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 Natural Resources, White Earth Department of Natural Resources,

Defendants.

Case No. 24-cv-03125

PLAINTIFF'S RESPONSE TO DEFENDANT ROY'S OBJECTIONS TO MAGISTRATE JUDGE BRISBOIS'S ORDER ON MOTION TO STAY

INTRODUCTION

Pursuant to Local Rule 72.2(a)(2), Plaintiff David Vipond ("Vipond") submits this Response to Defendant Roy's Objections to Magistrate Judge Brisbois's Order (ECF No. 49). Judge Brisbois's Order of November 25, 2024 (ECF No. 47) granted in part and denied in part Defendant Roy's Motion to Stay (ECF No. 13). Defendant Roy's Motion to Stay, filed just days before Plaintiff's Motion for Preliminary Injunction, only served to confuse matters and necessitate additional, duplicative briefing and oral argument. At both the hearing for the Motion to Stay and in his Order, Judge Brisbois expressed his frustration at having, in essence, a dispositive motion that would affect a Motion for Preliminary Injunction—an act that would trigger interlocutory review—dressed up as a non-dispositive motion. As such, Judge Brisbois's decision attempts to address Defendant's motion while also deferring to the District Court's upcoming review of Plaintiff's Motion for Preliminary Injunction. Although Plaintiff also does not agree with all of Judge Brisbois's authority and determinations, Plaintiff does not object to the Order and requests that the Court proceed to hear the Motion for Preliminary Injunction without further delay.

BACKGROUND

Plaintiff David Vipond was sued by White Earth Division of Natural Resources in White Earth's Tribal Court. Vipond sought relief in this Court from further proceedings in the Tribal Court on the basis that both the White Earth Division of Natural Resources ("WEDNR") and the Tribal Court lack jurisdiction over him with respect to the White Earth law being imposed on Vipond, the Water Protection Ordinance. As a non-member living on his fee lands located within the Reservation, the presumption under *Montana v.*

United States, 450 U.S. 544 (1981) is that the Tribe lacks jurisdiction over him, unless one of two limited exceptions is satisfied. The first exception arises when the nonmember and the tribe enter into a consensual relationship of some kind, which is inapplicable here. To have civil jurisdiction over a nonmember under *Montana*'s second exception, the tribe must show that the activity of the nonmember "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id*. at 566.

The parties had met and conferred several times after Plaintiff filed its complaint in this Court. Defendant Roy was aware that Vipond was going to file a motion for preliminary injunction, which is a motion that goes before the District Judge. Nevertheless, Defendant Roy preempted Vipond's motion by four days with its Motion to Stay, a non-dispositive motion that went to Magistrate Judge Brisbois.

The parties then were engaged in simultaneous cross-briefings between the two motions during the months of October and November. Many of the same arguments were repeated between the memoranda of the parties, as noted by Judge Brisbois in his Order. (Order, ECF No. 47, at 6-7.) The process has not been an efficient use of parties' resources nor the judicial resources of this Court. Judge Brisbois's hands were effectively tied on the Motion to Stay, because, as Vipond had filed his Motion for Preliminary Injunction, unless Judge Brisbois denied the Stay, it would interfere with the injunction sought by Vipond. Such an occurrence is treated like a denial of the injunction and triggers an appeal. *See* 11A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2962 (3d ed. 2024) ("when a court declines to make a formal ruling on a motion for a preliminary injunction, but its action has the effect of denying the requested relief, its refusal to issue a

specific order will be treated as equivalent to the denial of a preliminary injunction and will be appealable.") Likely desiring to avoid that outcome, Judge Brisbois granted the Stay in part, leaving alone the pending Motion for Preliminary Injunction for its consideration and decision by this Court.

ARGUMENT

Defendant Roy's Motion for Stay exemplifies why Vipond is being harmed—and will be irreparably harmed absent the preliminary injunction—by litigating before the Tribal Court. The Motion was duplicative, unnecessary, and expensive. It consumed considerable attorney time and party resources. And despite prevailing on its Motion in part, Defendant Roy *still* seeks reconsideration of the decision by the Court, requiring further briefing and attorney time. This may not be an issue for Defendant Roy, whose litigation is funded by a tribal government. But it is absolutely a hardship for an individual litigating against that government.

Moreover, Defendant Roy again misrepresents the legal standard on the exhaustion doctrine in its Memorandum objecting to Judge Brisbois's Order (ECF No. 49 at 3-7.) Apparently making these arguments before the federal court twice already is not sufficient, and Roy seeks a third at-bat. This matter has been very thoroughly briefed by the parties in both the Memoranda for and against the Motion to Stay (ECF Nos. 15, 33) and the Memoranda for and against the Motion for Preliminary Injunction (ECF Nos. 24, 42). Accordingly, Vipond will not reiterate his position on the prudential doctrine of exhaustion and why the tribal court plainly lacks jurisdiction over him, sufficient to satisfy one of its

four exceptions. Instead, Vipond will briefly address misrepresentations by Roy in his Memorandum.

I. Courts reject exhaustion when the second *Montana* exception applies.

Roy calls exhaustion "mandatory" and downplays the applicable exceptions in his Memorandum. (ECF No. 49 at 3-4.) But Roy entirely avoids the correct lens through which to determine whether the matter must be exhausted in the tribal court first—i.e., cases that require exhaustion when applying the second *Montana* exception. Roy cites *Montana* just once in his Memorandum, in a footnote, and does not discuss the very limited jurisdiction that a tribal government may have over a nonmember acting on his fee lands. (*Id*. at 6 n.2.)

Despite Judge Brisbois' contention in footnote 4, courts have not "universally recognize[d] the inherent authority of tribes to regulate the conduct of non-members within a reservation when the conduct directly affects the tribe's water rights." (ECF No. 47 at 9, n.4). Judge Brisbois cites only to *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52 (9th Cir. 1981), heavily relied on by Defendant Roy in his Motion. As noted by Vipond in his Opposition Memorandum, the holding in *Colville* was limited by the geographic facts of present in the case. (ECF No. 33 at 26, n.7.) The Ninth Circuit has distinguished *Colville* in later cases involving the application of the second *Montana* exception and regulation of excess waters within a reservation. *See United States v. Anderson*, 736 F.2d 1358, 1365-66 (9th Cir. 1984).

In cases factually similar to the present matter, courts have held that tribes lack jurisdiction over nonmember conduct on fee lands under the second *Montana* exception, even when a tribe's water rights are at issue. In 2022, the Tenth Circuit affirmed the district

court's determination that a tribe lacked jurisdiction over a nonmember who diverted water to irrigate his land, located within a reservation. *Ute Indian Tribe of Uintah and Ouray Reservation v. McKee*, 32 F.4th 1003, 1007-10 (10th Cir. 2022). Vipond respectfully further refers the Court to its argument in its Opposition to the Motion to Stay (ECF No. 33, 19-22.)

II. Defendant Roy takes contradictory positions on whether he is arguing the merits of the case through his Motion to Stay.

Roy claims that he is not asking this Court to rule on the merits of Vipond's jurisdictional claim (Roy Mem. at 4) but has also argued that "*jurisdiction is the dispositive merits issue* in the Tribal Court action." (Def. Roy's Opposition to Pl's. Mot. for Preliminary Injunction, ECF No. 42 at 31-32, emphasis in original.) Regardless of whether Roy believes the Motion to Stay tees up the jurisdictional question, it *necessarily* raises the issue, as the determination of whether exhaustion is required itself compels an analysis of whether the tribal court "plainly lacks jurisdiction" under the fourth exception. *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997); *Nevada v. Hicks*, 533 U.S. 353, 384 (2001). Thus, Vipond disputes that Judge Brisbois erred when stating that the parties both argue the overall merits of the claim underlying this case. (ECF No. 47 at 6, 7.) Though Roy seeks to dodge this question here, Roy's own Motion necessarily brought the jurisdiction issue before the Magistrate Judge.

III. Roy's unnecessary Motion essentially required Magistrate Brisbois to limit his holding, but that does not mean his determination was error.

At the hearing on October 24th, Judge Brisbois expressed his frustration with the Motion filed by Defendant Roy, as it seemed to require a merits determination (on the

fundamental question of jurisdiction) and, if granted, would prevent the Court from hearing Plaintiff's Motion for Preliminary Injunction. Roy here complains of this outcome, claiming it error that the Magistrate held that he need not determine whether the tribal court has jurisdiction in the first instance. (ECF No. 49 at 5-6; ECF No. 47 at 11.) But Judge Brisbois likely limited his ruling in order to defer to this Court's determination on Vipond's Motion for Preliminary Injunction, which raises the same fundamental issues of tribal court jurisdiction and the appropriate forum in which to litigate the Water Protection Ordinance. Roy filed an unnecessary Motion and now complains of the result. The determination is now properly before this Court, just as it would have been if Roy had never filed his Motion at all. Therefore, Vipond requests that Judge Brisbois Order be left intact and that the Court proceed to hear its Motion for Preliminary Injunction, as soon as possible.[1]

CONCLUSION

For the aforementioned reasons, Judge Brisbois's Order need not be modified nor set aside. Plaintiff David Vipond respectfully requests that the Court proceed to hear its Motion for Preliminary Injunction without further delay.

[1] The Tribal Court will hear the jurisdictional question on February 24th and 25th and Plaintiff's position is that time is of the essence to hear its Motion.

Respectfully submitted,

NOLAN, THOMPSON, LEIGHTON & TATARYN, PLC

Dated: December 20, 2024

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