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 OPPOSITION TO DEFENDANT ROY'S MOTION TO STAY

Plaintiff David Vipond ("Vipond") submits this memorandum in response to Defendant Dustin Roy's motion to stay the above-captioned proceedings. (ECF No. 13.) Vipond opposes the motion to stay the federal suit and return to Tribal Court. The Tribal Court lacks jurisdiction over Vipond with respect to the application and enforcement of White Earth's Water Protection Ordinance (the "Ordinance"), and further proceedings would serve no purpose other than delay. Under such circumstances, exhaustion of tribal court remedies is not required. *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997); *Nevada v. Hicks*, 533 U.S. 353, 384 (2001). Determination of the issues raised by WEDNR in its suit against Vipond, including the extent of federally-reserved water rights and the scope of tribal jurisdiction over a nonmember on nonmember-owned fee lands, are federal questions. *Baley v. United States*, 942 F.3d 1312, 1340 (Fed. Cir. 2019); *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008) ("We begin by noting that whether a tribal court has adjudicative authority over nonmembers is a federal question."). Lastly, WEDNR's claims against Vipond implicate the State of Minnesota's rights with respect to its regulatory jurisdiction over its navigable waters, and its rights cannot be adjudicated by the Tribal Court, which lacks jurisdiction over the State. But the State's interests could properly be adjudicated in this Court, making continued proceedings in the Tribal Court futile.

INTRODUCTION

David Vipond has done nothing more than apply for and obtain a permit from the State of Minnesota. In its Tribal Court suit against him, the White Earth Division of Natural Resources ("WEDNR") has not alleged anything else. WEDNR has not alleged that he has

violated the Ordinance that was passed while his permit application was pending before the Minnesota Department of Natural Resources ("MDNR"). He has not installed the high-capacity pump. He has not applied for a permit from WEDNR, because, as a nonmember operating on his own fee lands, WEDNR does not properly have jurisdiction over him and its attempts to regulate him via the Ordinance are invalid under binding precedent. *Montana v. United States*, 450 U.S. 544 (1981) (establishing the general rule that the sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe on their fee lands). Because he has not applied for the WEDNR permit, Vipond has been sued in Tribal Court, where he is being forced to spend hundreds of thousands of dollars to defend himself. Even if Defendant Roy's Motion to Stay is granted and Vipond is required to litigate the issue of the Tribe's jurisdiction in the Tribal Court, the case will almost certainly return to this Court. This presents a situation that is both inefficient and unfair. It is not in the spirit of the prudential exhaustion rule. Because the Ordinance itself is invalid as to Vipond, the Tribal Court lacks adjudicatory authority to hear the matter. *Strate*, 520 U.S. at 453. Defendant Roy's Motion to Stay should be denied and the District Court should proceed to hear Plaintiff's Motion for Preliminary Injunction, filed October 11, 2024. (ECF No. 22.)

FACTUAL BACKGROUND

David Vipond fully set forth the background facts leading to the Tribal Court Action and the procedural history of the present suit in both his Amended Complaint (ECF No. 4, ¶¶ 7-42, 47-50, 53-84) and his Memorandum in Support of his Motion for Preliminary Injunction (ECF No. 24, 5-10) and will not reiterate that background again here. However,

because Defendant Roy makes several misstatements and/or misrepresentations in his Memorandum (ECF No. 15, 2-12), Vipond will address those issues briefly.

I. Vipond's State Permit Allows Him to Pump Approximately One Percent of the Average Daily Flow of the Wild Rice River.

Defendant Roy asserts that Vipond's permit allows him to pump up to 65.2 million gallons of surface water from the River per year, at a rate of up to 1,000 gallons per minute. (*Id*. at 2.) MDNR has approved a permit for Vipond to use a high-capacity pump, subject to the limitations of the permit, up to those figures. Those numbers may sound large, but the reality is that Vipond's proposed appropriation would comprise just one percent of the average daily flow of the Wild Rice River, as recorded at the Twin Valley gauge downstream of the proposed site. (Am. Compl. ¶ 61, ECF No. 4; Declaration of Courtney E. Carter ("Carter Decl.") ECF No. 26-1, at 3, ¶ 24.) As part of the permit application process, Vipond set forth a contingency plan describing the alternative he would use if the appropriation were restricted due to low flows or low water levels. His contingency plan includes implementing a low-flow irrigation system, soil moisture monitoring, buffer strips, and shutting off the pump if water levels are not sufficiently high.

Defendant Roy indicates that he "contacted MNDNR to register the Nation's concerns with Plaintiff's proposed appropriation." (Def. Roy's Mem. 3.) Any contact that Roy made was not an official written comment as part of the application's comment process. For some reason—or perhaps no reason—White Earth did not submit any written comments regarding this proposed appropriation, despite its subsequent claims that such

an appropriation would constitute a "substantial threat" to its reserved water rights and treaty-protected natural resources. (Carter Decl. Ex. 1, ECF No. 26-1, at 2, ¶ 17.)

II. WEDNR presents contradictory information about its Ordinance.

In his brief, Roy states that the Ordinance was enacted by the Reservation Business Committee ("RBC") "after significant analysis and coordination with scientific and community experts […]" (*Id*.) But the RBC modified the Ordinance by Resolution No. 057-24-030 in June 2024, just thirteen months after its initial enactment—one month after being sued by R.D. Offutt Farms[1] over the application of the Ordinance to its existing appropriations—directing WEDNR to "continue study and analysis of the hydrology of the White Earth Reservation, the inter-connectedness of surface and ground water on and adjacent to the Reservation, the impact of high-capacity pumping on water levels and aquatic species, and related issues." (Carter Decl. Ex. 3, ECF No. 26-1, at 20.) WEDNR does not attempt to reconcile the conflict between these statements. Apparently, a single new proposed appropriation warrants regulation over a nonmember on his fee lands, necessarily sufficient to meet the narrow second *Montana* exception, but existing appropriators require further study to understand.[2] Roy states, "New Sources present a unique threat to Reservation resources, as they compound the adverse impacts of existing high-capacity appropriations and may be located in areas where groundwater is slower to

[1] *R.D. Offutt Farms Co. v. White Earth Division of Natural Resources, et al.*, 024-cv-01600-JMB-LIB.

[2] Common sense dictates that the reverse would be true; it seems one would better be able to understand the environmental impact of existing sources instead of one that has not yet occurred.

recharge or waters have not previously been subject to intensive pumping or study." (Def. Roy's Mem. 4). This statement is wholly speculative, however. There are no active water appropriation permit operators on the River within the Reservation. (Carter Decl. Ex. 1, ECF No. 26-1, at 3, ¶ 20 (explaining there is one active Water Appropriation Permit downstream of Vipond's proposed appropriation point, in Norman County)).

Further, the Ordinance itself—despite being allegedly backed by "significant" scientific study pre-enactment—requires the *applicant* to show that its new appropriation will not cause adverse environmental impacts. (Def. Roy's Mem. 4.) WEDNR does not—and cannot—explain how it has already satisfied the second *Montana* exception to be able to apply the Ordinance to nonmembers on nonmember fee land yet also require the applicant to be able to somehow rebut that determination with the applicant's own evidence. The Ordinance, as written and as applied to nonmembers, is facially invalid and WEDNR's claims to the contrary are contradicted by the Ordinance's own requirements.

III. The State of Minnesota did not direct Vipond to apply for a permit from WEDNR.

After MDNR determined that Vipond's proposed appropriation would not harm the natural resources in the Wild Rice River, MDNR sent a cover letter enclosing the permit. (Second Declaration of Courtney E. Carter, Ex. 1.) In its letter, MDNR explained that the RBC passed an ordinance that "may apply" to Vipond's permit. (*Id*.) MDNR then provided Roy's contact information and stated that Vipond could contact Roy "[f]or more information on the resolution." (*Id*.) This statement can hardly be described as "acknowledge[ing] the Nation's regulatory authority over such appropriations." (Def.

Roy's Mem. 5.) The paragraph of the MDNR Findings of Fact cited by Roy in his brief states, in full:

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

(Carter Decl. Ex. 1, ECF No. 26-1, at 2, ¶ 17.) The language in the cover letter itself indicates just that a Resolution had been passed and that the Ordinance "may apply" to his permitted appropriation. MDNR did not direct Vipond to obtain such a permit, nor did it indicate that White Earth had jurisdiction to enforce such an Ordinance over him. WEDNR again misrepresents the underlying facts.

IV. Agriculture was a central purpose of the White Earth Reservation when it was created in 1867.

The White Earth Reservation was created by treaty between the United States and the Chippewa Indians of the Mississippi in 1867. 16 Stat. 719. In the preamble, the Treaty states that a reservation that had been created in an earlier treaty with the Chippewa has "been found that the said reservation is not adapted for agricultural purposes for the use of such of the Indians as desire to devote themselves to such pursuits […]" *Id*. Article II of the treaty, describing the land at White Earth, states: "In order to provide a suitable farming region for the said bands there is hereby set apart for their use a tract of land […]" *Id*.

In his Memorandum, Roy states that the 1867 Treaty "reserved the aboriginal right of Ojibwe people to fish, hunt, and gather wild rice on the Reservation for sustenance and commercial purposes, free from interference." (Def. Roy's Mem. 6.) Vipond does not dispute the hunting and fishing treaty rights that White Earth members possess. But it is an incomplete account to omit that a main reason for the specific location of the Reservation was its suitability for agriculture. Hole-in-the-Day's quotation in Roy's Memorandum touches on it when he says that the new area has "good soil" and "a healthy climate." (*Id*.) This is significant because the right to share in water reserved to the Indian allottee in a reservation passes to a non-Indian purchaser of land when title passes. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 50-51 (9th Cir. 1981). To the extent that agricultural uses of water were contemplated by the Treaty, those too would pass to the subsequent landowner. As Roy states, quoting *Cappaert v. United States*, 426 U.S. 128, 139 (1976), "[W]hen the Federal Government reserves land, by implication it reserves water rights sufficient to accomplish the purposes of the reservation." Vipond, too, has rights to share in the water within the Reservation, as a riparian landowner, under the authority relied upon by Roy in his Memorandum. (Def. Roy's Mem., 6-7; *Cappaert*, 426 U.S. at 139; *Winters v. United States*, 207 U.S. 564, 576-77 (1908); *Colville*, 647 F.2d at 50-51.) Further, the determination of federally-reserved water rights presents a federal question. *Baley v. United States*, 942 F.3d 1312, 1340 (Fed. Cir. 2019).

ARGUMENT

I. Vipond need not exhaust his remedies in Tribal Court as the Tribal Court plainly lacks jurisdiction over him, and further proceedings there serve no purpose other than delay.

Exhaustion of remedies before the tribal court is a prudential rule, not a prerequisite. *Strate*, 520 U.S. at 453. "[T]his requirement is not jurisdictional, it is a prudential rule based in '[r]espect for tribal self-government'[…]" *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1133 (8th Cir. 2019). 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. *Strate*, 520 U.S. at 459 n.14. Though exhaustion "contemplates the development of a factual record that will serve the 'orderly administration of justice in the federal court,'" "factual development is generally not required for facial challenges to jurisdiction." *Kodiak*, 932 F.3d at 1134 (quoting *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985)). Roy sets forth the four exceptions to the exhaustion rule and presents arguments against each, but Vipond is only asserting the fourth exception; namely, that the Tribal Court lacks adjudicatory authority over him as White Earth lacks jurisdiction under the second *Montana* exception to apply their Water Protection Ordinance to Vipond. *Hicks*, 533 U.S. at 367. Lastly, exhaustion of tribal remedies is nonsensical when a necessary and indispensable party—the State of Minnesota—cannot be joined in the Tribal Court. Determining regulatory authority of navigable waters in the absence of the State is prejudicial to the State's interests and conflicts with precedent. *Hood ex rel. Mississippi v. City of Memphis, Tenn.*, 570 F.3d 625

(5th Cir. 2009); *Pueblo of Sandia v. Babbitt,* 47 F. Supp. 2d 49 (D.D.C. 1999); *Native American Mohegans v. U.S.*, 184 F. Supp. 2d 198 (D. Conn. 2002).

A. Because the Ordinance is invalid as to Vipond, the Tribal Court lacks jurisdiction over the underlying lawsuit.

Binding precedent controls here: "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." *Strate*, 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. *Hicks*, 533 U.S. at 367. Such is the case here.

B. Vipond's proposed appropriation would not cause "catastrophic harm" to White Earth's self-government or internal relations.

The sovereignty that Indian tribes retain is of a unique and limited character, and it centers on the land held by the tribe and on tribal members within the reservation. *Plains Commerce*, 554 U.S. at 327 (citing *United States v. Wheeler*, 435 U.S. 313, 323 (1978); *United States v. Mazurie*, 419 U.S. 544, 557 (1975)). The general rule is that tribes do not possess authority over non-Indians who come within their borders. *Plains Commerce*, 554 U.S. at 328 (citing *Montana*, 450 U.S. at 565). "This general rule restricts tribal authority over nonmember activities taking place on the reservation, and is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians—what we

have called "non-Indian fee land." 554 U.S. at 328 (citing *Strate*, 520 U.S. at 446). *Montana* sets out two exceptions to this general rule, both of which are limited and should not be construed in a way that would "swallow the rule." *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 655 (2001).

The parties agree that Vipond and White Earth are not engaged in a consensual relationship, so the first exception from *Montana* is inapplicable. To have civil jurisdiction over a nonmember under *Montana*'s second exception, the tribe must show that the activity of the nonmember "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. Importantly, the Supreme Court has cautioned:

> Montana's second exception 'can be misperceived.' The exception is only triggered by *nonmember conduct* that threatens the Indian tribe; it does not broadly permit the exercise of civil authority wherever it might be considered 'necessary' to self-government. Thus, unless the […] nonmember's conduct […] is so severe that it actually 'imperil[s]' the political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands.

Atkinson, 532 U.S. at 657 n.12 (citing *Montana*, 450 U.S. at 566).

Precedent is clear: the burden under the second *Montana* exception is very high, and White Earth cannot meet it here.

1. The appropriation cannot affect 99% of the relevant waters within the Reservation.

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. (Carter Decl. Ex. 10, ECF No. 26-1, at 70-71,

Def.'s Answers to Pl.'s Interrog. Nos. 15, 19.) 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.)

(i) The cases Roy cites are all factually distinguishable.

The authority relied on by Roy involve *upstream* appropriations, subsurface waters, or appropriations from pools or lakes—nothing like a downstream appropriation from a navigable river. *See Colville*, 647 F.2d at 52 (the farmer's appropriation allegedly affected downstream tribal lands and trout fishery); *Cappaert v. United States*, 426 U.S. 128 (1976) (ranch pumping groundwater from an underground aquifer that sourced an underground pool near Death Valley); *Winters*, 143 F. 740 (water appropriation was upstream of Indian reservation)[3]. It is possible for upstream appropriations to impact downstream water flows and ecology. But it is simply impossible for downstream appropriations to affect the water and ecology that exists upstream. Withdrawing water from a river does not present the same impacts as withdrawing water from an underground aquifer in a desert climate.

Roy also cites to three Ninth Circuit opinions that determined the second *Montana* exception was satisfied. (Def. Roy's Mem., 29-30.) These are also distinguishable. *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 935 (9th Cir. 2009) involved a

[3] These cases also predate the Supreme Court's subsequent jurisprudence in *Strate*, *Hicks*, *Atkinson*, and *Plains Commerce*, which involved the application of the second *Montana* exception.

nonmember corporation storing *millions of tons of hazardous waste* on the reservation. The record contained "extensive evidence of toxic, carcinogenic, and radioactive substances at the FMC site." *Id*. *State of Montana v. U.S. E.P.A.*, 137 F.3d 1135, 1141 (9th Cir. 1998) involved review of whether EPA's regulations, under which the relevant tribe was granted "treatment as a state" status reflected valid exercise of tribal authority over nonmembers. The Ninth Circuit held EPA's finding that the second *Montana* exception was satisfied was reasonable as the case involved pollutants in surface water, and the nature of pollutants in such water does not permit a distinction between any harm to the tribal portion of the reservation and the fee land portion of the reservation. The potential polluters on fee lands included "feedlots, dairies, mine tailings, auto wrecking yards and dumps, construction activities and landfills" and "wastewater treatment facilities, commercial fish ponds and hatcheries, slaughterhouses, hydroelectric facilities and wood processing plants." *Id*. at 1140. *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982) involved a lake held in trust by the United States for a tribe. The *Montana* analysis in *Namen* is also superficial at best. Decided just one year after *Montana*, the opinion wonders about the scope and meaning of *Montana* as a new Supreme Court decision. The Ninth Circuit ultimately concludes that the conduct at issue "has the potential for significantly affecting the economy, welfare, and health of the Tribes." *Id*. at 964. This analysis cannot hold much weight in light of forty-two additional years of jurisprudence under *Montana*, including the critical decisions in *Strate*, *Atkinson*, *Hicks*, and *Plains Commerce*.

2. Any harm to sturgeon is wholly speculative, as there are no spawning sturgeon present in the River.

Although Roy claims that White Earth has "worked for twenty-five years to restore a self-sustaining lake sturgeon population," (Def. Roy's Mem. 8), the reality is that there are no sturgeon that are presently spawning in the River. (Am. Compl. ¶ 67.) And the circumstances surrounding the proposed appropriation also make any harm to a future sturgeon population 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.) 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.) Vipond has agreed to suspend pumping in those circumstances.

3. No on-Reservation baitfishing occurs downstream of the appropriation site.

WEDNR has alleged that its baitfishers will suffer economic injury from Vipond's proposed appropriation, on the basis that a lower water level will undermine the baitfishers' ability to harvest enough bait. Again, such harm is entirely speculative and unsupported by the facts. No baitfishing within Reservation boundaries occurs downstream of Vipond's proposed site. (Def.'s Answer to Pl.'s Interrog. No. 19, Carter Decl. Ex. 10, ECF No. 26-1, at 71.) As noted above, the pump will shut off if water levels reach 18 cfs. And no activities that are upstream of the pump can be affected.

4. There are no wild rice stands within the Reservation downstream of the appropriation site.

Wild ricing by White Earth members primarily occurs in Lower Rice Lake, not the Wild Rice River. White Earth Wild Rice Manager Clifford Crowell explained that White Earth had a record season of wild rice harvesting this summer and attributed it to White Earth's "control" of the lake levels through water releasing and damming in Lower Rice 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. WEDNR's alleged harm to wild ricing suffers from the same logical defects as its other ecological claims: the location of the pump, the pump shut-off at low water levels, and the fact that no wild rice within the Reservation is grown downstream of the pump site make any impact, let alone a catastrophic one, improbable.

5. MDNR considered the environmental impacts on the surrounding natural resources before approving the permit.

MDNR is in charge of conserving and managing the State of Minnesota's natural resources. In its mission statement, MDNR explains: "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, ECF No. 26-1, at 4, ¶ 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.[4]

C. The cases Roy cites requiring exhaustion are inapposite.

Roy first cites to *Gaming World Intern., Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840 (8th Cir. 2003). *Gaming World* involved a dispute between White Earth and a corporation that operates casinos, over the terms of the contract between the parties. The corporation brought an action in federal court after being sued in tribal court, seeking an order to compel arbitration. The second *Montana* exception was not a factor in the court's decision to require exhaustion of tribal court remedies, nor nonmember fee lands.

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987) involved a plaintiff seeking personal injury damages in tribal court against the insurance company of their employer.

[4] 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.

WPX Energy Williston, LLC v. Jones, 72 F.4th 834 (8th Cir. 2023) involved a dispute over a term in an agreement independently negotiated between the energy company and the tribe. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) addressed the personal injury damages claim of an Indian minor injured on State-owned lands located within the Crow Indian Reservation. *Granberry v. Greer*, 481 U.S. 129 (1987) involved a state prisoner seeking a writ of habeas corpus—no tribal issues were even involved. The Court explained, "*At the other extreme, we might treat nonexhaustion as an inflexible bar* to consideration of the merits of the petition by the federal court, and therefore require that a petition be dismissed when it appears that there has been a failure to exhaust." *Id*. at 131 (emphasis added). None of these cases involved application of the second *Montana* exception to conduct on nonmember fee land.

Duncan Energy Co. v. Three Affiliated Tribes of Fort Berthold Reservation, 27 F.3d 1294 (8th Cir. 1994) involved a dispute regarding tribal taxation and employment rights. The Eighth Circuit was reviewing the district court's grant of summary judgment for the energy company and determined that summary judgment was "clearly inappropriate." The court said: "We make no judgment as to the merits of the case, but hold that the district court erred by failing to analyze the applicability of the *Montana* exceptions and by finding this exercise of regulatory authority impermissible as a matter of law." It later explained that the tribe faced a "heavy burden" in justifying the regulations at issue under *Montana*. *Id*. at 1301. Thus, Roy's characterization that the case "require[ed] exhaustion of tribal court remedies in dispute under second *Montana* exception" is misleading at best. (Def. Roy's Mem. 31.)

Thlopthlocco Tribal Town v. Stidham, 762 F.3d 1226 (10th Cir. 2014) was a dispute between two tribes regarding the results of an election. There were no non-members involved and no discussion of *Montana* was required. *DISH Network Service LLC v. Laducer*, 725 F.3d 877 (8th Cir. 2013) arose out of a contract governing activities on tribal land. The court rejected the application of DISH's argument that the tribal court plainly lacked jurisdiction: "It is not 'plain' that a tribal court lacks authority to exercise jurisdiction over tort claims closely related to contractual relationships between Indians and non-Indians on matters occurring on tribal lands." *Id*. at 885. The second *Montana* exception did not apply, nor was there an issue of regulation of nonmember fee lands. *Nguyen v. Gustafson*, No. 18-cv-522-SRN-KMM, 2018 WL 1413463 (D. Minn. Mar. 21, 2018) involved competing divorce petitions between a tribal-enrolled spouse and a non-Indian spouse. The court did not engage in its own *Montana* analysis but instead reiterated the findings of the tribal court on *Montana* when holding that the question of tribal jurisdiction was not "patently invalid" to excuse exhaustion. *Id*. at *5. The court acknowledged, "Nguyen presents valid arguments against tribal court jurisdiction, and may ultimately prevail on his jurisdictional challenge." *Id*.

Roy also presents *Attorney's Process & Investigation Servs., Inc. v. Sac and Fox Tribe of Miss. In Iowa*, 609 F.3d 927 (8th Cir. 2010) in a misleading fashion, indicating the court "require[ed]" exhaustion and upheld tribal jurisdiction under the second *Montana* exception. (Def. Roy's Mem. 30.) In fact, the parties had already exhausted in tribal court before they reached the Eighth Circuit, so it is incorrect to say that the decision "require[ed]" exhaustion. In addition, the court expressly held that the tribe failed to

demonstrate it had adjudicatory authority over the conversion claim in the suit under the second *Montana* exception. *Id*. at 940-41. With respect to its trespass and trade secret claims, the court found that the tribe did have authority under the second *Montana* exception, but the decision hinged on the fact that the conduct at issue *occurred on tribal land*. *Id*. at 940. "Here, the Tribe does not seek to assert jurisdiction over non Indian fee land. The facilities API raided are on tribal trust land. The Tribe's trespass and trade secrets claims thus seek to regulate API's entry and conduct upon tribal land, and they accordingly 'stem from the tribe's 'landowner's right to occupy and exclude.'" *Id*. (internal citations omitted).

All of these cases are distinguishable from the present matter, where we have a farmer who would like to irrigate his crops, on his own land, under the terms of a state-issued permit. This authority cannot be fairly relied on to guide the court's analysis here.

D. Courts reject exhaustion when the issue involves whether the second *Montana* exception is satisfied.

When faced with application of the second *Montana* exception, courts reject that exhaustion is required. *Strate*, 520 U.S. 438; *Hicks*, 533 U.S. 353. In *Hicks*, 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.

In addition to the Supreme Court decisions in *Strate* and *Hicks*, other courts similarly reject requiring exhaustion when a tribe seeks to regulate nonmember conduct on nonmember fee land. In *Evans v. Shoshone-Bannock Land Use Policy Com'n*, 736 F.3d 1298 (9th Cir. 2013), the nonmember property owner brought an action seeking a declaratory judgment that the tribe lacked jurisdiction over his ability to construct a single-family home on his land, located within the reservation. The Ninth Circuit expressly rejected exhaustion of remedies: "There is no dispute that Evans failed to exhaust tribal remedies. But the exhaustion requirement is not absolute." *Id*. at 1302. The court then explained that whether he is required to exhaust depends on whether the tribal court's jurisdiction is "colorable or plausible." *Id*. The tribe alleged it had authority to regulate under the second *Montana* exception, claiming that there were issues with groundwater contamination, improper disposal of construction debris, and increased risk of fire. *Id*. at 1305. The Ninth Circuit rejected these claims as sufficient under the second *Montana* exception. "The Tribes fail to show that Evans' construction of a single-family house poses catastrophic risks. The Fort Hall Reservation has long experienced groundwater contamination, and the Tribes proffer no evidence showing that Evans' construction would meaningfully exacerbate the problem." *Id*. at 1306. Further, the concerns about the waste disposal, fire hazards, and substandard construction practices were "speculative" and the

Tribe "fail[ed] to provide specific evidence showing that tribal regulation of Evans' modest construction project is necessary to avert catastrophe." *Id*. at 1306, and n.8.

In *Fort Yates Pub. Sch. Dist. No. 4 v. C.M.B.*, 786 F.3d 662 (8th Cir. 2015), the Eighth Circuit rejected exhaustion where the second *Montana* exception did not justify tribal regulation. The court explained that the threat of a federal lawsuit against a tribe did not imperil the subsistence of the tribe and tribal court jurisdiction was not "necessary to avert catastrophic consequences." *Id*. at 670 (internal quotations omitted). Because there was no colorable claim of tribal jurisdiction, exhaustion would "serve no purpose other than delay" and therefore was not required. *Id*. at 672 (citing *Strate*, 520 U.S. at 459 n.14).

In *Burlington Northern R. Co. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999), the estates of deceased tribal members in a wrongful death action alleged that the second *Montana* exception was satisfied because the deaths of tribal members caused damage to the community and deprived the tribe of potential councilmembers, teachers, and babysitters. *Id*. at 1065. The Ninth Circuit rejected this argument, applying *Strate*. "[I]f *Montana*'s second exception required no more, the exception would severely shrink the rule." *Id*. The court also rejected the claim of economic harm stemming from the Tribe's burial allowance for its members, saying such a claim was not proof of "demonstrably serious" economic consequences. *Id*. Exhaustion was therefore not required. *Id*. at 1065-66.

This court held similarly, in *Otter Tail Power Co. v. Leech Lake Band of Ojibwe*, No. 11-CV-1070-DWF-LIB, 2011 WL 2490820 (D. Minn. June 22, 2011). There, the Leech Lake Band of Ojibwe sought to regulate a utility company's high-voltage transmission construction line project. The Band claimed the company needed to obtain its

consent to proceed with the project. This court rejected that claim, explaining that neither *Montana* exception applied to give the tribe jurisdiction. As to the second *Montana* exception, the court disagreed that the project would sufficiently disrupt the tribe's treaty rights to hunt, fish, and gather so as to satisfy *Montana*. "While the record makes clear that there will be some impact on these rights, the record also demonstrates that the impacts will be limited in scope and duration. The Tribe has failed to demonstrate how the impairment of these rights via the construction of the Project will rise to a level of disruption that will imperil the subsistence of the Tribe's community." *Id*. at *5. Therefore, exhaustion would serve no purpose other than delay and was not necessary. *Id*. Although the construction project in *Otter Tail* differs from the nature of Vipond's proposed appropriation, his appropriation is not year-round. It is subject to the requirements of the state permit. And even *some* impact on tribal fishing, hunting, and gathering rights—which WEDNR has failed to show—is not sufficient to satisfy *Montana*'s second exception. *Id*. at *5. As in these cases, where the tribe lacks jurisdiction over the conduct at issue, exhaustion serves no purpose other than delay.

II. Vipond's federal action hardly comes at the "eleventh hour" of the Tribal Court Action, which is still in early stages due to being on hold for most of the last year.

Roy claims that Vipond's challenge to tribal court jurisdiction comes too late, as the parties have exchanged expert reports and are scheduling twenty-three[5] depositions of

[5] Roy notes that Vipond requested nineteen of the twenty-three depositions. This is true. WEDNR submitted reports or affidavits for nineteen witnesses. Vipond requested that WEDNR consider paring down the number of affidavits before the Tribal Court, but WEDNR declined to do so.

witnesses. Therefore, the federal action will create a "procedural nightmare." Not so. As an initial matter, the Tribal Court Action has been on hold for most of the last year, as Roy acknowledges ("the parties […] have agreed to numerous revisions of the case schedule to accommodate Plaintiff's counsel.") (Def. Roy's Mem. 1.) As explained in the Declaration of Randy V. Thompson, filed with Vipond's Motion for Preliminary Injunction, WEDNR counsel has graciously agreed to extensions due to his serious health issues, which included multiple surgeries and hospitalizations. (ECF No. 25.) As of the date of this Response, only two days of depositions have currently taken place. The two-day hearing on jurisdiction, which requires briefing, and post-trial findings of fact, is yet to occur. If Vipond is required to exhaust in tribal court, this determination of jurisdiction will then likely be appealed by the losing party to the White Earth Tribal Court of Appeals. That, too, will require extensive briefing and another hearing. With the speed of litigation and required appeals, Vipond will not realistically return to federal court for years.[6]

Principles of judicial economy are supported by the move to federal court. For starters, as explained, *infra* Part III, because the State of Minnesota is a required party to be joined, and who cannot be joined in the Tribal Court, all of the fact discovery that is

[6] Roy repeatedly suggests that Vipond seeks relief in the federal court because of a perception of prejudice against the Tribal Court. (Def. Roy's Mem. 22.) This is a mischaracterization. Vipond has stated the structure of White Earth's government and judiciary. And Vipond's concerns about the procedures thus far before the Tribal Court are not unfounded; the Tribal Court granted an *ex parte* order on WEDNR's motion for preliminary injunction before the time to answer had run and without a hearing on the motion. Regardless, the basis for Vipond seeking relief in the federal court is due to the lack of jurisdiction of the Tribal Court, and not any concerns about the integrity of the Tribal Court.

underway in the Tribal Court will need to be repeated if the Tribal Court is not enjoined. The time and cost of repeating fact discovery does not weigh in favor of exhaustion and a stay of this action. Requiring the parties to continue a necessarily incomplete adjudication of rights before the Tribal Court would create the nightmare of duplicative and wasteful subsequent litigation.

III. The State of Minnesota is a necessary party to be joined and cannot be joined in the Tribal Court.

By continuing in the Tribal Court, the State's interests in its navigable waters are being adjudicated in its absence. 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, ECF No. 26-1, at 58.) Litigating the sovereign rights of a government in its absence is tremendously prejudicial to its interests. 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).

A. Even in Indian country, a State retains regulatory authority.

The State of Minnesota has authority, even within Indian country, over criminal and civil matters. "Indian country is part of the State, not separate from the State […] as a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country." *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 636 (2022) (citing U.S. Const. amend. X.). Tribes, of course, retain inherent sovereign authority over its members and on its lands, and have authority over nonmembers and nonmember fee lands in certain limited circumstances, as exhaustively explained above. "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." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204-05 (1999).

Roy suggests he is now walking back the claim that the State's interests are preempted. (Def. Roy. Mem. 25, n.10.) But its positions in its Memorandum undercut this claim sharply. Roy refuses to acknowledge key facts, such as the navigable nature of the Wild Rice River and the State's ownership of the bed of that water, which is part of the State's sovereign authority to regulate the River. The only case to which Roy cites to support a tribe's regulation over a nonmember's irrigation of fee lands is *Colville*, 647 F.2d 42, where the Ninth Circuit held that the state's regulatory authority was preempted and "of no force and effect." *Id*. at 53. *Colville is* the authority for WEDNR's preemption claim. (Carter Decl. Ex. 9, ECF No. 26-1, at 58.) *Colville* stands for the proposition that a tribe has exclusive regulatory authority over the waters within its reservation. Roy's assertion that the claim of preemption is "of no moment" is not credible when Roy does not attempt to differentiate *Colville*, which relies on the determination of exclusive tribal authority and the unique facts presented in that case.[7]

Roy is plainly troubled by the State being a necessary and indispensable party and attempts unsuccessfully to minimize the State's interests at play. Roy says that WEDNR is

[7] *Colville* involved a non-navigable stream entirely within the boundaries of the reservation. The Ninth Circuit explained, "The geographic facts of this case make resolution of this issue somewhat easier than it otherwise might be." *Id*. at 52.

not seeking an adjudication of water rights in the present matter. (Def. Roy. Mem. 25.) But if a proposed appropriation of *one percent* of daily flow in the River would cause "catastrophic" harm, Roy necessarily is claiming WEDNR is entitled to 100% of the waters in the River. Roy is necessarily claiming that WEDNR can regulate the River differently from the State's regulation, which would apparently permit "catastrophic" harm. The State must be joined as a party because its regulatory authority is necessarily implicated in the Tribal Court Action. *Hood ex rel. Mississippi v. City of Memphis, Tenn.*, 570 F.3d 625 (5th Cir. 2009); *Pueblo of Sandia v. Babbitt,* 47 F. Supp. 2d 49 (D.D.C. 1999); *Native American Mohegans v. U.S.*, 184 F. Supp. 2d 198 (D. Conn. 2002).

CONCLUSION

Because the Tribal Court plainly lacks jurisdiction over the matter, exhaustion would serve no purpose other than to delay resolution of these issues. Vipond respectfully requests that the Court deny Defendant Roy's Motion to Stay and allow the matter to proceed in this Court.

Respectfully submitted,

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Dated: October 16, 2024

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