DNR pursuant to its statutory authority and comprehensive regulatory programs, demonstrate that RDO's groundwater withdrawals on RDO Lands have not had a direct effect on the political security, economic security, or health and welfare of White Earth. Consequently, under Supreme Court precedent in *Montana v. United States*, 450 U.S. 544 (1981) and its progeny, and recent precedent by the United States Court of Appeals for the Eighth Circuit in *Mandan, Hidatsa & Arikara Nation v. U.S. Department of the Interior*, 95 F.4th 573 (8th

[11] In the Davis Report, the Study Area is a defined area that includes the RDO Lands subject to the Pre-Complaint Ordinance and the area monitored in the SRGWMA. The Davis Report analyzes and opines on the impact, if any, of RDO's farming activities in the Study Area, which includes climatologic, physiographic, geologic, hydrogeologic, and hydrologic features of importance that inform Mr. Davis's opinions. Specifically, the Study Area spans four counties (all of Becker County with smaller portions in Hubbard, Clearwater, and Wadena Counties), covering approximately 627 square miles and incorporating the Otter Tail River and Crow Wing River watersheds. These watersheds create surface water and shallow groundwater divides and form natural flow boundaries. *See* Ex. B, Davis Report, at 4-1; *see also id.* Figure 1.

Cir. 2024), Defendants lack the constitutional authority to regulate groundwater appropriations by non-Indians on lands owned by non-Indians within the Reservation.

B. The Resolution Neither Cures the Pre-Complaint Ordinance's Constitutional Infirmities nor Undermines RDO's Standing in This Action.

On June 12, 2024—a little over a month after RDO filed its Complaint and just one day after the White Earth tribal election, the WERBC passed the Resolution purporting to suspend enforcement of the Pre-Complaint Ordinance provision relating to Existing Sources like RDO and repeal the Pre-Complaint Ordinance provision related to the five-mile area outside the Reservation. Ex. D, Resolution, at 6. The suspension has no timeline, and nothing in the Resolution would prevent Defendants from commencing enforcement immediately if the Court dismisses this case. *See id.*

The Resolution also states that the WERBC "*intends* to provide Existing Sources . . . with at least one year's notice before implementing or enforcing any current or amended provisions" of the Pre-Complaint Ordinance, but it is careful not to mandate (or guarantee) any notice to Minnesota farmers. *Id.* Further, the Resolution directs the Director of Natural Resources, defendant Dustin Roy, to "prepare and make publicly available a revised version of the [Pre-Complaint] Ordinance as amended by this resolution within two weeks[12] of the date of this resolution." *Id.* To date, however, Defendants have not made a revised version publicly available, and the Pre-Complaint Ordinance's requirement that entities holding existing MN DNR permits also obtain a groundwater

[12] Defendants have not attached a revised version of the Ordinance, and there does not appear to be one available at the website where the WERBC posts its ordinances as of the date of this filing. *See* https://whiteearth.com/rbc/resolutions, last visited October 1, 2024.

withdrawal permit from WEDNR remains on the books. Notably, Defendants reference the Resolution throughout their Memorandum of Law as forming the basis for their arguments despite the Resolution being clear that Defendants were required to issue a revised version of the Pre-Complaint Ordinance.

Despite the Resolution's acknowledgement that further scientific study is needed to inform Defendants' actions, Defendants are continuing to actively pursue enforcement in White Earth Tribal Court of the Pre-Complaint Ordinance as to "New Sources" like David Vipond, as referenced in RDO's Complaint. *See* Dkt. 1 at ¶¶ 24, 71-79. Defendants have yet to provide a rational basis for pursuing their case against Mr. Vipond (which clearly indicates an intent to enforce the Pre-Complaint Ordinance) while at the same time arguing that RDO is somehow precluded from litigating similar issues. It stands to reason that Defendants prefer their chosen forum in tribal court against Mr. Vipond versus federal court and also prefer litigating against Mr. Vipond versus litigating against RDO.

III. LEGAL ARGUMENT

A. RDO Has Standing to Assert Its Claim

1. *Standard of Review*

Although it is the plaintiff's burden to establish standing, "the extent of that burden varies depending on the stage of litigation." *Missouri v. Yellen*, 39 F.4th 1063, 1068 (8th Cir. 2022), *cert. denied,* 143 S. Ct. 734 (2023). On a motion to dismiss for lack of standing, the plaintiff is required only to "allege sufficient facts to support a reasonable inference that they can satisfy the elements of standing." *Animal Legal Def. Fund v. Vaught*, 8 F.4th

714, 718 (8th Cir. 2021). To prove standing, a plaintiff should establish an injury-in-fact, causation, and redressability. *Id.*

2. *RDO Has Suffered and Is Continuing to Suffer an Injury-in-Fact*

An allegation of injury-in-fact can be satisfied by establishing a future injury "if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur." *Susan B. Anthony*, 573 U.S. at 158 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013)). To bring a pre-enforcement challenge, the plaintiff must "allege[] 'an intention to engage in a course of conduct arguably affected with a constitutional interest[13], but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *Id.* at 159 (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)).

Defendants argue that a "plaintiff must show that enforcement is 'sufficiently imminent'" to establish a credible threat of prosecution. Dkt. 18 at 15 (quoting *Religious Sisters of Mercy v. Becerra*, 55 F.4th 583, 602-03 (8th Cir. 2022)). In making this argument, Defendants flip the standard on its head. As both the Supreme Court and the

[13] Defendants have not raised, and have therefore effectively conceded, that RDO has alleged an intent to engage in an activity that is "arguably affected with a constitutional interest." Any attempt by Defendants to improperly challenge this element in their reply should be rejected because RDO's allegations that it intends to continue to engage in farming, irrigation, and groundwater use clearly meet the threshold of alleging an intent to engage in an activity that is "arguably affected with a constitutional property interest." *See, e.g.*, *Birchansky v. Clabaugh*, 421 F. Supp. 3d 658, 671 (S.D. Iowa 2018), *aff'd*, 955 F.3d 751 (8th Cir. 2020); *see also, e.g.*, *First Lutheran Church v. City of St. Paul*, 326 F. Supp. 3d 745, 758 (D. Minn. 2018) ("'[R]estriction on property use constitutes an injury in fact'") (quoting *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cty.*, 450 F.3d 1295, 1304 (11th Cir. 2006)).

Eighth Circuit have explained, threatened enforcement *is* "sufficiently imminent" if the three elements, including establishing a credible threat of prosecution, are met. *See Religious Sisters of Mercy*, 55 F.4th at 602-03; *Susan B. Anthony*, 573 U.S. at 159 ("[W]e have permitted pre-enforcement review under circumstances that render the threatened enforcement sufficiently imminent. Specifically, we have held that a plaintiff satisfies the injury-in-fact requirement where he alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder."). Contrary to Defendants' argument, there is no separate "imminence requirement." *See* Dkt. 18 at 17.

There is no question that RDO is suffering an actual injury. As explained in the Complaint, RDO has an interest in 5,991.9 acres of land within the Reservation and the appurtenant five-mile area as either an owner or a tenant for the 2024 growing season. Dkt. 1 at ¶ 18. RDO's growing cycle begins years in advance of actual planting with seeds for the current season's crop being purchased five to seven years prior. *Id.* at ¶ 19. Likewise, RDO's crops are contractually committed well in advance of the growing season. *Id.* at ¶ 18. Uncertainty around RDO's ability to irrigate impacts not just the current growing season, but also the growing seasons for years to come. *Id.* RDO has satisfied all requirements to bring a pre-enforcement challenge, and the Court should reject Defendants' argument that it lacks standing.

a. The Pre-Complaint Ordinance Proscribes RDO's Conduct

RDO's conduct is undeniably proscribed by the Ordinance. As an initial matter, a resolution, like Defendants' Resolution, directing parties to issue an amended ordinance

does not amount to an amended ordinance as Defendants seem to suggest. *See Tom T., Inc. v. City of Eveleth, MN*, No. CIV. 03-CV-1197, 2003 WL 1610779, at *9 (D. Minn. Mar. 11, 2003) (Davis, J.). Defendants have offered no explanation for why they did not comply with the Resolution's directive to issue a revised version of the Pre-Complaint Ordinance by June 26, 2024. Even if Defendants had amended the Ordinance in accordance with the Resolution, the fact is *it remains in effect*; enforcement is simply suspended as to certain provisions. But Defendants may unilaterally lift the suspension at any time at their discretion and proceed with enforcement of the Pre-Complaint Ordinance, which is especially likely if Defendants succeed in their ongoing claims against Mr. Vipond in the tribal court. Thus, the Court must look to the language of the Pre-Complaint Ordinance to determine whether it proscribes the conduct at issue.

The Pre-Complaint Ordinance requires "Existing Sources" (such as RDO) to seek a permit from WEDNR and bans any Existing Source that does not obtain one. Ex. C, Ordinance § 5.2. The parties agree that RDO falls within the definition of Existing Source in the Ordinance. The parties agree that RDO has neither applied for nor obtained a permit from WEDNR to operate high-capacity wells on the Reservation. And the parties agree that RDO continues to operate its high-capacity wells without WEDNR permits despite the Ordinance's prohibition against it doing so.

Even if the Court were to assume that the Resolution constituted an actual amendment to the Ordinance (which by the Resolution's plain language, it does not), suspension of enforcement does not change the plain language of the Pre-Complaint Ordinance proscribing RDO's conduct. Moreover, contrary to Defendants' argument, the

fact that Defendants have not yet "applied" the Pre-Complaint Ordinance to RDO is of no consequence. *See* Dkt. 18 at 15. Defendants misleadingly state that "the Ordinance has not been applied to Plaintiff or to any other Existing Source in the sixteen months since its original passage." *See* Dkt. 18 at 15. Although the Ordinance was passed 16 months ago on May 5, 2023, by its own terms, it did not require "Existing Sources," like RDO, to submit permit applications until one year after its passage, on May 5, 2024. Ex. C, Ordinance § 5.2. By the time the Pre-Complaint Ordinance actually allowed enforcement against RDO, RDO had filed this action, which prompted the passage of the Resolution. For Defendants to suggest that they could have been enforcing the Pre-Complaint Ordinance against Existing Sources for sixteen months but chose not to do so is simply inconsistent with the facts. Neither RDO nor this Court has any basis to think Defendants would not immediately reinstate enforcement if this case were dismissed and apply the plain language of the Pre-Complaint Ordinance to initiate proceedings under the Ordinance against RDO in tribal court—just as it did against Mr. Vipond as a New Source. Any enforcement of the Pre-Complaint Ordinance against RDO would have a devastating impact on RDO's operations, causing actual injury to RDO.

b. A Credible Threat of Prosecution Exists

For the same reasons, the Court should reject Defendants' argument that no credible threat of prosecution exists. "[W]hen a course of action is within the plain text of a statute, a 'credible threat of prosecution' exists." *Alexis Bailly*, 931 F.3d at 778 (quoting *Heydinger*, 825 F.3d at 917); *see also Keller v. City of Fremont*, 719 F.3d 931, 947-48 (8th Cir. 2013) ("'When government action . . . is challenged by a party who is a target or object of that

action . . . there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing . . . the action will redress it.'") (quoting *Minn. Citizens Concerned for Life v. Fed. Election Comm'n*, 113 F.3d 129, 131 (8th Cir. 1997)).

As previewed above, in *Alexis Bailly*, the Eighth Circuit considered a challenge by wineries over a Minnesota legislative act that required a majority of the ingredients in the wine sold by wineries to be grown or produced in Minnesota. Although the wineries had never been denied a license or had their operations suspended for violating the act, they brought a pre-enforcement challenge arguing that the act violated the dormant Commerce Clause. *Alexis Bailly*, 931 F.3d at 778. The state argued that there was no credible threat of prosecution both because the state had never prosecuted the act (like Defendants argue here) and because the state had a waiver process by which the wineries could bypass the law. *Id.* The Eighth Circuit rejected these arguments, reasoning that because the action that the wineries wanted to take (using out-of-state grapes) fell within the plain text of the statute, a credible threat of prosecution existed. *Id.*

The Court also rejected the notion that the alleged injury needed to be "certainly impending" in cases where the plain language of the statute proscribed the conduct. *Id.* The Court distinguished the Supreme Court's decision in *Clapper v. Amnesty Int'l USA*, 568 U.S. at 409, where the plaintiffs were not actually targets of the challenged surveillance program but, rather, believed they communicated with individuals who were and such communications could lead to them becoming a target of future government investigation. *Id.* In *Clapper*, the Supreme Court found that when the statute did not target a plaintiff directly and harm could only be found by a "highly attenuated chain of possibilities," the

plaintiff lacked standing. *Id.* The *Alexis Bailly* court distinguished *Clapper*, explaining that *Clapper* "did not upset the well-settled standing inquiry for plaintiffs, like the Farm Wineries, that are themselves the objects of a challenged statute." *Alexis Bailly*, 931 F.3d at 778.

The Eighth Circuit's distinction directly applies here. Defendants readily admit that RDO is the object of the Ordinance. Dkt. 18 at 15 ("Plaintiff challenges the Ordinance as applied to its groundwater wells, all of which are Existing Sources under the Ordinance."). The threat of enforcement to RDO is neither found through a "highly attenuated chain of possibilities," nor "riddled with contingences and speculation." *See* Dkt. 18 at 16 (quoting *Trump v. New York*, 592 U.S. 125, 131 (2020)). Rather, as was true in *Alexis Bailly*, the threat of enforcement materializes whenever Defendants simply decide to enforce the Ordinance, which could happen at any time upon Defendants' whim.

Moreover, as was true in *Alexis Bailly*, RDO is experiencing harm *now* because of the Ordinance's interference in its business. As explained, RDO's operations depend on planning and contractual relationships made years in advance. *See supra*, at 16. Uncertainty around RDO's ability to irrigate impacts not just the current growing season but also the growing seasons for years to come. *Id.* This is exactly the type of harm the Eighth Circuit found sufficient to constitute an injury in fact in *Alexis Bailly*. *See Alexis Bailly*, 931 F.3d at 779 (finding injury in the form of concrete economic loss as a result of reduced borrowing power, operational efficiencies, and marketing opportunities, recognizing the impracticality of basing "substantial business investments on the mere *likelihood* of receiving future exemptions from state law").

Defendants point to the Resolution's language that they "intend[] to provide Existing Sources . . . at least one year's notice before implementing or enforcing any current or amended provisions." *See* Ex. D, Resolution, at 6. But intent is neither a mandate nor a guarantee. Nothing in the Resolution prevents or makes unlawful Defendants' failure to give such notice. Indeed, nothing in the Resolution prevents the passage of a new Resolution reinstating enforcement immediately if this Court dismisses this case.

3. *Causation and Redressability*

Defendants argue that any harm is not redressable because none of the named defendants have the authority to enforce suspended or repealed provisions of the Pre-Complaint Ordinance. Dkt. 18 at 17. Generally, "the causation element of standing requires the named defendants to possess authority to enforce the complained-of provision." *Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 958 (8th Cir. 2015). "[I]t must be the effect of the court's judgment on the defendant that redresses the plaintiff's injury, whether directly or indirectly." *Id.* (quoting *Nova Health Sys. V. Gandy*, 416 F.3d 1149, 1159 (10th Cir. 2005)).

Defendants' argument on causation is fatally circular. They suggest that the Resolution renders them incapable of enforcing the Pre-Complaint Ordinance by stating that they "shall take no action to implement or enforce the provisions of the Water Protection Ordinance as to such Existing Sources." Dkt. 18 at 12. But as already discussed, the Pre-Complaint Ordinance remains in effect—enforcement is simply suspended until some undetermined time in the future at which point *Defendants* are explicitly empowered to enforce it. *See* Ex. C, Ordinance § 10.3 ("WEDNR may take any appropriate

enforcement action against any Landowner or Operator in violation of this Ordinance."). The Court has the power to redress this harm by preventing Defendants from *ever* enforcing the Pre-Complaint Ordinance. That enforcement is suspended does not preclude the Court from issuing an order that would redress RDO's harm—specifically that would declare that Defendants lack legal authority to regulate RDO's water use on RDO Lands and that RDO is not required to apply for or obtain a groundwater appropriation permit or any other permit from Defendants.

This case is unlike the only case cited by Defendants, *Digital Recognition Network, Inc. v. Hutchinson*, where the Eighth Circuit found no redressability in an action against the governor and state attorney general when the statute at issue could be enforced *only* through a private right of action. *See* 803 F.3d at 958. Here, the Pre-Complaint Ordinance explicitly allows Defendants to enforce it. That the Resolution suspended enforcement is of no consequence because the Ordinance has not been repealed or amended, and enforcement could be reinstated at any time, in which case it would be Defendants who would carry out such enforcement.

B. RDO's Claim Is Ripe

Defendants argue that RDO's claims are not ripe because the dispute between the parties is "hypothetical" and because RDO is suffering no hardship. Both arguments are wrong. Ripeness and standing often overlap, particularly when the plaintiff brings a pre-enforcement challenge. *Susan B. Anthony*, 573 U.S. at 157 n.5; *see also Religious Sisters of Mercy*, 55 F.4th at 608 ("Because we have already held that the plaintiffs have standing . . . , we necessarily hold that their claims are ripe for judicial review."); *Johnson v.*

Missouri, 142 F.3d 1087, 1090 n.4 (8th Cir. 1998) (explaining that the doctrines of ripeness and standing "are closely related in that each focuses on whether the harm asserted has matured sufficiently to warrant judicial intervention"). Thus, if a plaintiff has standing, it stands to reason that the plaintiff has a ripe claim. *See id.*

"The touchstone of a ripeness inquiry is whether the harm asserted has matured enough to warrant judicial intervention." *Parrish v. Dayton*, 761 F.3d 873, 875 (8th Cir. 2014) (cleaned up). A plaintiff meets its burden of establishing ripeness by specifically alleging the intent to engage in conduct that violates the challenged statute. *St. Paul Area Chamber of Com. v. Gaertner*, 439 F.3d 481, 487 (8th Cir. 2006). To determine whether a claim is ripe for judicial review, a court evaluates "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Duffner v. City of St. Peters, Missouri*, 930 F.3d 973, 977 (8th Cir. 2019). RDO's Complaint satisfies both standards.

RDO's Complaint is fit for judicial decision. "The fitness prong safeguards against judicial review of hypothetical or speculative disagreements." *Parrish*, 761 F.3d at 875. Here, RDO seeks a declaratory judgment that Defendants "lack legal authority" to regulate RDO's water use on RDO's land. *See* Dkt. 1 at 34. A governing body's authority to regulate an entity is a legal question. *See, e.g.*, *Nord v. Kelly*, 520 F.3d 848, 856 (8th Cir. 2008) (noting that question of tribe's authority can be determined "as a matter of law") (citing *Strate*, 520 U.S. at 457-459).

Additionally, as already explained, RDO will suffer hardship if the Court declines to consider the case now as a result of the planning needed to run RDO's operations. *See*

supra, at 16. A case is ripe "[w]here the uncertainty resulting from . . . a situation creates a sufficiently substantial financial risk, or will force parties to modify their behavior significantly." *Nebraska Pub. Power*, 234 F.3d at 1039. Such harm is not limited to "the traditional concept of actual damages" but, rather, also includes "the heightened uncertainty and resulting behavior modification that may result from delayed resolution." *Id.* at 1038. Such uncertainty can create both a "definite, tangible and significant future harm" *and* a "present harm on [a plaintiff's] ability to plan and to conduct business operations." *Id.* at 1039. Uncertainty around RDO's ability to irrigate impacts not just the current growing season but also the growing seasons for years to come. In asserting lack of ripeness, Defendants utterly ignore this harm. But such uncertainty undoubtedly works both an actionable future harm and "a present harm on [RDO's] ability to plan and to conduct business operations," rendering its claim ripe for review. *See id.*

Additionally, in arguing that RDO is not suffering hardship, Defendants suggest that regulation of RDO "may not occur at all." *See, e.g.*, Dkt. 18 at 19. But *nowhere* does the Resolution state or even suggest that the purpose of further scientific inquiry is to decide *whether or not* to implement the Ordinance such that regulation would not occur at all. Rather, the Resolution states further inquiry will assist in more *effectively implementing* the Ordinance as to Existing Sources *in the future*. *See* Ex. D, Resolution, at 5 ("further analysis of Existing Sources . . . informed by these ongoing scientific studies and cooperative efforts, would be beneficial to the effective implementation of the Water Protection Ordinance as to those Existing Sources in the future"). The language in the

Resolution simply belies any argument that Defendants do not fully intend to implement the Ordinance against RDO.

C. RDO's Claim Was Not Mooted by Defendants' Voluntary and Temporary "Suspension" of Enforcement

If a plaintiff establishes standing, it is axiomatic that the case is not moot. *See, e.g.*, *Religious Sisters of Mercy*, 55 F.4th at 604 ("'Suffice it to say that if there is an ongoing dispute giving a plaintiff standing, the case is not moot.'") (quoting *Franciscan All., Inc. v. Becerra*, 47 F.4th 368, 377 (5th Cir. 2022)). Moreover, the Supreme Court and Eighth Circuit's jurisprudence make clear that Defendants' voluntary conduct has not satisfied the "stringent" standard to moot the case: a case will become moot only if it is "'*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Friends of the Earth*, 528 U.S. at 189 (quoting *Concentrated Phosphate Export Assn.*, 393 U.S. at 203) (emphasis added). As the Supreme Court recently confirmed, this is a "formidable burden"; if the rule were "more forgiving, a defendant might suspend its challenged conduct after being sued, win dismissal, and later pick up where it left off; it might even repeat 'this cycle' as necessary until it achieves all of its allegedly 'unlawful ends.'" *Fed. Bureau of Investigation v. Fikre*, 601 U.S. 234, 243, (2024) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)). Furthermore, "where circumstances suggest that by ceasing to engage in the challenged conduct, the defendant is simply 'attempting to manipulate [the court's] jurisdiction to insulate a favorable decision from review,' courts are unlikely to find a case moot." *Mille Lacs Band of Ojibwe v. Cnty. of Mille Lacs, Minnesota*, No. 17CV05155SRNLIB, 2022 WL 624661, at *5 (D. Minn. Mar. 3, 2022)

(quoting *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000)) (citing *Already*, 568 U.S. at 91).

1. *Enforcement of the Illegal Ordinance Is Likely to Recur*

A moratorium on enforcing an invalid ordinance or policy will not moot a case when "by its terms," it is not permanent. *See Friends of the Earth*, 528 U.S. at 190. Likewise, merely suspending illegal conduct does not moot an action challenging that conduct. This is true no matter how long the potential suspension. *See Fikre*, 601 U.S. at 243. Indeed, the Supreme Court recently confirmed: "[i]n all cases, **it is the defendant's 'burden to establish' that it cannot reasonably be expected to resume its challenged conduct**—whether the suit happens to be new or long lingering, and whether the challenged conduct might recur immediately or later at some more propitious moment." *Id.* (emphasis added) (quoting *West Virginia v. EPA*, 597 U.S. 697, 719 (2022)); *see also, e.g.*, *Parents Involved in Community Schools v. Seattle School Dist.*, 551 U.S. 701, 719 (2007) (declining to dismiss a case as moot five years after the defendant voluntarily ceased its challenged conduct).

In light of the above principles, and for good reason, courts routinely reject arguments based on mootness when a defendant suspends challenged conduct as a result of a lawsuit. For example, in *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982), the Supreme Court refused to dismiss a constitutional challenge to an ordinance that had been repealed because the Court found the repeal "would not preclude [the city] from reenacting precisely the same provision if the District Court's judgment were vacated." *Id.* at 289.

Similarly, in the Supreme Court's recent decision in *Fikre*, the Court unanimously held that the government's declaration representing that airline passenger "will not be placed on the No Fly List in the future based on the currently available information" did not show that challenged practice could not reasonably be expected to recur. 601 U.S. at 243. The *Fikre* Court noted that the government's speculation about the plaintiff's actions "cannot make up for a lack of assurance about its own. The burden here is on the defendant to establish that it cannot reasonably be expected to resume its challenged conduct." *Id.*

In *Tom T., Inc. v. City of Eveleth*, the court faced a similar issue that the court faces here. The defendant city passed a resolution suspending enforcement of a challenged ordinance and ordering amendments to the same to reflect the city council's intent. No. CIV. 03-CV-1197, 2003 WL 1610779, at *9. In rejecting the defendant's mootness argument, the court explained that the resolution "provides absolutely no assurance that the multiple constitutional infirmities of Ordinance No. 29 would be remedied by a subsequent amendment." *Id.* And an amendment, "evincing the Council's 'intent' could take any form and could alter any provision of the ordinance without actually addressing" the constitutional challenges. *Id.* As a result, the Court concluded "the promises of the City Council are insufficient to render the question of Ordinance No. 29's constitutional validity moot." *Id.*; *see also Christian Lab. Ass'n v. City of Duluth*, No. CV 21-227 (DWF/LIB), 2021 WL 2783732, at *11 (D. Minn. July 2, 2021) (Donovan, J.) (rejecting mootness argument because it was not "absolutely clear" that defendant cities would not reinstate challenged conduct).

The cases cited by Defendants are inapposite because they do not involve a mere suspension of enforcement. *See Teague v. Cooper*, 720 F.3d 973, 976 (8th Cir. 2013) (noting that challenged statute "was unconditionally repealed" by the state legislature); *SD Voice v. Noem*, 987 F.3d 1186, 1189 (8th Cir. 2021) (explaining that challenged statute was replaced by statute that did "not disadvantage Plaintiff in the same fundamental way" as the challenged statute).

Here, the Resolution itself is steeped in language demonstrating that Defendants intend to continue their illegal conduct in the future—perhaps "at some more propitious moment" when the illegal conduct is not the subject of a lawsuit. *See Fikre*, 601 U.S. at 243. Specifically, several aspects of the Resolution show that it is far from "absolutely clear" that WEDNR does not intend to reinstate enforcement of the illegal ordinance:

- The Resolution does not repeal the Pre-Complaint Ordinance nor does it even amend it. Rather, it orders Defendants to issue a revised version of the Ordinance by June 26, 2024, which Defendants have thus far failed to do. Ex. D, Resolution, at 6.

- The Resolution only *suspends* enforcement for Existing Sources with no timeline for when it might reinstate enforcement—enforcement could begin as soon as the Court dismisses this case. *Id.*

- The Resolution describes additional scientific inquiry as "beneficial to the effective implementation" of the Ordinance as it relates to Existing Sources like RDO, suggesting that the Ordinance will be implemented against RDO in the future. *Id.* at 5.

- The Resolution states merely that the WERBC intends to provide Existing Sources "with at least one year's notice before implementing or enforcing" the White Earth Water Ordinance. *Id.* at 6. But the "intent" of the governing body "could take any form and could alter any provision of the ordinance without actually addressing" the challenged conduct. *See Tom T.*, No. CIV. 03-CV-1197, 2003 WL 1610779, at *9. Intent to provide notice does not make the Ordinance legal, and nothing in the Resolution makes such intent enforceable. Defendants' intent to provide notice that

> it would resume enforcement is simply more evidence that it is not "absolutely clear" that WEDNR will refrain from enforcing the ordinance—quite the opposite: the intention to provide notice upon resuming enforcement indicates that Defendants, in fact, *fully intend to resume enforcement*.

These provisions of the Ordinance contrast starkly with the Resolution's provision related to the five-mile buffer area that, according to Defendants, "permanently repealed all provisions of the Ordinance relating to high-capacity pumping in the five-mile area adjacent to the Reservation." *See* Dkt. 18 at 12 (citing Ex. D, Resolution, at 5). Unlike this provision, the Resolution notably does not permanently repeal the Ordinance as it relates to Existing Sources, again suggesting it is not at all "absolutely clear" that it will not proceed with its illegal conduct in the future.[14]

2. *The Court Should Reject Defendants' Self-Serving Resolution Seeking to Avoid a Ruling on the Pre-Complaint Ordinance*

Additionally, in considering whether voluntary cessation of illegal conduct moots a case, courts consider whether "the change in conduct resulted from substantial deliberation or is merely an attempt to manipulate jurisdiction." *See, e.g., Djadju v. Vega*, 32 F.4th 1102, 1109 (11th Cir. 2022); *see also Mille Lacs Band of Ojibwe*, No. 17CV05155SRNLIB, 2022 WL 624661, at *5 ("[W]here circumstances suggest that by ceasing to engage in the challenged conduct, the defendant is simply 'attempting to manipulate [the court's] jurisdiction to insulate a favorable decision from review,' courts are unlikely to find a case moot."). The Resolution does not appear to be a result of

[14] The Resolution also allows ongoing enforcement of the Ordinance as to New Sources. Although RDO may not have standing to challenge the New Sources provision, that WEDNR is continuing to enforce that part of the Ordinance is simply more evidence that WEDNR does not intend to stop enforcing the Ordinance in general.

substantial deliberation but, rather, is a direct result of RDO's lawsuit. Moreover, it came just one day after the tribal election that resulted in the re-election of the incumbent Chairman under whom the illegal Pre-Complaint Ordinance was originally enacted, suggesting that the Resolution was a political decision rather than the result of a "commitment to the new policy or legislative scheme." *See Djadju*, 32 F.4th at 1109. The Resolution further appears designed to manipulate jurisdiction by maintaining the part of the Ordinance that is the subject of litigation in White Earth Tribal Court while purporting to suspend and repeal the parts of the Ordinance that are the subject of litigation in federal court. *See id.*; *see also Mille Lacs Band of Ojibwe*, No. 17CV05155SRNLIB, 2022 WL 624661, at *5. But, as the Supreme Court recently pronounced in rejecting mootness in the face of voluntary cessation, "'[t]he Constitution deals with substance,' not strategies." *Fikre*, 601 U.S. at 243. The Resolution is little more than a strategy to have this federal court case dismissed while pursuing its own case in its chosen forum.

Finally, Defendants' failure to comply with the directive to issue a publicly available revised version of the Ordinance further demonstrates that Defendants' "promises . . . are insufficient to render the question" of the Ordinance's validity moot. *See Tom T.*, No. CIV. 03-CV-1197, 2003 WL 1610779, at *9 (concluding that "the promises of the City Council [as stated in a resolution] are insufficient to render the question of Ordinance No. 29's constitutional validity moot," particularly when the challenged ordinance had not been amended).

D. RDO's Claim Is Not Barred by Sovereign Immunity

Defendants argue that White Earth enjoys sovereign immunity on the issues at hand and that Defendants WEDNR, Roy, and the WEDNR conservation officers "share" in White Earth's sovereign immunity. Dkt. 18 at 21. Not so. The protection of sovereign immunity is subject to the well-established exception described in *Ex parte Young*, which applies to tribes as much as any other government entity. *See Prairie Island*, 991 F.2d at 460 (citing *Ex parte Young*, 209 U.S. at 159-60). In *Ex parte Young*, the Supreme Court recognized, for good reason, that "sovereign immunity does not bar 'certain suits seeking declaratory and injunctive relief against state officers in their individual capacities' based on ongoing violations of federal law." *Kodiak Oil*, 932 F.3d at 1131 (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997)). When analyzing whether the *Ex parte Young* exception applies, "a court need only conduct a 'straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (quoting *Coeur d'Alene Tribe*, 521 U.S. at 296)). The official being sued must also have "some connection to the enforcement of the challenged laws." *Calzone v. Hawley*, 866 F.3d 866, 869 (8th Cir. 2019)).

As Defendants themselves acknowledge (Dkt. 18 at 22), the *Ex parte Young* doctrine applies to tribal officials. *See Kodiak Oil*, 932 F.3d at 1131 (citing *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 796 (2014)); *see also Prairie Island*, 991 F.2d at 460; *Tenneco Oil Co. v. Sac & Fox Tribe of Indians of Oklahoma*, 725 F.2d 572, 574 (10th Cir. 1984) ("If the sovereign did not have the power to make a law, then the official by

necessity acted outside the scope of his authority in enforcing it, making him liable to suit. Any other rule would mean that a claim of sovereign immunity would protect a sovereign in the exercise of power it does not possess."). Tribal sovereign immunity is *not* a defense when tribal officials have "acted beyond the amount of authority that the sovereign is capable of bestowing upon them," or when the sovereign did not have the authority to make the law the official is enforcing. *Prairie Island*, 991 F.2d at 460. A tribal law or ordinance goes beyond the scope of the tribe's authority if it is unconstitutional, it is preempted by federal statute, or is an invalid exercise of Indian sovereignty over non-Indians. *See Tenneco Oil Co.*, 725 F.2d at 574.

Courts routinely permit lawsuits against tribal officials and entities for declaratory and injunctive relief where, like here, it is necessary to prevent the ongoing enforcement of laws or ordinances that go beyond the scope of the tribe's authority. *See, e.g.*, *Baker Elec. Co-op., Inc. v. Chaske*, 28 F.3d 1466, 1471 (8th Cir. 1994) (reversing and remanding district court's grant of sovereign immunity with instructions for district court to determine whether tribe had power to enact ordinance asserting extensive regulatory authority over reservation's electric service); *N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 781 F. Supp. 612, 617 (D. Minn. 1991), *aff'd,* 991 F.2d 458 (8th Cir. 1993) (rejecting tribe's and tribal council's motion to dismiss based on sovereign immunity because tribe lacked authority to enact ordinance).

Here, RDO's Complaint alleges a violation of federal constitutional law and seeks relief that is properly characterized as prospective (Complaint, Dkt. 1, ¶¶ 16, 18, 20, 88). *See Verizon Md., Inc.*, 535 U.S. at 645. RDO also alleges facts demonstrating the requisite

connection between Defendants and enforcement of the challenged Ordinance. (*Id*. ¶¶ 34, 35, 73, 75). Indeed, Defendants are specifically empowered with enforcement by the challenged Pre-Complaint Ordinance itself. *See* Ex. C, Ordinance § 10.3. These allegations plainly satisfy the "straightforward inquiry" this court needs to perform at the motion to dismiss stage. *See Whole Woman's Health v. Jackson*, 595 U.S. 30, 46 (2021) (holding that sovereign immunity did not bar suit against named defendants at motion to dismiss stage); *Verizon Md., Inc.*, 535 U.S. at 646 (allowing suit to proceed against individuals in their official capacities where complaint satisfied "straightforward inquiry").

Defendants provide no meaningful explanation as to why the *Ex parte Young* doctrine would not apply to their conduct. Instead, they claim, in conclusory fashion, that "the challenged provisions of the Ordinance are no longer on the books" (which, as described above, is false) and that Defendants "have no ability or intent to" enforce the Ordinance. Dkt. 18 at 22. At the motion to dismiss stage, there is no record evidence to support Defendants' bald assertions, nor should RDO be forced to take Defendants' word for it that they have no ability or intention to enforce the Ordinance—especially when, as described above, the Resolution indicates every intention to enforce the Ordinance in the future. For these reasons, RDO's claim is not barred by sovereign immunity.

E. RDO Is Not Required to Exhaust Its Claims in Tribal Court

Defendants move, in the alternative, for a stay of this action until RDO exhausts tribal court remedies. Defendants base their argument on a misapplication of the law, going so far as to misleadingly tell this Court that "[e]xhaustion is mandatory" based on Eighth. Circuit law. *See* Dkt. 18 at 23 (citing *Gaming World Int'l, Ltd. v. White Earth Band of*

Chippewa Indians, 317 F.3d 840, 849 (8th Cir. 2003). *Gaming World* does not, as Defendants suggest, stand for the notion that exhaustion is mandatory and the inquiry ends there. Rather, the Eight Circuit explained that exhaustion is prudential, not jurisdictional, and is required only "*when a case fits within the policy*, and the legal scope of the doctrine is a matter of law to be reviewed de novo." *Id*. at 849 (emphasis added).

Since exhaustion is only a "prudential rule," it is not a prerequisite for this Court to exercise jurisdiction. *Kodiak Oil*, 932 F.3d at 1133. It is well-established that "exhaustion is not required where it is 'plain' the tribal court lacks jurisdiction or where exhaustion 'would serve no purpose other than delay.'" *Id*. (quoting *Strate*, 520 U.S. at 459 n.14). Exhaustion is also not necessary where: "(1) an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) the action is patently violative of express jurisdictional prohibitions; *or* (3) exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1420 n.14 (8th Cir. 1996) (emphasis added). 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)).

In *Prairie Island*, the Eighth Circuit concluded that the plaintiff was not required to exhaust tribal remedies before seeking relief in federal court. 991 F.2d at 463. In that case, the plaintiff challenged a tribal ordinance requiring transporters to obtain a tribal license for nuclear material shipments on tribal lands. *Id*. The Eighth Circuit concluded that the

federal Hazardous Materials Transportation Act preempted the ordinance and went on to reject the tribe's exhaustion argument, explaining that, the "only remedies are those created in the ordinance itself, and those remedies are void by virtue of the ordinance's preemption." *Id*. Thus, plaintiff had "nothing to exhaust." *Id*.

Similarly, in *Hornell*, the Eighth Circuit did not require exhaustion of claims against a non-Indian company for conduct occurring off the reservation. 133 F.3d at 1091. In that case, several breweries sued in federal court to enjoin tribal court proceedings against it in which the tribe sued the breweries based on claims related to their sale of Crazy Horse Malt Liquor. *Id*. The Eighth Circuit found it "plain that the Breweries' conduct outside the Rosebud Sioux Reservation does not fall within the Tribe's inherent sovereign authority" and "clear the tribal court lacks adjudicatory authority over disputes arising from such conduct." *Id*. at 1093. The court noted that the parties "fail[ed] to cite a case in which the adjudicatory power of the tribal court vested over activity outside the confines of a reservation." *Id*. at 1091. Thus, the Eighth Circuit found no need for exhaustion.

The out-of-circuit cases Defendants rely upon are inapposite. For example, *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52 (9th Cir. 1981) involved a non-navigable water system that was *entirely* within the boundaries of the reservation. Although some of the water passed through lands held by non-Indians, all of those lands were also entirely within the reservation boundaries. *Id*. In light of these facts, the court acknowledged that "[t]he geographic facts of this case ma[d]e resolution of this issue somewhat easier than it otherwise might be." *Id*.; *see also FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916 (9th Cir. 2019) (holding that tribe had jurisdiction under both *Montana* exceptions where

the defendant stored of millions of tons of hazardous waste on the reservation, which generated lethal amounts of phosphine gas and that posed a constant and deadly threat to the tribe); *State of Montana v. U.S. E.P.A.*, 137 F.3d 1135 (9th Cir. 1998) (holding that the Environmental Protection Agency's regulations – *not* the tribe's regulations – pursuant to which the tribe's treatment-as-state authority was granted were valid as reflecting appropriate delineation and application of inherent tribal regulatory authority over non-consenting non-members); *Confederated Salish & Kootenai Tribes of Flathead Rsrv., Montana v. Namen*, 665 F.2d 951 (9th Cir. 1982) (holding that tribe had authority to apply a 1977 ordinance that was approved by the Secretary of the Interior).

Here, exhaustion is not required because it would be futile and serve no purpose other than to delay resolution of this action. This is particularly true where Defendants' authority to regulate RDO's groundwater withdrawals is barred by clear United States Supreme Court precedent. *See Montana*, 450 U.S. at 566; *Plains Commerce*, 554 U.S. at 341. In the same vein, exhaustion is also not required here because the absence of tribal court authority is plain in light of Defendants' efforts to regulate non-Indians on non-Indian owned land.[15]

Defendants also argue that their assertion of tribal jurisdiction is not frivolous or obviously invalid. Dkt. 18 at 26. But Defendants' arguments are largely based on flawed

[15] Defendants do not cite any legal support for their suggestion that the existence of an entirely separate litigation involving Mr. Vipond is somehow relevant to whether RDO, in this case, must exhaust tribal court remedies. Moreover, the fact that MN DNR may have, according to Defendants, acknowledged the *existence* of the Pre-Complaint Ordinance does not, in any way, suggest that the MN DNR "acknowledged the Nation's regulatory authority over such appropriations," as Defendants claim. Dkt. 18 at 29-30.

scientific analysis. Defendants argue vaguely that agricultural irrigation *generally* can have devastating impacts on reservation waters, fisheries, and lands. *Id.* at 28. But Defendants do not dispute the overarching conclusions in the Straight River Report or the Davis Report, demonstrating that groundwater withdrawals in the relevant area (which includes the RDO Lands) have not impacted the Reservation. *See, e.g.*, Ex. A, Straight River Report, at 58 (concluding that "[a]quifer levels have been stable and resilient through the extensive period of record, and the DNR is not concerned about long-term aquifer sustainability"); Ex. B, Davis Report, at 6.1-6.4 (concluding that groundwater levels show no long-term decline despite increased irrigation, RDO's operations do not affect lake levels or stream flow, and RDO's groundwater withdrawals are sustainable).

Defendants also employ misleading and out-of-context arguments in an effort to catastrophize the data. For example:

- Defendants emphasize RDO's withdrawal of "billions" of gallons of water[16]. *See* Dkt. 18 at 28. But the level of withdrawal is meaningless when divorced from the level of recharge. *See, e.g.*, Ex. A, Straight River Report, at 47, 51 (explaining that "[i]n the water table aquifer, safe yield means that the long-term average withdrawal rate does not exceed the long-term average recharge rate to the aquifer and the quality of the water"). And, as noted, both the Straight River Report and the Davis Report concluded that groundwater withdrawal was sustainable. *See id.* at 58; Ex. B, Davis Report, at 6.1-6.4.

- Defendants state that MN DNR concluded that "concentrated pumping near the stream and connected wetlands [in the Pine Point Ponsford area] likely limits the

[16] Defendants also argue that RDO "sometimes" exceeds its withdrawal permits. Dkt. 18 at 28. RDO concedes that during the extreme drought in one year—2021—RDO exceeded its permitted withdrawals. As the Straight River Report noted, however, when comparing two similarly dry years (1990 and 2021), despite water use increasing over 180%, total streamflow in 2021 was 20% greater than that measured in 1990. Ex. A, Straight River Report, at 24; *see also* Ex. B, Davis Report, at 2-1 (concluding that "recharge has been sufficient to maintain long-term stable trends, including under 2021 drought conditions").

amount of baseflow reaching the stream." Dkt. 18 at 7. Defendants conspicuously omitted MN DNR's conclusion in the first half of that sentence that there is "ample" groundwater supply to sustain current groundwater withdrawals: "Significant surficial sand aquifers are mapped in the Ponsford sub-management area that provide ample supply for past uses, but concentrated pumping near the stream and connected wetlands likely limits the amount of baseflow reaching the stream. See Ex. A, Straight River Report, at 58.

- Defendants state that "[b]y drawing down water levels, high-capacity wells and pumps reduce the groundwater recharge and surface water in Reservation lakes, ponds, streams and wetlands." Dkt. 18 at 8. Drawing down water levels does *not* reduce groundwater recharge, and Defendants cite no evidence to support this statement. Moreover, this statement is not substantiated by the Straight River Report or the Davis Report, which found that lake and stream levels in the Ponsford sub-management area were stable.

- Citing the 2017 Straight River Groundwater Management Area Plan, Defendants state that "[g]roundwater appropriations cumulatively may reduce Straight River streamflow up to thirty-four percent during the irrigation season, increasing water temperature by 0.5˚C to 1.5˚C." Dkt. 18 at 8-9. The 2017 Plan cites a 30-year-old study identifying *hypothetical* conditions that might have resulted in the reduction Defendants set forth. Specifically, the study found that the reduction might occur "if groundwater appropriation rates continued at the levels observed during that particularly hot, dry summer of 1988 (Stark et. al., 1994)."

- Again, citing the 2017 Straight River Groundwater Management Area Plan, Defendants state that "[t]he disappearance of Brook Trout from the Straight River is likely due to warmer temperatures." Dkt. 18 at 9. Notably, the 2017 Plan explains that Brook Trout have not been sampled in the Straight River since 1947, which predates RDO's operations. Dkt. 1-3, at 4-8.

The above comprises just a sample of Defendants' misleading statements, and none of them contradict the clear conclusions in both the Straight River Report and the Davis Report. Defendants simply have no evidence that RDO's operations are impacting White Earth, much less evidence that any impact is "catastrophic" such as to allow tribal jurisdiction over non-Indians. Indeed, Defendants' suspension of enforcement pending

further scientific study in and of itself demonstrates the frivolity and invalidity of their claims of jurisdiction to regulate RDO's conduct.

For these reasons, Defendants' alternative request to stay this proceeding until Plaintiff exhausts tribal court remedies should be denied.

IV. CONCLUSION

For the foregoing reasons, the Court should deny Defendants' Motion to Dismiss.

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