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 OBJECTIONS TO MAGISTRATE JUDGE BRISBOIS'S ORDER ON MOTION TO STAY

INTRODUCTION

Pursuant to LR 72.2(a), Defendant Dustin Roy, in his official capacity as divisional director of White Earth Division of Natural Resources (WEDNR), respectfully submits these objections to Magistrate Judge Leo I. Brisbois's November 25, 2024 Order (Dkt. 47) (Order) granting in part and denying in part Defendant Dustin Roy's Motion to Stay (Dkt. 13). The Court should modify or set aside the part of the Order denying Defendant Roy's request to stay all proceedings in this matter until Plaintiff exhausts his challenge to the regulatory and adjudicatory jurisdiction of the White Earth Nation ("Nation") in a previously filed action pending in the Nation's courts. A stay is mandatory because Plaintiff has not shown that any exception to the tribal court exhaustion rule applies.

BACKGROUND

On October 8, 2024, Defendant Roy moved to stay this action until Plaintiff David Vipond exhausts his challenge to the Nation's jurisdiction in an action filed by WEDNR against Mr. Vipond in the White Earth Tribal Court in August 2023. Mem. of Law in Supp. of Def. Dustin Roy's Mot. to Stay (Dkt. 15) ("Def. Roy's Mem."). The parties have been actively litigating the jurisdictional question in the Tribal Court for more than a year—they have conducted discovery and exchanged expert reports, and the Tribal Court will hold a hearing on jurisdiction in February 2025. Defendant Roy filed his nondispositive Motion to Stay with the Honorable Leo I. Brisbois pursuant to LR 7.1(b), Plaintiff filed his Memorandum in Opposition to the Motion to Stay on October 16, 2024 (Dkt. 33), and Magistrate Judge Brisbois held a hearing on October 24, 2024.

Magistrate Judge Brisbois issued the Order on Defendant Roy's Motion to Stay on November 25, 2024. The Order focuses in substantial part on the interplay between Defendant Roy's Motion to Stay and Plaintiff's Motion for Preliminary Injunction, filed on October 11, 2024. Order at 6-10. The Order wrestles with whether, in light of considerations of efficiency and economy, the assigned Magistrate Judge or the assigned District Judge should be the one to decide if the Tribal Court must have the opportunity to review Plaintiff's jurisdictional challenge in the first instance. *Id.*

With respect to the exhaustion rule that should be dispositive of the Motion to Stay, the Order states that "the law suggest[s] that it is the Tribal Court which should decide Plaintiff's jurisdictional challenge in the first instance." *Id.* at 9; *see also id.* at 9 n.4. Nevertheless, the Order grants Defendant Roy's Motion to Stay *only* with respect to "the remainder of any deadlines in this Federal litigation pending Judge Menendez's resolution of Plaintiff's Motion for Preliminary Injunction," denying the motion in all other respects. *Id.* at 10-11. And it grants the limited stay only "until the resolution of Plaintiff's Motion for Preliminary Injunction," regardless of the outcome. *Id.* at 11.

ARGUMENT

The Order is contrary to law and should be modified or set aside for three principal reasons. *See* LR 72.2(a)(3)(A).

First, the Order does not apply the correct legal standard to Defendant Roy's Motion to Stay. The Order sets forth the following standard of review:

> The District Court enjoys broad discretion in staying proceedings when doing so is an appropriate measure in managing the Court's docket.

> There is, however, a presumption in favor of denying a motion to stay which seeks to stay a proceeding in its entirety. This presumption places a heavy burden on the proponent of such an all encompassing stay to demonstrate the need for the stay. To meet this heavy burden, the proponent of the stay must demonstrate a specific hardship or inequity which would result if the proponent were required to proceed in the action.

Order at 5-6 (citations omitted).

The Supreme Court, however, has set forth an entirely different standard of review when a non-Indian mounts a federal court challenge to an Indian tribe's assertion of jurisdiction, which Defendant Roy relied upon in his Motion to Stay. Def. Roy's Mem. at 13-14, 17-18. Under these circumstances, a federal court must "stay[] its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction," *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985). Until then, "it would be premature for a federal court to consider any relief," *id.* at 857, including a preliminary injunction, *see, e.g.*, *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"). Def. Roy's Mem. at 13-14.

This is not a matter of discretion. "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 narrow exceptions applies. Def. Roy's Mem. at 13-14, 18. The Supreme Court and Eighth Circuit have already balanced the unique hardships and equities that apply when a non-Indian challenges tribal jurisdiction and concluded that a stay is required. *See id.* at 13-17 (discussing substantive federal policies and prudential policies

undergirding the exhaustion rule). The Order turns this legal standard on its head, instead applying a "presumption" *against* a stay and imposing "a heavy burden" on Defendant Roy to overcome, Order at 6. *See also id.* at 9 ("The Court finds that Defendant Roy has failed to demonstrate the need to stay the entirety of the present Federal proceedings."). That standard, however, applies only to *other* kinds of stay requests.

Second, the Order misapprehends the relevant inquiry under Supreme Court and Eighth Circuit precedent. The Order states that "Defendant Roy argues the underlying merits of the present case." *Id.* at 6; *see also id.* at 7 ("In short, the parties, in opposition and support of the present Motion to Stay, argue the overall merits of the claims underlying this case."). This is incorrect. Defendant Roy expressly affirmed that he is *not* asking the Court to rule on the merits of Plaintiff's jurisdictional claim: "it would be premature at this stage for the Court to conduct a full jurisdictional analysis" because "that job is for the Nation's courts in the first instance[.]" Def. Roy's Mem. at 30. Defendant Roy is only asking the Court to require Plaintiff to exhaust his tribal court remedies before entertaining Plaintiff's collateral attack on the Nation's jurisdiction. *Id.* at 1-2.

To be sure, the parties' briefs did address the jurisdictional question—but only to the extent relevant to this procedural context, i.e., the Court's consideration of whether to stay proceedings to allow for tribal court exhaustion. As explained in Defendant Roy's memorandum, there are four exceptions to the exhaustion rule, and none applies in this case. *Id.* at 18-31. The briefs particularly discussed the fourth exception, which provides that exhaustion is not required "if the assertion of tribal court 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).[1] Def. Roy's Mem. at 18. Defendant Roy explained why, under existing precedent, the Nation's assertion of jurisdiction over high-capacity water appropriations on the White Earth Reservation comes nowhere close to meeting this standard. *Id.* at 23-31; *see also* Def. Dustin Roy's Notice of Filing in Related Case (Amicus Brief of the United States in Support of WEDNR in Tribal Court action).

Again, Defendant Roy is not currently asking this Court to hold conclusively that the Nation possesses jurisdiction over Plaintiff's proposed 65.2-million-gallon appropriation, but only to find that the Nation's assertion of jurisdiction is not "frivolous or obviously invalid under clearly established law." If the Nation's courts uphold tribal jurisdiction, and if Plaintiff exhausts his remedies in the lower court and the White Earth Court of Appeals, then, once those proceedings are concluded, this Court may proceed to determine whether the exercise of tribal jurisdiction is consistent with federal law and will have the benefit of the Nation's courts' factual and legal analyses. Def. Roy's Mem. at 1-2, 13--18. This is "the orderly administration of justice" that the exhaustion rule mandates, *Nat'l Farmers Union*, 471 U.S. at 856. Def. Roy's Mem. at 14-15.

Third, the Order misapprehends the decision the Court is required to make under the tribal court exhaustion doctrine. The Order states that "Defendants argue that the Tribal Court has the requisite jurisdiction to, in the first instance, adjudicate Plaintiff's

[1] Plaintiff's Memorandum in Opposition to Defendant Roy's Motion to Stay (Dkt. 33) confirms at page 9 that this is the only exception he argues is applicable in this case.

jurisdictional challenge. But this is not the issue before the undersigned in the present Motion to Stay[.]" Order at 11.

Respectfully, under the exhaustion doctrine that is precisely the issue presented to the Court. The exhaustion rule dictates that "the forum whose jurisdiction is being challenged [should have] the first opportunity to evaluate the factual and legal bases for the challenge," *Nat'l Farmers Union*, 471 U.S. at 856. Def. Roy's Mem. at 13-18 (arguing for stay based on exhaustion rule); Def. Dustin Roy's Opp'n to Pl.'s Mot. for Prelim. Inj. (Dkt. 38) at 14-27 (discussing basis for stay in memorandum opposing preliminary injunction). Defendant Roy's motion requires the Court to determine whether the rule governs here, such that a full stay should be granted, or whether an exception instead obtains, in which case no stay would be appropriate. But rather than making this binary determination, the Order sets forth a limited quasi-stay that finds no support in exhaustion case law.[2]

The Order also reflects a concern that, if the Magistrate Judge were to grant the Motion to Stay, it would preempt the District Judge's ruling on Plaintiff's Motion for Preliminary Injunction. Order at 8. But that consideration is properly addressed by other

[2] The Order likewise has it wrong in stating that "[n]either this Motion to Stay nor Plaintiff's Motion for Preliminary Injunction will determine the underlying substantive issue of whether the White Earth Tribal Ordinance and the Tribal Court have jurisdiction over Plaintiff," Order at 8. In fact, if the Court were to grant Plaintiff's Motion for Preliminary Injunction—which would require holding that the Nation's assertion of jurisdiction is frivolous under *Montana v. United States*, 450 U.S. 544 (1981) and its progeny—it *would* determine the underlying jurisdictional issue. At that point, nothing would remain for further proceedings in this Court, the Tribal Court proceedings would be enjoined, and the Tribal Court would never have had the opportunity to rule on its own jurisdiction. Such a result would be contrary to law.

means. For example, had the stay been granted as required by applicable law, Plaintiff could have objected, giving this Court an opportunity to consider the stay issue either prior to or in tandem with the injunction motion. As noted, the Order at one point does reach the correct legal conclusion: "the law suggest[s] that it is the Tribal Court which should decide Plaintiff's jurisdictional challenge in the first instance." Order at 9 & n.4. Indeed, the law is clear that the Nation's assertion of jurisdiction is not "frivolous or obviously invalid under clearly established law," *DISH Network*, 725 F.3d at 883. Def. Roy's Mem. at 23-31. Under these circumstances, a stay of federal proceedings is "mandatory." *Supra* p. 3.

While the Order understandably sought "to ensure the just, speedy and inexpensive determination of this action," Order at 10, the Order actually risks the opposite result by staying this action only "until the resolution of Plaintiff's Motion for Preliminary Injunction," *id.* at 11. If the Court were to deny the Motion for Preliminary Injunction and leave the Order untouched, there would be no stay in place. This would then risk *simultaneous* adjudications of the jurisdictional question by this Court and the Tribal Court, resulting in "direct competition" between tribal and non-tribal courts, *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987). This is exactly what the exhaustion rule operates to prevent.

Defendant Roy recognizes that, in the course of ruling on Plaintiff's Motion for Preliminary Injunction, this Court could conclude that Defendant Roy is entitled to a stay of all further proceedings and could accordingly grant the same relief denied by Magistrate Judge Brisbois in the Order. Nevertheless, the Order itself is contrary to law,

and thus Defendant Roy objects to the Order and requests that it be modified or set aside. *See* LR 72.2(a)(1) ("A party may not assign as error a defect in the order not timely objected to."); Fed. R. Civ. P. 72(a) (same). In doing so, Defendant Roy understands that it is within this Court's sound discretion whether or not to reach Plaintiff's Motion for Preliminary Injunction concurrent with ruling on these objections.

CONCLUSION

For the foregoing reasons, Defendant Roy respectfully requests that the Court modify or set aside the November 25, 2024 Order granting in part and denying in part Defendant Roy's Motion to Stay and enter an order staying this action in its entirety until Plaintiff exhausts all remedies available in the Nation's court system.

Respectfully submitted on this 6th day of December, 2024.

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Word Count Certificate of Compliance

I, Cory J. Albright, affirm that these Objections comply with the limits in LR 72.2(c)(1) and with the type-size limit of LR 72.2(c)(2). I further certify that Microsoft Word for Office 365 was used; the program has been applied specifically to include all text, including headings, footnotes, and quotations; and the total word count is 2,173 words.

/s/ Cory J. Albright
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