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 REPLY MEMORANDUM IN SUPPORT OF HIS MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Defendant Roy, in his Response Memorandum (ECF No. 42), cherry-picks the facts underlying the Tribal Court Action, misrepresents the relevant case law, and entirely avoids any substantive discussion of the actual standard at issue in Plaintiff David Vipond's Motion—namely, that because Vipond is a nonmember acting on his fee lands, the Tribal Court presumptively lacks jurisdiction over him, and the standard under *Montana* and its subsequent progeny requires WEDNR to show that the Band is "catastrophically" injured by his state-permitted proposed water appropriation.

BACKGROUND

I. State sovereignty does not end at a reservation's border.

WEDNR attempts to conflate the "Indian country" status of the White Earth Reservation—which is not at all in dispute—with limits on state regulatory authority. What WEDNR does not address is *Oklahoma v. Castro-Huerta*, 597 U.S. 629 (2022), which also dealt with the exercise of state jurisdiction in Indian country. There, the Court explained:

> To begin with, the Constitution allows a State to exercise jurisdiction in Indian country. Indian country is part of the State, not separate from the State. To be sure, under this Court's precedents, federal law may preempt that state jurisdiction in certain circumstances. But otherwise, as a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country. See U.S. Const., Amdt. 10.

Id., 597 U.S. at 636.

II. White Earth's reserved water rights do not bear on its authority to regulate a nonmember under *Montana*, but if water rights must be adjudicated, that presents a federal question properly heard by the federal court.

The determination of reserved water rights under *Winters v. United States*, 143 F. 740 (9th Cir. 1906) typically involves an adjudication of rights between the users of that water. If White Earth is seeking an adjudication of its water rights to the River, that presents a federal question. *Baley v. United States*, 942 F.3d 1312, 1340 (Fed. Cir. 2019). And an adjudication of rights to a public waterway within the State would necessarily require the State of Minnesota's participation. *Hood ex rel. Mississippi v. City of Memphis, Tenn.*, 570 F.3d 625 (5th Cir. 2009).

ARGUMENT

I. Exhaustion is not required because WEDNR plainly lacks jurisdiction under the second *Montana* exception.[1]

II. Because WEDNR lacks jurisdiction over Vipond, the likelihood of success factor of the preliminary injunction weighs in his favor.

WEDNR cannot show it satisfies the second *Montana* exception, and none of its authority involve nonmembers on fee lands. *See Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987)(plaintiff seeking personal injury damages in tribal court against the insurance company of their employer); *Gaming World Intern., Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840 (8th Cir. 2003)(first *Montana* exception applied); *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412 (8th Cir. 1996)(first *Montana* exception and tribal lands at issue); *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951, 964 (9th Cir. 1982)(the lake involved was held in trust for the tribe, not public waters); *State of*

[1] This issue is presently before Magistrate Judge Brisbois under Roy's Motion to Stay. Because WEDNR nevertheless argues it extensively in its Response, Vipond refers the Court to its briefing on the exhaustion issue in its Opposition to Roy's Motion to Stay, ECF No. 33.

Montana v. U.S. E.P.A., 137 F.3d 1135, 1141 (9th Cir. 1998)(review of EPA's decision to grant "treatment as a state" status to a tribe, who was applying EPA regulations to nonmembers).

A. *Montana* does not support a "generally applicable" tribal regulation over nonmembers.

Despite WEDNR's contention, (Roy Mem. 19), *Montana* does *not* stand for the proposition that a tribe can establish a "generally applicable" regulation over its waters—just the opposite. 450 U.S. 544 (1981). In *Montana*, the Court rejected this exact argument. There, the tribe had passed a resolution regulating hunting and fishing within the reservation, including over nonmembers on fee lands: "'[I]nherent sovereignty' is not so broad as to support the application of [the tribal resolution] to non-Indian lands." *Id*. at 563. *Montana* established the general rule that tribes *lack* jurisdiction over nonmembers, and that tribes only have jurisdiction under two limited exceptions. And the Supreme Court has cautioned that *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 Trading Co. Inc., v. Shirley, 532 U.S. 645, 657 n.12 (2001).

WEDNR further seems to want to adjust the second *Montana* exception to suit its purposes (and facts) by asserting that "the courts must consider the threats posed by the class of activity subject to regulation." (Roy Mem. 26.) But that is not the standard for

regulation over *nonmember conduct on fee lands*. To regulate the nonmember on their own lands, the nonmember's *conduct* must imperil the tribe's political integrity. *Atkinson*, 532 U.S. at 657 n.12. Although WEDNR protests the impossibility of "establish[ing] that each individual appropriator, standing alone, imperils the subsistence of the entire tribal community," (Roy Mem. 27), that is, in fact, what *Montana* requires.

For example, in *Evans v. Shoshone-Bannock Land Use Policy Com'n*, 736 F.3d 1298, 1305 (9th Cir. 2013), the tribe alleged it had authority to regulate the construction of a nonmember's home on his fee lands under the second *Montana* exception, claiming that there were issues with groundwater contamination, improper disposal of construction debris, and increased risk of fire. The Ninth Circuit rejected this: "The Tribes fail to show that Evans' construction of a single-family house poses catastrophic risks." *Id*. at 1306. Further, the tribe's concerns 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. *Evans* did not look to whether an entire *class of activity* threatened the tribe. It looked to what it must under *Montana*: whether the nonmember's conduct would cause catastrophic harm to the tribe.

WEDNR's cases do not support its novel interpretation of *Montana*. *Cooley* does not stand for the proposition that a tribe can generally regulate nonmembers in the way that WEDNR seeks to regulate Vipond:

> We also note that our prior cases denying tribal jurisdiction over the activities of non-Indians on a reservation have rested in part upon the fact that full tribal jurisdiction would require the application of tribal laws to non-Indians who do not belong to the tribe and consequently had no say in creating the laws

> that would be applied to them […] Saylor's search and detention, however, do not subsequently subject Cooley to tribal law, but rather only to state and federal laws that apply whether an individual is outside a reservation or on a state or federal highway within it.

United States v. Cooley, 593 U.S. 345, 353 (2021).

Simply put, WEDNR cites no authority that a tribe can enact a general regulatory scheme applying tribal law to nonmembers on fee lands *without* a showing that the *conduct of the individual nonmember* satisfies the second *Montana* exception. It is a difficult standard for good reason. First, it is an *exception* to the general rule that a tribe does not have jurisdiction over a nonmember. Second, nonmembers cannot participate in tribal elections, legislation, or governance. What WEDNR protests in its Memorandum is precisely what federal law requires: that WEDNR must establish that "each individual appropriator, standing alone, imperils the subsistence of the entire tribal community." (Roy Mem. 27.) If the appropriator is a nonmember operating on nonmember land, yes—that is exactly what federal law compels WEDNR to do: "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 (emphasis added).

WEDNR thus all but admits it cannot satisfy *Montana*'s second exception using only Vipond's appropriation. (Roy Mem. 27.)

B. WEDNR's cases involving water regulation are factually distinguishable.

The authority relied on by WEDNR involve *upstream* appropriations, subsurface waters, or appropriations from pools or lakes—nothing like a downstream appropriation from a navigable river. *See Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52 (9th Cir. 1981) (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).

Colville has a narrow holding:

> The geographic facts of this case make resolution of this issue somewhat easier than it otherwise might be. The No-Name system is non-navigable and is entirely within the boundaries of the reservation. Although some of the water passes through lands now in non-Indian ownership, all of those lands are also entirely within the reservation boundaries.

647 F.2d at 52. In *United States v. Anderson*, not cited by WEDNR, the Ninth Circuit expressly distinguished *Colville*, holding that the state, not the tribe, had the authority to regulate excess waters by non-Indians on fee lands. 736 F.2d 1358, 1365-66 (9th Cir. 1984). The court explained the state's role in regulating its waters:

> Washington is obligated to regulate and conserve water consumption for the benefit of all its citizens, including those who own land within a reservation in fee. *See* 25 U.S.C. § 349. Therefore, the state's special concern is shared with, not displaced by, similar tribal and federal interests when water is located within the boundaries of both the state and the reservation. The weight of the state's interest depends, in large part, on the extent to which the waterways or aquifers transcend the exterior boundaries of Indian country.

Id. at 1366. The *Anderson* court rejected the tribe's argument that the tribe needed regulatory authority over all the water within the reservation. *Id*. It also found that the second *Montana* exception was not satisfied, even though tribal interests in water flowing through a reservation were involved: "We find no conduct which so threatens or has such a 'direct effect on the political integrity, the economic security, or the health and welfare of the Tribe,' as to confer tribal jurisdiction." *Id*. at 1365. Lastly, it noted: "The mere issuance of a state permit does not impinge on tribal rights." *Id*. at 1366 n.1.

Here, too, the issuance of the state permit does not impinge on White Earth's rights. Vipond has pumped no water from the Wild Rice River. He has not installed a pump. He has not even decided whether he will install the pump. The only *conduct* that has occurred is his receipt of a state permit to appropriate water. (Declaration of David Vipond, ¶ 5, filed herewith.)

Because WEDNR lacks jurisdiction over Vipond, the likelihood of success factor weighs in his favor.

III. Minnesota's issuance of the permit demonstrates that WEDNR cannot prove catastrophic harm and requires Minnesota to be a participant in the litigation.

The issuance of the permit by MDNR makes it nearly impossible for WEDNR to demonstrate the catastrophic harm required by *Montana*. (ECF No. 24 at 13; Roy Mem. 23.) The State has considered the needs of the aquatic resources in the River, determined the amount of water that can safely be appropriated, and granted a permit under those guidelines. If the State believed that baitfishing, sturgeon, and wild rice gathering would be gravely harmed by the appropriation, they would either not have granted the permit or

they would have granted it under different terms than they did. The State has already considered the impact of the pumping on the River and found it would not harm these resources. It is difficult to see how WEDNR can prove catastrophic harm considering these facts. WEDNR's authority does not change that. WEDNR attempts to again muddy the standards because its position is unsupported by precedent, saying that tribal sovereignty is not subordinate to states, and that there is no suggestion that tribal inherent authority exists only when no other government can act. (Roy Mem. 23.) These statements are entirely beside the point. The *only* limitation Vipond raises is *Montana*. WEDNR knows it cannot meet the second *Montana* exception and is trying to assert alternative grounds to bolster its position. But it can escape neither precedent nor facts.

In contrast to WEDNR's false claim that Vipond only cited to its Complaint and "unverified sources" in its Memorandum, (Roy Mem. 24), Vipond's Complaint heavily relied on the Findings of Fact made by MDNR when it issued the permit. That is evidence by an expert regulatory agency, making conclusions based on its duty to protect the State's natural resources. (See Carter Decl. Ex. 1, ECF No. 26-1; see also the Declaration of Larry Kramka, filed herewith.)

Vipond relied on the MDNR's Findings of Fact because the State determined the appropriation would be safe to the aquatic resources in the River. If WEDNR finds the State's determinations to be inadequate, Vipond is not the proper party through which WEDNR can challenge those determinations. WEDNR must challenge the State directly. And because the adequacy of the State's determinations and its sovereign interests are squarely at issue in the litigation, they are a party required to be joined under Rule 19. *See*

Hood, 570 F.3d 625. WEDNR could have submitted written objections to the permit during the comment period. It did not. WEDNR could have filed an administrative action challenging the issuance of the permit. It did not. WEDNR could have asked the State to withdraw the permit. It did not. These were the remedies it had for challenging the State's determinations. Instead, it sued a farmer in its tribal court for receiving the State permit. Its desire to avoid the State does not mean that it can adjudicate the State's rights in its absence.

For instance, as explained in the Declaration of Larry Kramka, filed herewith, WEDNR expert Dr. Jody Kubitz asserts that there "is no surplus water available for out-of-stream uses during [July through October]." (Kramka Decl. ¶ 42.) If *zero* surplus water exists, WEDNR is asserting a claim to *one hundred percent* of the waters in the River. WEDNR is *de facto* preempting the State's rights and the riparian rights of landowners. WEDNR is attempting to adjudicate the rights to the River in the absence of the State, in a forum in which the State cannot be joined. 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 Rule 19. *Hood*, 570 F.3d 625.

WEDNR suggests it is now walking back the claim that the State's interests are preempted. (Roy. Mem. 28, n.10.) Yet the only case WEDNR cites to support a tribe's regulation over a nonmember's irrigation of fee lands is *Colville*, 647 F.2d 42, which held that the state's authority was preempted and "of no force and effect." *Id*. at 53. *Colville* <u>*is*</u> the authority for WEDNR's preemption claim. (Carter Decl. Ex. 9, ECF No. 26-1, at 58.) WEDNR's assertion that the claim of preemption is "of no moment" is not credible when WEDNR continues to rely on *Colville* heavily.

IV. Continuing to litigate in the Tribal Court, which lacks jurisdiction over him, irreparably harms Vipond.

WEDNR attempts to distinguish Vipond's reliance on *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1139 (8th Cir. 2019) (ECF No. 24 at 22; Roy Mem. 30), claiming the plaintiff there first exhausted in tribal court, and Vipond must do the same. But all that happened in the tribal court in *Kodiak* is that the plaintiff moved to dismiss, appealed that decision, and then sought relief in the federal court. The tribe in *Kodiak* argued that these steps were inadequate to satisfy the exhaustion rule, but the court expressly rejected this. *Id*. at 1133. *Kodiak* held that continuing to litigate in a court that lacked jurisdiction over the party was unjust: "Without the injunction, [plaintiff] would be forced to expend the time and cost associated with continued litigation in a tribal court that lacks jurisdiction over them, whereas the only possible injury to the tribal court plaintiffs and tribal court officials from the injunction is delay." *Id.* at 1139.

V. Vipond's motion for preliminary injunction did not come too late.

As an initial matter, the Tribal Court Action has been on hold for most of the last year, as WEDNR acknowledges. (Roy Mem. 12-14.) As previously explained, Vipond's lead counsel had serious health challenges necessitating these delays, which WEDNR graciously agreed to. (ECF No. 25.) The two-day hearing on jurisdiction, which requires briefing and post-trial findings of fact, is yet to occur. With the speed of litigation and required appeals, Vipond will not realistically return to federal court for years.

WEDNR cites *Ng v. Bd. of Regents of Univ. of Minn.*, 64 F.4th 992 (8th Cir. 2023) in support of its argument. There, the gymnastics team members and coaches had already

left the school, so preserving the team was impossible. But here, the Tribal Court Action is ongoing. It is not too late to move the matter to a forum in which all necessary parties may participate. Moreover, no pump has been installed. *Ng* does not support WEDNR's argument.

Judicial economy supports an injunction. Because the State of Minnesota is a required party to be joined, and who cannot be joined in the Tribal Court, fact discovery currently ongoing will need to be repeated if the Tribal Court is not enjoined. The time and cost of doing so weighs in favor of an injunction. Requiring the parties to continue a necessarily incomplete adjudication of rights before the Tribal Court creates the nightmare of duplicative and wasteful litigation.

CONCLUSION

Because the Tribal Court lacks jurisdiction over Vipond, the Tribal Court Action should be enjoined. Plaintiff respectfully requests that the Court grant his Motion.

Respectfully submitted,

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Dated: November 15, 2024

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