UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

DEFENDANT DUSTIN ROY'S OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Since August 2023, Plaintiff David Vipond and the White Earth Division of Natural Resources (WEDNR) have been engaged in active litigation in the White Earth Tribal Court, developing facts—including through witness affidavits, expert reports, written discovery, and depositions—that will serve as the predicate for that court's resolution of their dispute. The dispute centers on the White Earth Nation's jurisdiction to regulate Mr. Vipond's proposal to engage in the high-capacity pumping of tens of millions of gallons of Reservation waters—activity that threatens devastating harm to the wild rice, fisheries, and other natural resources that sustain the Tribal community. The parties will present the body of evidence they are developing, along with live testimony, to the Tribal Court at a two-day hearing in February 2025, after which the Tribal Court will make findings of fact and conclusions of law to resolve the parties' jurisdictional dispute and Mr. Vipond's challenge to the Tribal Court's adjudicatory jurisdiction. WEDNR's pre-hearing brief on jurisdiction is due November 13, 2024, and Mr. Vipond's brief is due December 6, 2024.

Now, despite the considerable factual development that has taken place for over a year in the Tribal Court, Plaintiff asks this Court to enter a preliminary injunction, Dkt. 22, and to bring the Tribal Court proceedings to an abrupt halt. He asks this Court to rule on the same legal and factual arguments that he is making in Tribal Court, yet without the factual record before it. Plaintiff's collateral attack on the Tribal Court action is barred by clear precedent—until Mr. Vipond exhausts his challenge to tribal jurisdiction in the Nation's courts, "it would be premature for a federal court to consider any relief," *Nat'l*

Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 857 (1985); *see also WPX Energy Williston, LLC v. Jones*, 72 F.4th 834, 835 (8th Cir. 2023) (vacating preliminary injunction because company "did not exhaust its tribal court remedies" and thus "a ruling in federal court on the question of tribal court jurisdiction was premature").

Accordingly, Defendant Dustin Roy, in his official capacity as WEDNR divisional director, has moved to stay this matter pending Plaintiff's exhaustion of remedies in the Nation's courts. Dkt. 13. A stay is the proper course of action under the tribal exhaustion doctrine, but if the Court reaches Plaintiff's motion for a preliminary injunction, that motion should be denied. Plaintiff fails to establish that WEDNR's assertion of jurisdiction "is frivolous or obviously invalid under clearly established law," *DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 883 (8th Cir. 2013), or that he would suffer irreparable harm by completing the tribal court proceedings in which he has actively participated for fourteen months.

BACKGROUND

I. The White Earth Reservation and the Nation's Treaty-Protected Waters and Fishing, Hunting, and Gathering Rights.

The White Earth Reservation was reserved by and guaranteed to the Ojibwe people in the United States' Treaty with the Chippewa of the Mississippi, Mar. 19, 1867, 16 Stat. 719, and comprises approximately 830,000 acres in Mahnomen County and portions of Becker and Clearwater Counties, *Littlewolf v. Lujan*, 877 F.2d 1058, 1060 (D.C. Cir. 1989) (stating acreage). When Chief Hole-In-The-Day proposed the location

that would become the White Earth Reservation in a letter to the President of the United States, he explained that

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

State v. Clark, 282 N.W.2d 902, 909 n.19 (Minn. 1979) (emphases added) (quotation marks omitted). The Treaty reserved the aboriginal right of Ojibwe people to fish, hunt, and gather wild rice on the Reservation for sustenance and commercial purposes, free from interference. *Id.* at 909; *see also, e.g.*, *United States v. Dion*, 476 U.S. 734, 738 (1986) ("As a general rule, Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them[.]").[1]

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

> Under this Court's longstanding reserved water rights doctrine, sometimes referred to as the *Winters* doctrine, the Federal Government's reservation of land for an Indian tribe also implicitly reserves the right to use needed water from various sources—such as groundwater, rivers, streams, lakes,

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

> and springs—that arise on, border, cross, underlie, or are encompassed within the reservation.

Id. at 561; *see also Cappaert v. United States*, 426 U.S. 128, 139 (1976) ("[W]hen the Federal Government reserves land, by implication it reserves water rights sufficient to accomplish the purposes of the reservation."); *Winters v. United States*, 207 U.S. 564, 576-77 (1908). The Nation's *Winters* rights include sufficient water for current and future consumptive uses (such as household, commercial, agricultural, and industrial uses) and for non-consumptive uses (such as instream flows to protect fisheries). *See, e.g.*, *Navajo Nation*, 599 U.S. at 561; *United States v. Adair*, 723 F.2d 1394, 1410-11 (9th Cir. 1983).

In the decades after the 1867 Treaty, the Nation was dispossessed of much of its Reservation land base through the policy of "allotment," which nationwide resulted in the loss and transfer to non-Indians of approximately ninety million acres of Indian lands. *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650 n.1 (2001); *Clark*, 282 N.W.2d at 905-06. All lands within the boundaries of the White Earth Reservation, however, including formerly allotted lands now owned in fee by non-Indians, retain their "Indian country" status under federal law. *Clark*, 282 N.W.2d at 906; *see also, e.g.*, *McGirt v. Oklahoma*, 591 U.S. 894 (2020). "Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it[.]" *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998).

Fishing, hunting, and gathering wild rice are no less central to the physical sustenance and economic survival of the Nation's people today than they were 150 years ago when they entered the Treaty. Hundreds of Tribal members provide healthy food for

their families throughout the year with wild rice, fish, and game harvested on the Reservation and generate a substantial portion of their annual income from the commercial sale of wild rice and baitfish (minnows and leeches). Decl. of Dustin Roy in Support of Def. Roy's Opp'n to Pl.'s Mot. for Prelim. Inj. ("Roy Decl.") ¶¶ 16, 20-21, 32; Decl. of Jacob Syverson in Support of Def. Roy's Opp'n to Pl.'s Mot. for Prel. Inj. ("Syverson Decl.") Exs. B-E. Tribal members harvest these resources throughout the entire Reservation, including in the Wild Rice River (named in Chief Hole-In-The-Day's letter) and Rice Lake and White Earth Lake (named in Article 2 of the 1867 Treaty), as well as in off-reservation areas. Roy Decl. ¶¶ 15-34.

II. The Impacts of High-Capacity Pumping on Reservation Natural Resources, and the White Earth Groundwater and Surface Water Protection Ordinance.

Water is the lifeblood of the Reservation. The Reservation contains 530 lakes over ten acres in size, more than 300 miles of rivers and streams, and more than 150,000 acres of wetlands. *Id.* ¶ 35. The Reservation's surface waters and groundwater aquifers are an interconnected and highly complex resource. *Id.* ¶ 37.

Sufficient levels of surface water and groundwater are necessary to sustain the natural resources that define life on the Reservation. *Id.* ¶¶ 35-52. Wild rice beds, for example, require sufficient water levels during the summer months to support the stalks as they grow taller, until the rice is ready for harvest. *Id*. ¶ 42. The Nation's walleye fishery depends on sufficient water for WEDNR's hatchery and the natural rearing ponds where fry grow to fingerlings before they are planted throughout the Reservation. *Id*. ¶¶ 12, 50; Syverson Decl. Ex. C. The baitfish industry also relies on maintaining water in

rivers, streams, lakes, and ponds—lower water means warmer water with less oxygen (unsuitable for minnow habitat) and impairs harvester access. Roy Decl. ¶ 49. And for twenty-five years, the Nation has worked to reintroduce a self-sustaining lake sturgeon population on the Reservation, including in the Wild Rice River. *Id*. ¶ 11 & Ex. C ¶¶ 7-26; Syverson Decl. Ex. C. These ancient fish play a powerful role in Ojibwe culture and identity and must have sufficient water at all life stages, including for spawning and migration. Roy Decl. ¶¶ 11, 48.

Unfortunately, Reservation waters have been subject to rapidly increasing and permanent depletion by industrial agriculture for more than fifty years. There are approximately eighty-four high-capacity wells and pumps in total on the Reservation, pumping up to approximately 3.28 billion gallons of water annually (or even more when exceeding state-permitted levels, *infra* p. 7). *Id.* ¶ 53; Syverson Decl. Ex. A. For example, in the southeast corner of the Reservation alone, "[a]gricultural irrigation has increased water use by an average of 77 million gallons of water per year since 1988." MNDNR, Straight River Groundwater Management Area Plan 2-5 (Mar. 2017).[2] These wells and pumps deplete groundwater aquifers and lower surface water levels in Reservation lakes, ponds, streams, and wetlands that support the natural resources that sustain the Tribal community. *See* Syverson Decl. Exs. B-E. To make matters worse, the peak irrigation season coincides with a time of critical water need for the Reservation's fisheries,

[2] https://files.dnr.state.mn.us/waters/gwmp/area-sr/sr_gwma_plan.pdf.

wildlife, wild rice, and other aquatic plants, which rely on summer low flows. Roy Decl. ¶¶ 54-57 & Exs. C ¶¶ 32-39, D ¶¶ 25-47.

The necessity of maintaining sufficient water levels to sustain Reservation resources cannot be overstated. The entire Reservation wild rice harvest can fail without sufficient water. In 2021, for example, tribal members harvested less than 10,000 pounds of rice, a mere four percent of the 280,000 pounds harvested a few years earlier in 2018. Roy Decl. ¶¶ 44-45; *see also id.* ¶ 43 (observing that small river system that connects important ricing waters is now nearly dry most of the year); *id.* Ex. D ¶¶ 32-38 (describing wild rice need for water). That summer, an irrigator operating in the southeast portion of the Reservation pumped over 1.5 billion gallons of groundwater in excess of permitted levels and paid only a de minimis fine to the State for doing so. *See* Greg Stanley, *Fighting Drought, Potato Farmers in Northern Minnesota Overdrew Their Water Permits by Tens of Millions of Gallons*, The Minnesota Star Tribune (Feb. 18, 2023).[3] As another example, water levels at rearing ponds are sometimes too low in August and September to retrieve walleye fingerlings, which prevents WEDNR from planting the fish for harvest throughout the Reservation. Roy Decl. ¶ 50. Water levels in some ponds are too low to be used for rearing at all. *Id*.

On May 5, 2023, after significant analysis and coordination with scientific experts, the White Earth Nation Reservation Business Committee (RBC), which is the Nation's

[3] https://www.startribune.com/drought-potato-farmers-in-minnesota-overdrew-water-permits-by-tens-millions-gallons-r-d-offutt/600252769; *see also Big Farms and Flawless Fries Are Gulping Water in the Land of 10,000 Lakes*, The New York Times (Sept. 3, 2023), https://tinyurl.com/48e8xj8a (noting impacts on White Earth Reservation).

duly elected governing body, enacted the White Earth Reservation Groundwater and Surface Water Protection Ordinance ("Water Protection Ordinance" or "Ordinance") to protect the Reservation's natural resources against harm from existing, and the continued expansion of, "high-capacity" groundwater wells and surface water pumps (those capable of pumping more than 10,000 gallons per day or one million gallons per year). Dkt. 4-1 at PDF pp.7-9, 17. The RBC has declared that the Ordinance

> is necessary to protect against substantial threats to the Nation's reserved water rights and treaty-protected natural resources and to ensure that high-capacity ground water wells and high-capacity surface water pumps, individually and cumulatively, do not deplete the quantity or impair the quality of Reservation waters; harm water-dependent resources critical to the White Earth way of life, including wild rice, lake sturgeon, and other fisheries; and imperil the physical, cultural, and spiritual health and welfare, the economic security, and the political integrity of the White Earth Nation and its members[.]

Id. at PDF p. 21. The Ordinance defines two categories of high-capacity groundwater wells and surface water pumps: (1) "New Source[s]" not in operation as of May 5, 2023 (the effective date of the Ordinance), and (2) "Existing Source[s]" already in operation on that date. *Id.* at PDF pp. 8-9. The Ordinance does not regulate other Reservation water uses, such as domestic wells for household use. It regulates only high-capacity wells and pumps due to the outsized threat they present.

The Ordinance requires that operators of any proposed New Source apply to WEDNR for a permit before commencing operations. *Id.* at PDF p.10. The operator must show, individually and cumulatively with other high-capacity appropriations, that the New Source will not significantly reduce the quantity of groundwater available for reasonable use by current groundwater users or adversely affect surface waters; will not

exceed the sustainable yield of the aquifer; and will not reduce base flows or water levels in a manner that harms aquatic species and habitats, including by changing water temperature. *Id.* at PDF pp. 13-14. New Sources present a unique threat to Reservation resources, as they compound the adverse impacts of existing high-capacity appropriations and may be located in areas where groundwater is slower to recharge or waters have not previously been subject to intensive pumping or study. *Id.* at PDF p. 22. Accordingly, the Nation has prioritized implementing the Ordinance with respect to New Sources.[4]

III. Mr. Vipond's Proposed Appropriation and Ongoing Tribal Court Proceedings Regarding WEDNR's Regulatory Authority.

Plaintiff alleges he owns 611 acres of farmland on the Reservation adjacent to the Wild Rice River. Am. Compl. (Dkt. 4) ¶ 8. In March 2023, Plaintiff applied to the Minnesota Department of Natural Resources (MNDNR) for a permit to pump up to 65.2 million gallons of surface water from the Wild Rice River each summer, at a rate of up to 1,000 gallons per minute, to irrigate 353 acres of agricultural land on the Reservation. *Id.* ¶¶ 9-10. According to Plaintiff, this farm has produced crops for close to one hundred

[4] Existing Sources were not required to submit permit applications until one year after passage of the Ordinance. Dkt. 4-1 at PDF p. 10. On June 12, 2024, the RBC suspended indefinitely the permit requirement with respect to Existing Sources operating in compliance with MNDNR permits, citing WEDNR's ongoing coordination with state, federal, and tribal agencies, regional watershed commissions, and other stakeholders to study Existing Sources' impacts on aquatic species and sustainable levels of consumptive use, and to develop collaborative strategies to protect water quality and quantity on and adjacent to the Reservation. *Id.* at PDF pp. 22-24. The RBC directed WEDNR to submit a report on the status of its work no later than December 2026 and to recommend any amendments to the Ordinance to advance its effective and efficient operation. *Id.* at PDF pp. 23-24. Plaintiff's suggestion that this deliberative approach somehow undermines the Nation's own sovereign regulatory interest, Mot. 18-19, is sorely misguided.

years with no supplemental irrigation, but Plaintiff now seeks to increase his crop yields. Dkt. 26-1 at PDF p. 72 (answer to interrogatory 23).

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

While MNDNR ultimately issued a state permit to Plaintiff, MNDNR also acknowledged the Nation's regulatory authority over such appropriations, advising Plaintiff "of the need to obtain any other permits that may apply including any permits required by White Earth Nation." *Id.* at PDF p. 3 ¶ 17. Despite this direction from the State of Minnesota, and despite receiving multiple notices from WEDNR, Plaintiff refused to respond or otherwise acknowledge the Nation's Ordinance and permit requirement. *Id.* at PDF p. 31 ¶ 31.[5]

On August 23, 2023, WEDNR filed an action for declaratory and injunctive relief against Mr. Vipond in White Earth Tribal Court. Dkt. 4 ¶ 25. WEDNR filed a second amended complaint on March 28, 2024. Dkt. 4-1 at PDF pp. 26-34. WEDNR requests a

[5] While WEDNR has not determined whether it would grant, grant with conditions, or deny a permit to Mr. Vipond to pump large volumes of water from the Wild Rice River, it has very serious concerns regarding Plaintiff's proposed appropriation. *Infra* pp. 24-26.

declaration from the Tribal Court that the Ordinance applies to Mr. Vipond's proposed high-capacity pumping of Reservation waters from the Wild Rice River and that he must obtain a permit from WEDNR before installing and operating a pump. *Id.* at PDF p. 26 ¶ 1, PDF p. 33 (prayer for relief). WEDNR also requests an injunction enjoining Mr. Vipond from installing or operating a high-capacity pump on the Wild Rice River within the Reservation without a WEDNR permit. *Id.* at PDF pp. 26-27 ¶ 1, PDF pp. 33-34 (prayer for relief). WEDNR states:

- Mr. Vipond's "proposed pumping of up to 65.2 million gallons of water per year from the Wild Rice River on the White Earth Reservation, individually and cumulatively with other existing High-Capacity surface water pumps and groundwater wells on and immediately adjacent to the White Earth Reservation, would have serious and substantial adverse impacts on the wild rice, baitfish, sturgeon, and other treaty resources by reducing streamflow in the Wild Rice River below levels necessary to protect those resources." *Id.* at PDF p. 31 ¶ 34.

- "By imperiling streamflow and treaty resources, [Mr. Vipond's] proposed High-Capacity pumping from the Wild Rice River on the White Earth Reservation threatens the subsistence, health and welfare, political integrity, and economic security of the White Earth Band and its members." *Id.* at PDF p. 32 ¶ 35.

Mr. Vipond answered WEDNR's complaint, pleading numerous affirmative defenses, including lack of subject matter jurisdiction, lack of personal jurisdiction, lack of regulatory jurisdiction under federal common law, lack of ripeness, failure to join a necessary and indispensable party, and failure to state a claim upon which relief can be granted. *Id.* at PDF pp. 44-47 ¶¶ 35-51. Mr. Vipond further alleges that his proposed pumping activities will not harm or threaten the health and welfare of the Nation or the Reservation's natural resources. *Id.* at PDF p. 46 ¶ 45.

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

The Court of Appeals promptly heard Mr. Vipond's appeal and emphasized the judicial obligation to answer threshold questions of jurisdiction, *id.* at PDF p. 60:

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

Id. at PDF p. 61. The Court of Appeals also concluded that the White Earth Rules of Civil Procedure (WERCP) require that the Tribal Court conduct a hearing before issuing a preliminary injunction. *Id.* at PDF pp. 60-61. The Court of Appeals accordingly construed the order as a temporary restraining order and remanded to the Tribal Court with directions to provide the parties a full opportunity to present evidence and arguments regarding Mr. Vipond's jurisdictional challenge, and to enter detailed findings regarding the same. *Id.* at PDF pp. 61-62.

On remand, the Tribal Court dissolved the temporary restraining order and entered a scheduling order providing for fact discovery, the exchange of expert reports, expert depositions, briefing on the question of jurisdiction, and a jurisdictional hearing in June 2024. *Id.* at PDF pp. 74-75. On February 7, 2024, the parties jointly moved for a four-month extension of the deadlines due to Mr. Vipond's counsel's health. Dkt. 16-2. The Tribal Court granted the parties' motion and rescheduled the jurisdictional hearing for October 2024. Dkt. 16-3.

On June 14, 2024, WEDNR disclosed five expert witness reports and several related affidavits, including reports on surface water, groundwater, aquatic species, economics, and cultural resources. Dkt. 16-4; Roy Decl. ¶ 67. On July 11, 2024, the parties jointly moved the court to extend the case schedule by two weeks in light of Mr. Vipond's counsel's ongoing medical concerns. The parties also stipulated to additional deadlines, including for the exchange of exhibits and witness lists for the jurisdictional hearing and for the submission of post-hearing proposed findings of fact and conclusions of law. Dkt. 16-5. The Tribal Court granted the parties' motion on July 12, 2024. Dkt. 16-6. Mr. Vipond disclosed three expert witness reports and one witness affidavit to WEDNR on July 29, 2024. Dkt. 16-7. Four days later, on August 2, 2024, Mr. Vipond filed the instant action in this Court. Compl. (Dkt. 1).

On August 15, 2024, in light of Mr. Vipond's counsel's upcoming medical treatment, the parties again agreed to extend all deadlines in Tribal Court, this time by one month. Dkt. 16-8. The Tribal Court granted the parties' motion on August 20, 2024, and rescheduled the jurisdictional hearing for December 2024. Dkt. 16-9. The same day,

citing Plaintiff's lawsuit against him in this Court, Judge David DeGroat recused himself from the Tribal Court action, and the matter was reassigned to Judge B.J. Jones. Dkt. 16-10. On September 11, 2024, counsel for WEDNR in the Tribal Court action withdrew, Dkt. 16-11, and undersigned counsel filed a notice of appearance the next day, Dkt. 16-12. "[D]ue to the transition in [WEDNR's] counsel and the Parties' ongoing efforts to schedule and conduct a total of approximately twenty-three depositions," nineteen by Mr. Vipond, the parties jointly moved for an additional extension of the case deadlines. Dkt. 16-13.[6] The Tribal Court granted the motion, ordering jurisdictional briefing to be completed by December 20, 2024, and scheduling the jurisdictional hearing for February 24-25, 2025. Dkt. 16-14. The parties will submit proposed findings of fact and conclusions of law in March 2025. *Id.*

IV. Defendant Roy's Motion to Stay Proceedings in This Court Pending Mr. Vipond's Exhaustion of Tribal Court Remedies.

After filing his Answer in this action, Defendant Roy promptly moved for a stay of all proceedings in this Court pending Plaintiff's exhaustion of remedies in the case pending in the Nation's courts. *See* Dkt. 13 (Mot. to Stay); Dkt. 15 (Mem. of Law in Supp. of Mot. to Stay). The Honorable Leo I. Brisbois heard Defendant Roy's Motion to Stay on October 24, 2024. Dkt. 36. Defendant Roy briefly summarizes his motion here.

As discussed in detail in Defendant Roy's Memorandum of Law in Support of Motion to Stay, a non-Indian who wishes to challenge tribal regulatory or adjudicatory

[6] The parties began taking depositions several weeks ago, and they expect to complete all depositions before the Thanksgiving holiday.

jurisdiction must first do so in tribal court. *See* Dkt. 15. This requirement reflects the Supreme Court's longstanding recognition that "[t]ribal courts play a vital role in tribal self-government" and that "[a] federal court's exercise of jurisdiction over matters relating to reservation affairs can … impair the authority of tribal courts," *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14, 15 (1987); *see also, e.g.*, *WPX Energy*, 72 F.4th at 837. It also advances the prudential policies of ensuring "the orderly administration of justice," *Nat'l Farmers Union*, 471 U.S. at 856 ("[T]he forum whose jurisdiction is being challenged [should have] the first opportunity to evaluate the factual and legal bases for the challenge."), "allow[ing] a full record to be developed in the Tribal Court" before any review by a federal court, *id.*, and ensuring that the tribal court will decide questions of tribal law, *Iowa Mut.*, 480 U.S. at 16.

"Exhaustion is mandatory," *Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 849 (8th Cir. 2003), unless one of four exceptions applies. In this case, Plaintiff states that he is "only asserting the fourth exception," Dkt. 33 at 9 (Opp'n to Mot. to Stay)—an exception that applies where the lack of tribal jurisdiction is "plain," *Strate v. A-1 Contractors*, 520 U.S. 438, 459 n.14 (1997), which requires a showing that the assertion of tribal jurisdiction "is frivolous or obviously invalid under clearly established law," *DISH Network*, 725 F.3d at 883. As discussed in detail in Defendant Roy's memorandum, this exception does not apply here. Dkt. 15 at 23-31; *see also infra* pp. 18-27.

Accordingly, the proper course is for this Court to "stay[] its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction," *Nat'l Farmers*

Union, 471 U.S. at 856-57. Until then, "it would be premature for a federal court to consider any relief," *id.* at 857, including a preliminary injunction; *see also WPX Energy*, 72 F.4th at 835 (vacating preliminary injunction because company "did not exhaust its tribal court remedies" and thus "a ruling in federal court on the question of tribal court jurisdiction was premature").

A stay will allow the Tribal Court to evaluate Mr. Vipond's challenge to the Nation's jurisdiction to regulate non-Indians who propose to engage in high-capacity pumping of Reservation waters, as well as his challenge to the Tribal Court's jurisdiction to adjudicate WEDNR's dispute with Mr. Vipond under the Ordinance. *See* Dkt. 15 at 13-18. It is only once proceedings in the Nation's courts are concluded that this Court may properly consider Plaintiff's claim (in the event the Nation's courts uphold tribal jurisdiction) and will have the necessary factual record and analysis of tribal law to do so.

ARGUMENT

Plaintiff is not entitled to a preliminary injunction. "A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). The factors bearing on a preliminary injunction motion are "(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). None of these factors weighs in Plaintiff's favor.

Plaintiff asks this Court to arrest ongoing Tribal Court proceedings addressing his challenge to WEDNR's regulatory authority and the Tribal Court's adjudicatory authority. The tribal court exhaustion rule bars Plaintiff's request. This Court must defer review of Plaintiff's jurisdictional challenge until after the Tribal Court has developed a factual record, resolved questions of tribal law, and ruled on its own jurisdiction. *Supra* pp. 14-16. This case, moreover, does not present the exceptional circumstances that would justify a deviation from the rule. It is Plaintiff's burden to show that tribal jurisdiction "is frivolous or obviously invalid under clearly established law," *DISH Network*, 725 F.3d at 883 (citing *Strate*, 520 U.S. at 459 n.14). Plaintiff cannot meet this standard and thus cannot show a likelihood of success on the merits.

Nor can Plaintiff, having litigated in the Nation's court system for more than a year, produced multiple expert reports, and noted nineteen depositions to discover facts pertaining to the Nation's jurisdiction, credibly claim that the completion of those proceedings will result in irreparable harm. To the contrary, an injunction would interfere with the Nation's right of self-government and the authority, integrity, and development of its courts. *See Iowa Mut.*, 480 U.S. at 14-15. The Supreme Court has already balanced these harms, weighed the public interest, and determined that exhaustion is required.

I. Likelihood of Success on the Merits.

Plaintiff cannot show a likelihood of success on the merits. As explained above, *supra* pp. 14-16, Plaintiff must exhaust his challenge to the Nation's regulatory and adjudicatory jurisdiction in the Nation's courts before seeking relief from this Court. His failure to do so means he cannot succeed in establishing any entitlement to a preliminary

injunction. *DISH Network*, 725 F.3d at 882-85 (holding that failure to exhaust tribal remedies defeated the "probability of the moving party's success on the merits" in preliminary injunction analysis). Plaintiff's assertion that to obtain an injunction he "must only demonstrate a fifty percent likelihood of success" on the question of the Nation's regulatory jurisdiction over high-capacity water appropriations, Mot. 12, is plainly in error as it ignores the exhaustion requirement altogether.

To avoid exhaustion, Plaintiff must show that the Nation's assertion of authority "is frivolous or obviously invalid under clearly established law." Plaintiff's arguments—that tribal jurisdiction is precluded by *Montana* and its progeny, Mot. 12-22, and that the State of Minnesota is a required (indispensable) party, *id.* at 25-31—fall well short of this standard.

A. The Nation's Assertion of Jurisdiction Under the *Montana* Test Is Not "Frivolous or Obviously Invalid Under Clearly Established Law."

i. Case Law Supports the Nation's Jurisdiction.

"Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Iowa Mutual*, 480 U.S. at 18 (citations omitted); *see also, e.g.*, *Gaming World*, 317 F.3d at 849; *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1419-20 (8th Cir. 1996). Thus, "a tribe retains inherent sovereign authority to address 'conduct [that] threatens or has some direct effect on … the health or welfare of the tribe,'" *United States v. Cooley*, 593 U.S. 345, 347 (2021) (brackets and ellipsis in original) (quoting

Montana, 450 U.S. at 566), so long as it has not been divested of such authority by the United States. No such divesture has occurred here, where the 1867 Treaty reserved to the Nation water, fishing, hunting, and gathering resources to make the Reservation a permanent homeland. *Supra* pp. 2-4.

Case law strongly supports the Nation's authority to establish generally applicable regulations governing high-capacity pumping of Reservation groundwater and surface waters. In *Montana*, the Supreme Court held that a tribe "retain[s] inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566.[7] The Court also made clear that this authority, commonly referred to as the second *Montana* exception, is a "corollary" to the rule that "Indian tribes retain rights to river waters necessary to make their reservations livable." *Id.* n.15 (citing *Arizona v. California*, 373 U.S. 546, 599 (1963), in which the Court found the United States understood "that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised"). In other words, tribal inherent authority includes the power to regulate activities that threaten a tribe's reserved rights.

[7] This standard determines the scope of both tribal regulatory and adjudicatory jurisdiction. *See Attorney's Process and Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa*, 609 F.3d 927, 936 (8th Cir. 2010) ("*Montana*'s analytic framework now sets the outer limits of tribal civil jurisdiction—both regulatory and adjudicatory—over nonmember activities on tribal and nonmember land.").

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

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

Id. (emphases added).

This reasoning applies foursquare to the Nation, whose regulation of high-capacity wells and pumps is driven by the same concerns. *Supra* pp. 5-9. Reservation-wide appropriations already surpass three billion gallons annually, and Plaintiff proposes to pump 65.2 million gallons each summer from the Wild Rice River in an area that provides critical habitat for sturgeon, wild rice, and baitfish. *Supra* pp. 5-7; *infra* pp. 24-

26. It is well established, moreover, that agricultural irrigation can have devastating impacts on reservation waters, fisheries, and lands, even when located many miles away. *See Cappaert*, 426 U.S. at 133, 142-43 (enjoining ranch's operation of wells 2.5 miles away); *Winters v. United States*, 143 F. 740 (9th Cir. 1906) (enjoining non-Indian water withdrawal upstream of Indian reservation); *Colville Confederated Tribes*, 647 F.2d at 52.

Other cases further confirm that the Ordinance stands on solid jurisdictional ground and that this case is a far cry from one in which the assertion of jurisdiction "is frivolous or obviously invalid under clearly established law," *DISH Network*, 725 F.3d at 883. In *Montana v. U.S. E.P.A.*, 137 F.3d 1135, 1139-41 (9th Cir. 1998), the court affirmed tribal authority under the second *Montana* exception to set water quality standards to protect all reservation waters, including on non-Indian fee lands. The court explained that, due to the unitary nature of water resources, "it would in practice be very difficult to separate the effects of water quality impairment on non-Indian fee land from impairment on the tribal portions of the reservation[.]" *Id.* at 1141. And in *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951, 964 (9th Cir. 1982), the court held that a tribal ordinance regulating riparian structures, including non-Indian waterfront property, "falls squarely" within the second *Montana* exception because of potential harm to lake ecology; the tribal economy, health, and welfare; and treaty fishing rights.

There accordingly exists no basis for Plaintiff to escape the exhaustion requirement. The assertion of jurisdiction here simply cannot be described as frivolous or as foreclosed by existing law.

Plaintiff's characterization of the Ordinance "as an unlawful tax on nonmembers," Mot. 19, is inaccurate and changes nothing. First, as Plaintiff acknowledges, *id.*, the "application and initial review fee of $5,000" is in fact a *deposit* to cover the *actual costs* that may be associated with WEDNR review. All unused amounts of the deposit must be returned to the applicant. Roy Decl. Ex. B § 6.2(b); *see also id.* § 6.2(c). Second, characterizing the Ordinance as a tax does not excuse Plaintiff from the mandatory exhaustion requirement. *See, e.g.*, *Duncan Energy Co. v. Three Affiliated Tribes of Fort Berthold Reservation*, 27 F.3d 1294, 1296, 1299-1301 (8th Cir. 1994) (holding that oil and gas company must exhaust its tribal court remedies before challenging the tribe's jurisdiction under the second *Montana* exception to tax the company's activities on non-Indian fee land). Third, the case on which Plaintiff relies, *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, is plainly distinguishable. There the Supreme Court held that the Navajo Nation lacked jurisdiction to impose a hotel occupancy tax. But regulating the withdrawal of millions or billions of gallons of Reservation waters—a unitary and finite resource, unconstrained by parcel boundaries, which is necessary to support the natural resources that sustain the White Earth community, *supra* pp. 4-7—is a far cry from regulating the "operation of a [non-Indian] hotel on non-Indian fee land," *id.* at 657, which had no discernible effect on the tribe; *cf. FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 935-41 (9th Cir. 2019) (upholding tribal regulation of non-Indian company storing hazardous waste on non-Indian fee lands, including $1.5 million annual permit fee, under second *Montana* exception).

Plaintiff further claims that his receipt of a state permit creates "a nearly insurmountable presumption" that his proposed pumping is not subject to tribal regulation under federal law. Mot. 13. But Plaintiff cites nothing for this proposition, and the case law does not support it. The Supreme Court has long held "that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Washington v. Confederated Tribes of Colville Indian Rsrv.*, 447 U.S. 134, 154 (1980). And "there is 'no suggestion' in the *Montana* case law that 'inherent [tribal] authority exists only when no other government can act.'" *FMC Corp.*, 942 F.3d at 935 (brackets in original) (quoting *Montana v. U.S. EPA*, 137 F.3d at 1141); *see also Colville Confederated Tribes*, 647 F.2d 42 (recognizing tribal authority to regulate non-Indian irrigator under the second *Montana* exception notwithstanding prior issuance of state permit). Indeed, MNDNR advised Plaintiff "of the need to obtain any other permits that may apply including any permits required by the White Earth Nation." Dkt. 4-1 at PDF p. 3 ¶ 17 (emphasis added). And in any event, WEDNR's expert witnesses will establish in the Tribal Court that tribal regulation is necessary to safeguard the Nation's waters, wild rice, and fisheries resources from large-volume appropriations. *See generally* Minn. Stat. § 103G.271(Subd. 3) (MNDNR lacks authority to protect aquatic species by restricting groundwater pumping for agricultural irrigation from April 1 to November 15).

In sum, despite arguing that the Nation's jurisdiction is invalid under clearly established law, Plaintiff fails to identify any analogous case rejecting tribal authority, and the plain sweep of the case law is decidedly to the contrary.

ii. Plaintiff's Factbound Arguments Are Premature, Unsubstantiated, and Inaccurate.

Unable to find support in case law, Plaintiff argues the second *Montana* exception on the facts, asserting that his pumping of 65.2 million gallons of water from the Wild Rice River each summer will not harm tribal members' harvest of baitfish or wild rice, WEDNR's efforts to restore wild rice in the river, or the Nation's twenty-five-year program to restore the locally extirpated sturgeon population. Mot. 15-17.

To support his factual arguments, Plaintiff relies only on the allegations of his own complaint and on conclusory, self-serving responses to interrogatories. These materials are insufficient to support a preliminary injunction. *See*, *e.g.*, *Rud v. Johnston*, Civil No. 23-0486 (JRT/LIB), 2023 WL 2600206, at *4 (D. Minn. Mar. 22, 2023) ("To carry its burden, a plaintiff seeking a preliminary injunction must offer proof beyond unverified allegations in the pleadings." (citation omitted)).[8]

Moreover, Plaintiff's allegations are contradicted by evidence developed in the Tribal Court action, which will establish that high-capacity pumping on the Reservation, including Plaintiff's proposal, threatens substantial harm to the Reservation's natural

[8] While a few allegations in the complaint cite public sources, even these do not support Plaintiff's arguments. For example, Plaintiff asserts that pumping in August and September cannot affect sturgeon because "sturgeon migration occurs from mid-May through June[.]" Mot. 15 (citing Am. Compl. ¶ 67). But his source merely states that adult sturgeon "begin to migrate to their spawning habitat" in mid-May and June, not that sturgeon are absent from rivers during other times of year. https://www.dnr.state.mn.us/minnaqua/speciesprofile/lake_sturgeon.html.

resources and the Nation's way of life.[9] For example, WEDNR and its expert witness will testify that sturgeon reintroduction in the Wild Rice River is at a critical stage, that a spawning event is imminent, that young-of-year fish are highly vulnerable during the summer months as they pass downstream, and that Plaintiff's diversion would substantially reduce the sturgeon habitat available. Roy Decl. ¶ 69 & Ex. C ¶¶ 17-19. WEDNR expert witnesses will testify that the low-flow suspension level imposed by Plaintiff's state permit (18 cubic feet per second) is based on an inaccurate dataset and would result in substantial additional threats to sturgeon and baitfish resources during the summer months when they are most vulnerable—a low-flow suspension level using MNDNR's methodology and accurate data would be more than twice as high (41 cubic feet per second). Roy Decl. ¶ 68. Furthermore, economics and cultural resources experts will testify to the paramount role that wild rice, fisheries, and other aquatic resources play in the commercial livelihood, physical sustenance, and cultural preservation of Tribal

[9] It is Plaintiff's burden to establish a likelihood of success on the merits. Yet he has not submitted any of the witness affidavits or expert reports disclosed in the Tribal Court action, including his own. *See* Dkts. 16-4 (WEDNR disclosing five expert witness reports), 16-7 (Mr. Vipond disclosing three expert witness reports); Mot. 3. The parties will disclose additional exhibits and witnesses on January 15, 2025, to assist the Tribal Court in resolving Mr. Vipond's jurisdictional challenge at the February 2025 hearing. *See* Dkt. 16-14. The tribal court exhaustion rule requires that these materials, which were developed in the Tribal Court action, be evaluated by the Tribal Court in the first instance. *Supra* pp. 14-16. For these reasons, Defendant Roy does not submit all those materials here. However, to illustrate the Nation's powerful sovereign interests in regulating high-capacity pumping on the Reservation, Defendant Roy submits herewith the Declaration of Dustin Roy, which includes a brief description of the subject matter and certain key findings of WEDNR's expert reports. If the Court would like to review the full reports (which have not yet been submitted to the Tribal Court) in connection with Plaintiff's motion, Defendant Roy will submit them upon request.

members. These experts and WEDNR will explain why maintaining sufficient water levels to protect those resources is imperative and why failing to do so will result in significant damage to the White Earth economy and substantial harm to Tribal members and their families. Roy Decl. ¶¶ 71-72 & Exs. C, D.

More fundamentally, while this body of evidence weighs heavily in favor of tribal jurisdiction, it would be improper for the Court to resolve disputed factual issues here—that job is for the Nation's courts in the first instance. *See Nat'l Farmers Union*, 471 U.S. at 856 (explaining that exhaustion "allow[s] a full record to be developed in the Tribal Court" before any review by a federal court); *Duncan Energy*, 27 F.3d at 1300 ("[T]ribal exhaustion contemplates the development of a factual record that will serve the orderly administration of justice in the federal court." (quotation marks omitted)). In advancing his unsupported factual assertions in this Court, Plaintiff again entirely ignores the governing force of the tribal exhaustion doctrine.

Finally, Plaintiff's factual arguments use the wrong lens. The Ordinance is a generally applicable regulatory program designed to safeguard Reservation waters and natural resources from the devastating impacts of large-volume water appropriations. In evaluating the Nation's jurisdiction to maintain this program, the courts must consider the threats posed by the class of activity subject to regulation. *See*, *e.g.*, *Cooley*, 593 U.S. at 350-51 ("To deny a tribal police officer authority to search and detain for a reasonable time any person he or she believes may commit or has committed a crime would make it difficult for tribes to protect themselves against ongoing threats."); *Montana v. U.S. E.P.A.*, 137 F.3d at 1139-41 (affirming tribe's inherent authority to issue water quality

standards for all reservation waters due to threats to the tribe's health and welfare posed by potential pollution sources on non-Indian fee lands, including dairies, feedlots, auto wrecking yards, and landfills); *Confederated Salish & Kootenai Tribes*, 665 F.2d at 964 ("The conduct that the Tribes seek to regulate in the instant case—generally speaking, the use of the bed and banks of the south half of Flathead Lake—has the potential for significantly affecting the economy, welfare, and health of the Tribes. Such conduct, if unregulated, could increase water pollution, damage the ecology of the lake, interfere with treaty fishing rights, or otherwise harm the lake, which is one of the most important tribal resources."). Plaintiff, however, would have this Court wear blinders and require WEDNR to establish that each individual appropriator, standing alone, imperils the subsistence of the entire tribal community. This is the definition of death by a thousand cuts, and federal law does not compel the White Earth Nation to suffer it.

* * *

In short, neither case law nor Plaintiff's unsubstantiated factual assertions demonstrate that the Band's exercise of regulatory authority over high-capacity appropriations of Reservation waters "is frivolous or obviously invalid under clearly established law," *DISH Network*, 725 F.3d at 883.

B. Plaintiff's Required-Party Argument Mischaracterizes the Tribal Court Action and Does Not Support an Exception from the Exhaustion Rule.

Plaintiff argues that the Tribal Court action should not proceed because the State of Minnesota is a required or indispensable party. *See* Mot. 25-31. His argument fails for several reasons.

First, as a threshold matter, Plaintiff fundamentally mischaracterizes the Tribal Court action. WEDNR's sole claim is that Plaintiff's proposed high-capacity pumping from the Wild Rice River is subject to the Ordinance and that Plaintiff must obtain a permit from WEDNR before installing or operating a pump. WEDNR is not seeking any relief against Minnesota and is not asking the Tribal Court to adjudicate any rights of Minnesota or to make any determination regarding the State's regulatory authority.[10] Plaintiff's various allegations that "the State's interests in its navigable waters are being adjudicated in its absence," *id.* 25, and that the Tribal Court is adjudicating the State's, Plaintiff's, and the Nation's water rights, *id.* 29, are incorrect.[11] The Nation is merely asserting its inherent sovereign authority to protect Reservation waters and natural resources from substantial harm.

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

[11] Plaintiff's allegations also contain numerous incorrect and irrelevant statements of law. For example, Plaintiff claims, without citation, that "[t]he Wild Rice River is a navigable body of water." Mot. 26. But the question of navigability—which requires a fact-intensive, historical inquiry, *PPL Mont., LLC v. Montana*, 565 U.S. 576, 591-92 (2012)—is distinct from the question of a tribe's regulatory authority over non-Indian uses of reservation waters and is not at issue in the Tribal Court action. *See* Dkt. 15 at 26-27 (discussing *Montana v. United States*, 450 U.S. at 566).

Plaintiff also claims he possesses federal water rights by virtue of acquiring "tribal allotments … that became nonmember fee lands." Mot. 30 (citing *Colville Confederated Tribes*, 647 F.2d at 51). But Plaintiff admits that "[t]his farm has produced crops for close to one hundred years with no supplemental irrigation," Dkt. 26-1 at PDF p. 72 (answer to interrogatory 23), and *Colville Confederated Tribes* is clear that while "the Indian allottee does not lose by non-use the right to a share of reserved water[,] [t]his characteristic is not applicable to the right acquired by a non-Indian purchaser," 647 F.2d at 51.

Second, exhaustion is excused only where "it is plain that tribal *jurisdiction* does not exist[.]" *DISH Network*, 725 F.3d at 883 (emphasis added) (quotation marks omitted). Yet "[t]he issue of want of indispensable parties is not a jurisdictional one." *Clim-A-Tech Indus., Inc. v. Ebert*, Civil No. 14-1496 (MJD/SER), 2015 WL 2195115, at *12 n.9 (D. Minn. May 11, 2015) (emphasis added) (quoting *Warner v. First Nat'l Bank of Minneapolis*, 236 F.2d 853, 857 (8th Cir. 1956)); *see also Kansas City S. Ry. Co. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 824 n.2 (8th Cir. 1980); Charles Alan Wright et al., 7 Fed. Prac. & Proc. Civ. § 1611 (3d ed.) (collecting cases). Thus, the question of indispensability under the federal rules of civil procedure is not a proper basis to exempt a party from the tribal court exhaustion requirement. Plaintiff cites no authority suggesting otherwise.

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

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

Dkt. 16-15 at PDF p. 12. Plaintiff must present his joinder argument to the Tribal Court, and indeed he has stated his intent to do so, Dkt. 4-1 at PDF pp. 45-46 ¶¶ 42-43. It is not for this Court to make determinations under tribal law regarding, for example, whether

and how, in the State's absence, the Tribal Court can "reach a just result" or "fashion a resolution so as to do the greatest justice possible under the circumstances."

For all these reasons, the cases on which Plaintiff relies, Mot. 26-27, are inapposite. Each case would have required the court to adjudicate the legal rights of the absent state, each case was governed by Federal Rule of Civil Procedure 19, and no case involved a tribal court action or the tribal exhaustion doctrine. *See Hood ex rel. Mississippi v. City of Memphis*, 570 F.3d 625, 627, 629 (5th Cir. 2009) (deciding whether Mississippi or Tennessee held property rights to aquifer waters); *Pueblo of Sandia v. Babbitt*, 47 F. Supp. 2d 49 (D.D.C. 1999) (deciding legal rights of state under gaming agreement with tribe); *Native Am. Mohegans v. U.S.*, 184 F. Supp. 2d 198 (D. Conn. 2002) (same). If Minnesota were a required party simply by virtue of asserting overlapping jurisdiction, nearly *every* case involving an assertion of tribal regulatory authority over non-Indians would entail a required party because states possess regulatory authority over non-Indians in Indian country unless preempted by federal law, *see HCI Distribution, Inc. v. Peterson*, 110 F.4th 1062, 1065-66 (8th Cir. 2024). If this were enough to defeat tribal court exhaustion, the rule would be a nullity.

II. Irreparable Harm.

Plaintiff argues that he will suffer irreparable harm by having to continue litigating the Tribal Court action, citing *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125 (8th Cir. 2019). Mot. 22. In *Kodiak*, however, the Eighth Circuit found that "the oil and gas companies [already had] exhausted their tribal court remedies" with respect to their facial challenge to tribal jurisdiction. *Id.* at 1133. That is not the case here, and *Kodiak*

underscores why Plaintiff must exhaust his remedies in the Nation's courts. The *Kodiak* court emphasized that "the development of a factual record may generally be required where a challenge to tribal court jurisdiction turns on disputed factual questions," *id.* at 1134, and distinguished the case before it—"a contract dispute, pure and simple"—from "[t]ribal court enforcement of tribal laws relating to public health and safety or environmental protection," *id.* at 1138 (citation omitted).

Plaintiff's claim of irreparable harm, moreover, is defeated by his active participation in the Tribal Court action for over a year—including retaining experts and disclosing expert reports, conducting depositions, and requesting numerous case schedule extensions, *supra* pp. 11-14—before seeking any relief from this Court. *See*, *e.g.*, *Ng v. Bd. of Regents of Univ. of Minn.*, 64 F.4th 992, 997 (8th Cir. 2023) ("[A]n unreasonable delay in moving for the injunction can undermine a showing of irreparable harm and is a sufficient ground to deny a preliminary injunction." (quotation marks omitted)); *Hubbard Feeds, Inc. v. Animal Feed Supplement, Inc.*, 182 F.3d 598, 603 (8th Cir. 1999) (holding that plaintiff's delay in seeking preliminary injunction "belies any claim of irreparable injury pending trial").

Plaintiff also complains that "WEDNR has taken the determination of tribal jurisdiction … as license to fully litigate the merits of the matter and develop a voluminous factual record before the Tribal Court." Mot. 23. But Plaintiff misses two critical points. First, WEDNR is doing nothing more than what the White Earth Court of Appeals ordered in the wake of Mr. Vipond's appeal and what Supreme Court and Eight Circuit precedent require. Second, *jurisdiction is the dispositive merits issue* in the Tribal

Court action. It is undisputed that the Ordinance requires Plaintiff to obtain a permit to engage in high-capacity pumping on the Reservation, and it is undisputed that Plaintiff has refused to apply for a tribal permit. The only question, then, is whether WEDNR possesses authority to enforce the permit requirement against him.

III. Balance of Harms.

Again, the Supreme Court has determined that the "balance of harms" weighs in favor of allowing a tribal court to determine its jurisdiction in the first instance, absent exceptional circumstances. *Supra* pp. 15-16 (discussing benefits of exhaustion requirement); *see also Iowa Mut.*, 480 U.S. at 15 ("A federal court's exercise of jurisdiction over matters relating to reservation affairs can … impair the authority of tribal courts[.]").

Disregarding this entirely, Plaintiff argues that the Nation would suffer no harm if the Tribal Court action were enjoined because "it could file suit in federal district court under 28 U.S.C. § 1331." Mot. 24. But Plaintiff cites nothing for the proposition that the potential availability of a federal forum defeats the application of the exhaustion rule or cures the harm to tribal self-government that would result from enabling litigants to circumvent tribal court authority. And his suggestion that further multiplying proceedings is the appropriate outcome here is ill-advised. *See Nat'l Farmers Union*, 471 U.S. at 856 (exhaustion ensures "the orderly administration of justice" and protects against "'procedural nightmare[s]'"). In any event, it is unclear how WEDNR could sue to enforce the Ordinance in federal court, because such a lawsuit involves a tribal cause of action under tribal law. *See*, *e.g.*, *Iowa Mut.*, 480 U.S. at 16 ("[T]ribal courts are best

qualified to interpret and apply tribal law."); *Runs After v. United States*, 766 F.2d 347, 352 (8th Cir. 1985) (explaining that "resolution of … disputes involving questions of interpretation of the tribal constitution and tribal law is not within the jurisdiction of the [federal] district court").

Plaintiff also attacks the independence and competence of the Nation's courts. He charges that the Nation's courts are "not neutral," Dkt. 4 at ¶ 122(k), and not "independent," Mot. 24. But "a party cannot skirt the tribal exhaustion doctrine simply by invoking unfounded stereotypes," *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 34 (1st Cir. 2000); *see also Iowa Mut.*, 480 U.S. at 19 ("The alleged incompetence of tribal courts is not among the exceptions to the exhaustion requirement[.]"), and Plaintiff's accusations are grossly unwarranted here.[12] The White Earth Judicial Code, Chapter III, includes detailed provisions on judicial selection, terms, qualifications, removal, and conflicts of interest. Dkt. 16-1 at PDF pp. 8-10. Moreover, the course of proceedings in the Nation's courts—including the Court of Appeals' order that the Tribal Court carefully consider Mr. Vipond's jurisdictional challenge, *supra* pp. 12-13—manifestly discredits Plaintiff's charge.

IV. Public Interest.

As with the other preliminary injunction factors, the exhaustion rule renders the analysis under this factor straightforward: exhaustion serves the public interest, unless

[12] It is telling that the source for Plaintiff's allegations is an out-of-context, citation-free sentence from a 2013 blogpost on a socialism internet forum, Mot. 24 (quoting David Thorstad, *White Earth Nation Adopts New Constitution*, MR Online (Nov. 21, 2013), https://mronline.org/2013/11/21/thorstad211113-html/).

one of four specific exceptions apply. Plaintiff cites *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140 (10th Cir. 2011), Mot. 25, in which the court held that continued tribal proceedings did not serve the public interest. But in *Crowe*, tribal exhaustion was excused because tribal court jurisdiction was plainly absent. *Id.* at 1153. Here, by contrast, Plaintiff has failed to establish that any exception to the rule applies, *supra* pp. 18-27, and the public interest is served through the development of and respect for tribal courts, *see Iowa Mut.*, 480 U.S. at 14-15.

CONCLUSION

Plaintiff must exhaust his challenge to the White Earth Nation's jurisdiction in the Nation's courts before seeking relief from this Court. Accordingly, if the Court reaches Plaintiff's motion for preliminary injunction, Defendant Roy respectfully requests that the Court deny the motion.

Respectfully submitted on this 1st day of November, 2024.

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