

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DAVID VIPOND,
Plaintiff-Appellant,

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 Division of Natural Resources,
Defendants-Appellees

Appeal from the United States District Court for the District of Minnesota,
Case No. 24-cv-03125-KMM-LIB (Hon. Katherine M. Menendez)

RESPONSE BRIEF OF DEFENDANT-APPELLEE DUSTIN ROY

Riyaz A. Kanji
Joshua H. Handelsman
KANJI & KATZEN, P.L.L.C.
P.O. Box 3971
Ann Arbor, Michigan
(734) 769-5400
rkanji@kanjikatzen.com
jhandelsman@kanjikatzen.com

Cory J. Albright
Jane G. Steadman
KANJI & KATZEN, P.L.L.C.
811 1st Avenue, Suite 640
Seattle, Washington 98104
(206) 344-8100
calbright@kanjikatzen.com
jsteadman@kanjikatzen.com

Sara K. Van Norman
VAN NORMAN LAW, PLLC
400 South 4th Street, Suite 401
Minneapolis, Minnesota 55415
(612) 299-1794
sara@svn.legal

*Counsel for Defendant-Appellee Dustin Roy,
in his official capacity as Director of Natural Resources,
White Earth Division of Natural Resources*

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
JURISDICTIONAL STATEMENT	1
STATEMENT OF ISSUES	1
INTRODUCTION	2
STATEMENT OF THE CASE.....	5
I. Aquatic Natural Resources Form the Bedrock of Tribal Member Subsistence on the White Earth Reservation.....	5
II. The Water Protection Ordinance Guards Against Grave Threats Posed by High-Capacity Pumps and Wells.....	7
III. The Tribal Court Action Between WEDNR and Mr. Vipond.....	11
IV. Mr. Vipond’s Federal Court Action	15
SUMMARY OF THE ARGUMENT	18
ARGUMENT	20
I. Standard of Review.....	20
II. The District Court Properly Denied Mr. Vipond’s Motion for Preliminary Injunction Because He Failed To Exhaust Tribal Court Remedies.....	21
A. A Party Who Disputes Tribal Jurisdiction Must Exhaust Tribal Court Remedies Before Seeking Relief in Federal Court.....	21
B. The District Court Correctly Held Exhaustion Is Required.....	23
C. The District Court Properly Denied a Preliminary Injunction for Failure To Exhaust Without Reaching the <i>Dataphase</i> Factors.	28

III.	The District Court Properly Determined that No Exception to the Exhaustion Requirement Applies Because the Assertion of Tribal Jurisdiction Is Not “Frivolous or Obviously Invalid Under Clearly Established Law.”	31
A.	The Nation’s Assertion of Jurisdiction over High-Capacity Water Appropriations Is Not Frivolous or Obviously Invalid Under Clearly Established Law.....	31
B.	The Existence of State Regulation Does Not Prohibit Tribal Regulation.	38
C.	No Prohibition Exists Against Tribal Regulation of Non-Indian Use of Reservation Water Resources.	43
IV.	Mr. Vipond’s Rule 19 Argument Does Not Support an Exhaustion Waiver.	47
	CONCLUSION	51

TABLE OF AUTHORITIES

Cases

<i>Arizona v. California</i> , 373 U.S. 546 (1963)	33, 34, 45
<i>Atkinson Trading Co., Inc. v. Shirley</i> , 532 U.S. 645 (2001)	41
<i>Attorney's Process and Investigation Services, Inc. v. Sac & Fox Tribe of Mississippi in Iowa</i> , 609 F.3d 927 (8th Cir. 2010).....	24, 26
<i>Big Horn County Electric Cooperative, Inc. v. Big Man</i> , 526 F.Supp.3d 756 (D. Mont. 2021).....	42
<i>Bruce H. Lien Co. v. Three Affiliated Tribes</i> , 93 F.3d 1412 (8th Cir. 1996).....	33
<i>Burlington Northern Railroad Co. v. Red Wolf</i> , 196 F.3d 1059 (9th Cir. 1999).....	36
<i>Colville Confederated Tribes v. Walton</i> , 647 F.2d 42 (9th Cir. 1981).....	34, 35, 44, 50
<i>Confederated Salish and Kootenai Tribes v. Namen</i> , 665 F.2d 951 (9th Cir. 1982).....	34, 42, 44
<i>Crowe & Dunlevy, P.C. v. Stidham</i> , 640 F.3d 1140 (10th Cir. 2011).....	30
<i>Dataphase Systems, Inc. v. C L Systems, Inc.</i> , 640 F.2d 109 (8th Cir. 1981).....	28, 29
<i>DISH Network Service L.L.C. v. Laducer</i> , 725 F.3d 877 (8th Cir. 2013).....	passim
<i>Duncan Energy Co. v. Three Affiliated Tribes of Fort Berthold Reservation</i> , 27 F.3d 1294 (8th Cir. 1994).....	passim
<i>Evans v. Shoshone-Bannock Land Use Policy Commission</i> , 736 F.3d 1298 (9th Cir. 2013).....	35, 36

<i>FMC Corp. v. Shoshone-Bannock Tribes</i> , 942 F.3d 916 (9th Cir. 2019).....	25, 39, 40, 49
<i>Fort Yates Public School District # 4 v. Murphy ex rel. C.M.B.</i> , 786 F.3d 662 (8th Cir. 2015).....	35
<i>Gaming World International, Ltd. v. White Earth Band of Chippewa Indians</i> , 317 F.3d 840 (8th Cir. 2003)	20, 22, 27, 33
<i>Havasupai Tribe v. Anasazi Water Co.</i> , 321 F.R.D. 351 (D. Ariz. 2017)	46, 47
<i>Hood ex rel. Mississippi v. City of Memphis</i> , 570 F.3d 625 (5th Cir. 2009).....	50, 51
<i>Iowa Mutual Insurance Co. v. LaPlante</i> , 480 U.S. 9 (1987)	passim
<i>Kansas City Southern Railway Co. v. Great Lakes Carbon Corp.</i> , 624 F.2d 822 (8th Cir. 1980).....	47
<i>Kickapoo Tribe of Indians of Kickapoo Reservation v. Babbitt</i> , 43 F.3d 1491 (D.C. Cir. 1995)	51
<i>Kodiak Oil & Gas (USA) Inc. v. Burr</i> , 932 F.3d 1125 (8th Cir. 2019).....	24, 29, 30, 32
<i>Littlewolf v. Lujan</i> , 877 F.2d 1058 (D.C. Cir. 1989)	5
<i>Lower Brule Sioux Tribe v. South Dakota</i> , 104 F.3d 1017 (8th Cir. 1997).....	39, 42
<i>Mandan, Hidatsa & Arikara Nation v. U.S. Department of Interior</i> , 95 F.4th 573 (8th Cir. 2024)	40
<i>Minnesota v. Clark</i> , 282 N.W.2d 902 (Minn. 1979)	5
<i>Montana v. U.S. Environmental Protection Agency</i> , 137 F.3d 1135 (9th Cir. 1998).....	34, 35, 39, 42

<i>National Farmers Union Insurance Cos. v. Crow Tribe of Indians</i> , 471 U.S. 845 (1985)	passim
<i>Nevada v. Hicks</i> , 533 U.S. 353 (2001)	26, 43
<i>Ng v. Board of Regents of University of Minnesota</i> , 64 F.4th 992 (8th Cir. 2023)	30
<i>Otter Tail Power Co. v. Leech Lake Band of Ojibwe</i> , Civil No. 11-cv-1070, 2011 WL 2490820 (D. Minn. June 22, 2011)	36
<i>PPL Montana, LLC v. Montana</i> , 565 U.S. 576 (2012)	45
<i>Runs After v. United States</i> , 766 F.2d 347 (8th Cir. 1985).....	48
<i>School District of City of Pontiac v. Secretary of U.S. Department of Education</i> , 584 F.3d 253 (6th Cir. 2009).....	50
<i>South Dakota v. Bourland</i> , 39 F.3d 868 (8th Cir. 1994).....	50
<i>Stanko v. Oglala Sioux Tribe</i> , 916 F.3d 694 (8th Cir. 2019).....	33
<i>Strate v. A-1 Contractors</i> , 520 U.S. 438 (1997)	passim
<i>Temple v. Mercier</i> , 127 F.4th 709 (8th Cir. 2025)	passim
<i>United States v. Adair</i> , 723 F.2d 1394 (9th Cir 1983)	5
<i>United States v. Anderson</i> , 736 F.2d 1358 (9th Cir. 1984).....	46, 50
<i>United States v. Cooley</i> , 593 U.S. 345 (2021)	33, 42

<i>United States v. Montana</i> , 450 U.S. 544 (1981)	passim
<i>Warner v. First National Bank of Minneapolis</i> , 236 F.2d 853 (8th Cir. 1956).....	2, 47
<i>Washington v. Confederated Tribes of Colville Indian Reservation</i> , 447 U.S. 134 (1980)	40
<i>Window Rock Unified School District v. Reeves</i> , 861 F.3d 894 (9th Cir. 2017).....	36
<i>Winters v. United States</i> , 207 U.S. 564 (1908)	44
<i>WPX Energy Williston, LLC v. Jones</i> , 72 F.4th 834 (8th Cir. 2023)	passim

Statutes and Rules

28 U.S.C. § 1292(a)(1).....	1
28 U.S.C. § 1331	1, 21
Federal Rule of Civil Procedure 19	passim
Minn. LR 7.1	16
Minn. Stat. § 103G.005(15)(a).....	45
Minn. Stat. § 103G.005(15)(b)	45
White Earth Rule of Civil Procedure § 9.04	48

Treaties

Treaty with the Chippewa of the Mississippi, Mar. 19, 1867, 16 Stat. 719.....	5
---	---

Other Authorities

7 Charles Alan Wright et al., Federal Practice and Procedure (3d ed.)	47
---	----

Congressional Research Service, Indian Water Rights Settlements (updated Dec. 3, 2024).....	46
Felix Cohen, <i>Handbook of Federal Indian Law</i> (2012 ed.)	46
Minnesota Department of Natural Resources (MDNR), Straight River Groundwater Management Area Plan 2-5 (Mar. 2017)	7
White Earth Reservation Business Committee’s Resolution and Amended Water Protection Ordinance	passim

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331 over Mr. Vipond's claim that the tribal court lacks jurisdiction over his dispute with the White Earth Division of Natural Resources (WEDNR) regarding the Nation's regulatory authority. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985) ("§ 1331 encompasses the federal question whether a tribal court has exceeded the lawful limits of its jurisdiction").

The district court issued an order on March 5, 2025, denying Mr. Vipond's motion for preliminary injunction and staying the case pending Mr. Vipond's exhaustion of tribal court remedies. Mr. Vipond filed a notice of appeal on April 3, 2025. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES

1. Whether the district court properly denied Mr. Vipond's motion for preliminary injunction for failure to exhaust his tribal court remedies, as required by *National Farmers Union* and its progeny. Apposite cases include:

- a. *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985);
- b. *WPX Energy Williston, LLC v. Jones*, 72 F.4th 834 (8th Cir. 2023); and
- c. *Duncan Energy Co. v. Three Affiliated Tribes of Fort Berthold Reservation*, 27 F.3d 1294 (8th Cir. 1994).

2. Whether the district court properly determined that Mr. Vipond is not exempt from the exhaustion requirement because “the assertion of tribal court jurisdiction is [not] frivolous or obviously invalid under clearly established law,” *DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 883 (8th Cir. 2013). Apposite cases include:

- a. *WPX Energy Williston, LLC v. Jones*, 72 F.4th 834 (8th Cir. 2023); and
- b. *DISH Network Service L.L.C. v. Laducer*, 725 F.3d 877 (8th Cir. 2013).

3. Whether Mr. Vipond’s unprecedented effort to impose Federal Rule of Civil Procedure 19 on the tribal court provides a basis to exempt him from the exhaustion requirement. Apposite cases include:

- a. *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987); and
- b. *Warner v. First National Bank of Minneapolis*, 236 F.2d 853 (8th Cir. 1956).

INTRODUCTION

The tribal court exhaustion doctrine exists to protect tribal courts from premature interference in their decision-making and to ensure that federal courts enjoy the benefit of a fully developed factual and legal record when they ultimately assess the existence of tribal jurisdiction over non-Indian activities. The preliminary injunction sought here runs directly counter to these twin objectives,

the importance of which both the Supreme Court and this Court have reiterated many times over.

The waters of the White Earth Reservation have long sustained the White Earth Nation and its members in their way of life. In recent decades, however, large-scale appropriations for industrial agricultural purposes have increasingly threatened these waters and the fisheries, wild rice, and other natural resources they support. Faced with this reality, the Nation has enacted a comprehensive regulatory scheme pursuant to which WEDNR seeks, in a careful and considered manner, to guard against the pumping of waters in a way that will impair the ecosystems they support and thereby imperil the welfare and economy of the Nation and its members.

When WEDNR asked David Vipond to comply with this regulatory scheme by applying for a permit for his proposed pumping activity, he refused to recognize the Nation's authority over him. WEDNR accordingly filed an action in White Earth Tribal Court to resolve this jurisdictional question.

Mr. Vipond then had a choice—he could, consistent with the long-established tribal court exhaustion doctrine, allow the White Earth courts to adjudicate the Nation's jurisdiction over him in the first instance (with ultimate review in the federal courts), or he could refuse to recognize their authority too and march prematurely into federal court. Mr. Vipond initially chose not to flout the

authority of the tribal court. But after the parties had expended considerable effort in preparing for a tribal court hearing on jurisdiction, he changed course and asked the federal courts to short-circuit the tribal court process. Recognizing that Mr. Vipond's efforts fly in the face of the exhaustion doctrine, the district court rejected his entreaty, and this Court should do so as well.

Mr. Vipond's appeal depends heavily on positing, as uncontested, key facts that in truth are very much in dispute in the tribal court. That court is currently working through an extensive factual record (which is presently not before this Court and was not before the district court), including the testimony of numerous fact and expert witnesses and a developed documentary record, to determine whether tribal jurisdiction exists. The tribal court is doing its job conscientiously, and no warrant exists for enjoining that process based on factual claims this Court simply cannot accept as true. Nor is such warrant provided by precedent. The *per se* rules Mr. Vipond seeks to carve out—that tribal regulation is barred where state regulation also exists or in the realm of water resources—find no basis in the law.

The district court got it right in saying this case lies at the heart of the exhaustion doctrine, and the respect it accorded the tribal court decision-making process merits vindication by this Court.

STATEMENT OF THE CASE

I. Aquatic Natural Resources Form the Bedrock of Tribal Member Subsistence on the White Earth Reservation.¹

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 northwestern Minnesota, *Littlewolf v. Lujan*, 877 F.2d 1058, 1060 (D.C. Cir. 1989). The Reservation was selected after Chief Hole-In-The-Day wrote to President Lincoln, proposing the United States set aside “a tract of country of the best character for my people ...; say that strip of land lying on the Wild Rice river There is every advantage of good soil, game, fish, rice, sugar, cranberries, and a healthy climate.” *Minnesota v. Clark*, 282 N.W.2d 902, 909 n.19 (Minn. 1979). The Treaty reserved the aboriginal right of Ojibwe people to fish, hunt, and gather wild rice on the Reservation, *id.* at 909, and sufficient waters to sustain the resources that enable tribal members to maintain this way of life, *see, e.g., United States v. Adair*, 723 F.2d 1394, 1410-11 (9th Cir 1983).

¹ As explained in Section III, pp. 13-14, WEDNR and Mr. Vipond have developed a substantial evidentiary record in the tribal court action pertaining to the issues addressed in Sections I and II. The evidence cited by WEDNR herein is limited to the evidence that was before the district court—a very small fraction of the facts in the tribal court record.

Aquatic natural resources are as central to the diet and economic survival of tribal members on the Reservation today as they were to their forbearers 150 years ago. More than 550 tribal members harvest wild rice for subsistence and commercial purposes, with each member saving thousands of dollars in food costs and generating thousands of dollars in income each year. (App. 388-89 ¶¶71; R. Doc. 43, at 20-21 ¶¶71; *see also, e.g.*, App. 375 ¶¶18-21; R. Doc. 43, at 7 ¶¶18-21; App. 422 ¶¶10-11; R. Doc. 39-4, at 3 ¶¶10-11.²) More than 275 tribal members commercially harvest minnows and leeches (baitfish) in Reservation waters, including the Wild Rice River, earning on average over \$10,000 annually—a vital source of income on the Reservation where tribal member per capita income is just \$17,000. (App. 388-89 ¶¶71; R. Doc. 43, at 20-21 ¶¶71; *see also, e.g.*, App. 376-378 ¶¶23-32; R. Doc. 43, at 8-10 ¶¶23-32; App. 428-429 ¶¶56-65; R. Doc. 39-4, at 9-10 ¶¶56-65.) Walleye is another critical food source for tribal members—WEDNR operates a walleye hatchery, rears the fry in natural ponds, and then plants the fingerlings in lakes throughout the Reservation, where they are available for harvest. (App. 372-373, 378 ¶¶12, 34; R. Doc. 43, at 4-5, 10 ¶¶12, 34.)

The Nation works tirelessly to safeguard, steward, and restore the Reservation's aquatic resources. For twenty-five years, WEDNR has worked to reintroduce a self-sustaining lake sturgeon population on the Reservation,

² All record citations are to the PDF page numbers shown in the document header.

including in the Wild Rice River, which provides a critical migration corridor and juvenile rearing habitat. (App. 372 ¶11; R. Doc. 43, at 4 ¶11; App. 414-416 ¶¶7-26; R. Doc. 39-3, at 2-4, ¶¶7-26.) These ancient fish play a powerful role in Ojibwe culture and identity but were locally extirpated in the twentieth century. (App. 372 ¶11; R. Doc. 43, at 4 ¶11; App. 389 ¶72; R. Doc. 43, at 21 ¶72.) WEDNR is also working to reseed wild rice in waterbodies on the Reservation where it once flourished, including the western stretch of the Wild Rice River. (App. 371 ¶9; R. Doc. 43, at 3 ¶9; App. 423-428 ¶¶20, 24-25, 29-31, 39-40, 47, 51-52; R. Doc. 39-4, at 4-9 ¶¶20, 24-25, 29-31, 39-40, 47, 51-52.)

II. The Water Protection Ordinance Guards Against Grave Threats Posed by High-Capacity Pumps and Wells.

The Reservation waters that sustain the resources critical to tribal members' subsistence have been subject to rapidly increasing and permanent depletion over the past fifty years. Approximately eighty-four high-capacity groundwater wells and surface water pumps already operate on the Reservation, pumping up to 3.28 billion gallons of water annually—primarily for industrial agricultural purposes. (App. 383-384 ¶53; R. Doc. 43, at 15-16, ¶53.) In the southeast portion of the Reservation, for example, “[a]gricultural irrigation has increased water use by an average of 77 million gallons of water per year since 1988,” Minnesota Department of Natural Resources (MDNR), Straight River Groundwater

Management Area Plan 2-5 (Mar. 2017).³ These wells and pumps deplete groundwater aquifers and lower surface water levels in Reservation lakes, ponds, streams, and wetlands. (*See, e.g.*, App. 379, 387-388 ¶¶37, 68-69; R. Doc. 43, at 11, 19-20 ¶¶37, 68-69.) To make matters worse, the peak irrigation season coincides with a time of critical water need for aquatic natural resources. (*See, e.g.*, App. 379-384 ¶¶37, 39, 42, 47, 50-51, 54-57; R. Doc. 43, at 11-16 ¶¶37, 39, 42, 47, 50-51, 54-57.) Nevertheless, MDNR has continued to issue new high-capacity appropriation permits to irrigators on the Reservation, including in the Wild Rice River watershed.

These pumps and wells present existential threats to the Nation's health and welfare. Wild rice beds require sufficient water levels during the summer months to support the stalks as they grow taller until the rice is ready for harvest, and to enable tribal members to access the beds. (App. 380-381 ¶¶41-42; R. Doc. 43, at 12-13 ¶¶41-42; App. 425-426 ¶¶34-35, 38; R. Doc. 39-4, at 6-7 ¶¶34-35, 38.) The entire wild rice harvest can fail without sufficient water. For example, in 2021, a severe drought year, tribal members harvested less than 10,000 pounds of rice, a mere four percent of the 280,000 pounds harvested a few years later in 2024. (App. 381-382 ¶¶44-45; R. Doc. 43, at 13-14 ¶¶44-45.) Adequate water levels in rivers and streams are also vital to the success of the Nation's baitfish economy—lower

³ https://files.dnr.state.mn.us/waters/gwmp/area-sr/sr_gwma_plan.pdf.

water means warmer water with less oxygen (unsuitable habitat lethal to minnows) and impairs harvester access. (App. 382-383, 388 ¶¶49, 69; R. Doc. 43, at 14-15, 20 ¶¶49, 69; App. 430-431 ¶¶75-80; R. Doc. 39-4, at 11-12 ¶¶75-80.) Likewise, the success of the Nation’s sturgeon reintroduction program, which is on the cusp of the first natural spawning event, (App. 416 ¶¶23-26; R. Doc. 39-3, at 4 ¶¶23-26), hinges on maintaining water levels in the Wild Rice River system at all life stages, including for spawning and migration—in late summer, vulnerable juveniles are likely to be in the river. (App. 382, 388 ¶¶48, 69; R. Doc. 43, at 14, 20 ¶¶48, 69; App. 417-418 ¶¶36-40; R. Doc. 39-3, at 5-6 ¶¶36-40.) And the Nation’s walleye fishery depends on maintaining sufficient water in the natural rearing ponds—in recent years, however, water levels in the ponds are sometimes too low in August and September to retrieve the fingerlings or too low to use the ponds for rearing at all. (App. 383 ¶50; R. Doc. 43, at 15 ¶50.)

In May 2023, the White Earth Reservation Business Committee (RBC), the Nation’s duly elected governing body, determined these harms and threats had become so grave that tribal regulatory oversight was necessary. It enacted the White Earth Reservation Groundwater and Surface Water Protection Ordinance (“Water Protection Ordinance” or “Ordinance”) and established a permitting process for all “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) on the Reservation. (App. 402-412; R. Doc. 39-2, at 5-15 (Ordinance, as amended June 2024).⁴) To prevent a bad situation from getting worse, the Nation has prioritized implementing the Ordinance with respect to “new sources,” i.e., high-capacity appropriations that were not in operation as of the effective date of the Ordinance. (See App. 393-397; R. Doc. 39-1, at 2-6; App. 402; R. Doc. 39-2, at 5 (Section 3).) New sources may compound and exacerbate the adverse impacts of existing high-capacity appropriations and tend to be located in areas where groundwater is complex and slower to recharge. (App. 395; R. Doc. 39-1, at 4.)

The Ordinance does not prohibit high-capacity appropriations—it operates to ensure they are sustainable and do not imperil the resources that support tribal members’ subsistence lifestyle. Upon receipt of a permit application, WEDNR evaluates a proposed appropriation to ensure it will not, individually or cumulatively with other appropriations, 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

⁴ On May 30, 2025, the RBC amended Sections 6.2 and 9.3 of the Ordinance, regarding permit application fees and costs. The RBC’s resolution and the Amended Water Protection Ordinance is available at <https://www.whiteearth.com/media/pages/divisions/judicial-services/codes-ordinances/e2f8b5c798-1749667120/resolution-057-24-030a-water-protection-ordinance-amended.pdf>.

species and habitats. (App. 406-408; R. Doc. 39-2, at 9-11 (Sections 7, 8).)

WEDNR must complete its application review and issue a decision with findings of fact within ninety days. (App. 406; R. Doc. 39-2, at 9 (Section 6.3(c).) WEDNR may grant a permit with or without conditions (for example, restrictions on pumping timing or duration or limits on the amount of water withdrawn during certain times of year) or may deny a permit. *Id.* An applicant may challenge a permit decision in tribal court, which may sustain, modify, or reverse WEDNR's decision. (App. 410; R. Doc. 39-2, at 13 (Section 10.4).)

III. The Tribal Court Action Between WEDNR and Mr. Vipond.

In August 2023, Mr. Vipond obtained a permit from MDNR to pump up to 65.2 million gallons of water per year from the Wild Rice River to irrigate 353 acres of adjacent agricultural land. (App. 368; R. Doc. 34-1.) Mr. Vipond's appropriation site and lands are on the Reservation. (Add. 2-3; App. 540-541; R. Doc. 55, at 2-3.) MDNR advised Mr. Vipond "of the need to obtain any other permits that may apply including any permits required by White Earth Nation." (Add. 16 ¶17; App. 36 ¶17; R. Doc. 4-1, at 3 ¶17.) It further recommended that Mr. Vipond contact WEDNR for more information on the Ordinance. (App. 368; R. Doc. 34-1.) Concurrently, WEDNR notified Mr. Vipond by certified mail and hand delivery of the Nation's permitting requirement. (App. 63-64 ¶¶25-26, 28-29; R. Doc. 4-1, at 30-31 ¶¶25-26, 28-29.) Mr. Vipond did not apply for a tribal permit

and refused any communication with WEDNR, disputing its authority to exercise any regulatory oversight of his pumping. (App. 64 ¶31; R. Doc. 4-1, at 31 ¶31.)

To resolve this jurisdictional question, WEDNR filed an action against Mr. Vipond in White Earth Tribal Court, seeking a declaratory judgment (and corresponding injunctive relief) that he is subject to the Ordinance’s permitting requirement. (App. 59-67; R. Doc. 4-1, at 26-34 (Second Amended Complaint).) WEDNR alleged that Mr. Vipond’s proposed pumping, individually and cumulatively with other high-capacity pumps and wells, threatens devastating effects on baitfish, sturgeon, wild rice, and other aquatic resources, thereby imperiling the subsistence, health and welfare, and economic security of the Nation and its members. (App. 64-65 ¶¶34-35; R. Doc. 4-1, at 31-32 ¶¶34-35.) Mr. Vipond pled numerous affirmative defenses to WEDNR’s complaint.⁵ (App. 77-80 ¶¶35-51; R. Doc. 4-1, at 44-47 ¶¶35-51.)

Concurrent with filing its complaint, WEDNR moved for a preliminary injunction to enjoin Mr. Vipond from installing or operating a high-capacity pump, which the tribal court granted. (App. 92; R. Doc. 4-1, at 59.) “Mr. Vipond secured a victory at the tribe’s appellate court,” (Add. 4; App. 542; R. Doc. 55, at 4)—the

⁵ The tribal court action does not involve any dispute over a WEDNR permit decision. Mr. Vipond has refused to apply for a permit, and thus WEDNR has not denied a permit or granted a permit on conditions he finds objectionable. The question is whether Mr. Vipond must go through the tribal permitting process at all.

White Earth Court of Appeals remanded with directions for the tribal court to provide the parties a full opportunity to present evidence and arguments regarding whether jurisdiction exists “under the *Montana* doctrine and other federal law,” and to enter detailed findings regarding the same, (App. 94-95; R. Doc. 4-1, at 61-62; *see also* App. 108; R. Doc. 4-1, at 75 (dissolving injunctive order)).

The tribal court entered a scheduling order providing for fact discovery, the exchange of expert reports, expert depositions, jurisdictional briefing, and a jurisdictional hearing in June 2024. (App. 107-108; R. Doc. 4-1, at 74-75.) The parties and the court agreed to extend these deadlines multiple times primarily due to Mr. Vipond’s counsel’s health. (App. 207-208; R. Doc. 16-2, at 2-3; App. 212; R. Doc. 16-3, at 2; App. 218-219; R. Doc. 16-5, at 2-3; App. 223-224; R. Doc. 16-6, at 2-3; App. 228-229; R. Doc. 16-8, at 2-3; App. 232-233; R. Doc. 16-9, at 2-3; App. 241-243; R. Doc. 16-13, at 2-4; App. 245-246; R. Doc. 16-14, at 2-3.) The court ultimately scheduled the jurisdictional hearing for February 24 and 25, 2025. (App. 245; R. Doc. 16-14, at 2.) On June 14, 2024, WEDNR disclosed five expert witness reports and several related affidavits, including reports on surface water, aquatic species, economics, and cultural resources. (App. 214-215; R. Doc. 16-4, at 2-3.) Mr. Vipond disclosed three expert witness reports and one witness affidavit on July 29, 2024. (App. 226; R. Doc. 16-7, at 2.) Beginning in October 2024 and continuing through January 2025, Mr. Vipond took nineteen party and third-party

depositions, including depositions of WEDNR officials and expert witnesses, MDNR officials, and individual tribal-member commercial and subsistence harvesters. (*See generally* App. 242; R. Doc. 16-13, at 3.)

Prior to the February 2025 hearing, the parties stipulated to the admission of 141 documentary exhibits, eighteen deposition transcripts, and five affidavits, which the tribal court accepted into evidence. At the two-day hearing, the tribal court heard live testimony from a total of twelve witnesses, including four expert witnesses offered by WEDNR and three expert witnesses offered by Mr. Vipond. In a February 26, 2025 Post Hearing Status Order, the tribal court requested that the parties submit proposed findings of fact, proposed conclusions of law, and post-hearing briefs addressing eleven specific questions (arising under federal and tribal law) pertaining to the court's jurisdiction over the parties' dispute and the Nation's regulatory authority. These submissions were completed on May 27, 2025, and the tribal court has deemed the matter submitted.⁶

⁶ The procedural history recited in this paragraph is not part of the district court record because these events occurred after Mr. Vipond's motion for preliminary injunction was fully briefed. Director Roy includes this background so the Court is fully aware of the status of the tribal court proceedings. The parties can make these submissions and other tribal court materials available if they would aid in the Court's resolution of this appeal—Mr. Vipond and WEDNR, for example, each proposed more than 100 findings of fact based on the evidence presented at the jurisdictional hearing.

IV. Mr. Vipond's Federal Court Action.

After actively litigating the tribal court action for one year, and just two months before the jurisdictional hearing then-scheduled for October 2024, (App. 212; R. Doc. 16-3, at 2; App. 223-224; R. Doc. 16-6, at 2-3), Mr. Vipond abruptly altered course. On August 5, 2024, he sued Judge DeGroat and WEDNR Director Dustin Roy in the court below, seeking declaratory and injunctive relief on the theory that as a matter of federal law, the tribal court lacks jurisdiction over the parties' dispute and the Nation lacks regulatory authority over non-member water appropriations for use on non-member fee lands.⁷ (App. 32; R. Doc. 4, at 32.) Director Roy answered the complaint on October 7, 2024, (App. 109-146; R. Doc. 12), moving concurrently for a stay of all proceedings pending Mr. Vipond's exhaustion of tribal court remedies, (R. Doc. 13).⁸

On October 11, 2024, more than two months after filing suit, Mr. Vipond moved for a preliminary injunction to enjoin further tribal court proceedings. (R.

⁷ After Mr. Vipond filed the instant action, Judge DeGroat recused himself from the tribal court action, and the matter was reassigned. (App. 235; R. Doc. 16-10, at 2.)

⁸ Judge DeGroat joined in the stay request. (R. Doc. 21.) Per local rule, Director Roy's Motion to Stay was heard by U.S. Magistrate Judge Leo Brisbois, who "concluded that the request for a stay had become intertwined with Mr. Vipond's [subsequent] injunction motion, in the sense that staying this litigation entirely while the tribal court process played out would amount to a denial of Mr. Vipond's motion seeking an injunction of the tribal court process." (Add. 5; App. 543; R. Doc. 55, at 5.) Judge Brisbois accordingly granted Director Roy's motion only in part, staying the action (with the exception of Mr. Vipond's motion) until the resolution of the injunction motion. (R. Doc. 47 at 11.)

Doc. 22.) He submitted two attorney declarations with his motion, (R. Docs. 25, 26), but did not submit any declarations or affidavits from fact or expert witnesses. In response, Director Roy submitted a declaration describing the economic, dietary, and cultural importance of the Reservation's wild rice, fish, and game resources to tribal members; the necessity of sufficient water to support those resources; the grave threats posed by high-capacity pumps and wells; the Ordinance; and the nature of the expert reports disclosed by WEDNR in the tribal court case. (App. 369-412; R. Docs. 43, 39-1, 39-2.) Attached to his declaration were affidavits from WEDNR's sturgeon reintroduction project manager and wild rice manager, which had been previously disclosed in the tribal court case. (App. 413-431; R. Docs. 39-3, 39-4.)

With his reply, Mr. Vipond filed two new declarations—his own and one from Larry Kramka, one of his tribal court experts. (App. 446-538; R. Docs. 45, 45-1, 46, 46-1.) At oral argument, Director Roy requested that the district court exclude the declarations because they were improper under Local Rule 7.1(c)(1)(D), which provides that a party moving for a preliminary injunction “must file and serve ... any affidavits and exhibits” with his motion and opening memorandum of law, and because the new opinions expressed in Mr. Kramka's declaration had not been disclosed by the July 29, 2024 expert report deadline in

tribal court, (App. 223; R. Doc. 16-6, at 2; *see* App. 559, at 29:17-30:12; R. Doc. 56, at 29:17-30:12).

In its order, the district court summarized the factual and procedural background of Mr. Vipond's dispute with WEDNR. (Add. 2-4; App. 540-542; R. Doc. 55, at 2-4.) It then outlined the standards governing the power of Indian tribes to exercise civil authority over nonmembers and the tribal court exhaustion doctrine, (Add. 6-8; App. 544-546; R. Doc. 55, at 6-8), observing that "[u]nder this doctrine, a federal court should stay its hand until tribal remedies are exhausted," unless one of four exceptions applies, (Add. 8; App. 546; R. Doc. 55, at 8 (quoting *Temple v. Mercier*, 127 F.4th 709, 715 (8th Cir. 2025))). The district court concluded the exception invoked by Mr. Vipond does not apply:

The question of whether the Nation has the power, pursuant to [*United States v. Montana*, 450 U.S. 544 (1981)], to regulate Mr. Vipond's high-capacity well and water withdrawals will hinge on a factual record that remains undeveloped before this Court. And the question is manifestly *not* one over which the assertion of tribal court jurisdiction is so frivolous or plainly contradictory to established law that it relieves Mr. Vipond of his obligation to exhaust his tribal remedies before seeking this Court's intervention.

(Add. 11; App. 549; R. Doc. 55, at 11.) It accordingly denied Mr. Vipond's motion for preliminary injunction without prejudice and stayed the case pending his exhaustion of tribal court remedies. (Add. 11-13; App. 549-551; R. Doc. 55, at 11-13.)

The district court did not undertake to resolve the many factual issues disputed by Mr. Vipond and Director Roy that bear upon tribal jurisdiction, leaving those to the tribal court in the first instance as required by the exhaustion rule. It considered the merits only for purposes of determining whether an exception to exhaustion applies. (Add. 10; App. 548; R. Doc. 55, at 10.) The court accordingly did not consider or cite any of the declarations submitted by the parties and did not reach Director Roy’s motion to exclude.⁹

SUMMARY OF THE ARGUMENT

Mr. Vipond disputes the Nation’s authority to exercise regulatory oversight of his proposal to pump tens of millions of gallons of water from the Wild Rice River on the Reservation. Mr. Vipond and WEDNR have been litigating this dispute and Mr. Vipond’s challenge to the tribal court’s jurisdiction in the tribal court system since August 2023. In February 2025, the tribal court held a two-day evidentiary hearing to develop the factual record necessary to resolve those jurisdictional questions, including whether such pumping “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe[.]” *Montana*, 450 U.S. at 566. Mr. Vipond and WEDNR have

⁹ Mr. Vipond cites the challenged declarations liberally throughout his brief, *see* Vipond Br. 10-11, 23, 43, 48 (citing R. Docs. 45, 45-1, 46, 46-1), but he does not acknowledge that their admissibility is in controversy. For the reasons explained below, they are not relevant to the proper disposition of this appeal.

submitted post-hearing briefs and proposed findings of fact and conclusions of law and now await the tribal court's decision.

The district court correctly denied Mr. Vipond's request, fourteen months into the tribal court action, to bring those proceedings to a grinding halt. Supreme Court and Circuit precedent are clear that a party may not challenge tribal jurisdiction in federal court unless it first exhausts the remedies available in tribal court—until exhaustion occurs, “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), including the preliminary injunction Mr. Vipond seeks here. The district court also correctly held there is no basis to waive exhaustion because the Nation's assertion of jurisdiction over high-capacity appropriations, which imperil the aquatic natural resources that sustain the tribal community, is not “frivolous or obviously invalid under clearly established law,” *WPX Energy Williston, LLC v. Jones*, 72 F.4th 834, 838 (8th Cir. 2023) (citation omitted).

Mr. Vipond's arguments to the contrary disregard this standard (which he never mentions) and the substantial body of case law affirming the powerful tribal regulatory interest in protecting reservation water resources. Instead, Mr. Vipond asks this Court to impose unprecedented, per se limitations on tribal jurisdiction over nonmembers, and to wade into vigorously disputed issues of fact without the benefit of the voluminous factual record developed in tribal court. In short, he

seeks to carve out a new exception to exhaustion that would swallow the rule entirely. Mr. Vipond’s argument that Federal Rule of Civil Procedure 19 provides an independent basis to enjoin tribal court proceedings is likewise fatally flawed, as Rule 19 is non-jurisdictional and does not apply in tribal court in any event.

The district court’s order denying Mr. Vipond’s preliminary injunction motion and staying this action until he has exhausted his jurisdictional challenge in tribal court should be affirmed.

ARGUMENT

I. Standard of Review.

A party may not successfully move to enjoin tribal court proceedings until it first exhausts tribal court remedies. *See WPX Energy Williston*, 72 F.4th at 837-39. “The legal scope of the tribal exhaustion doctrine is a matter of law to be reviewed de novo.” *Temple*, 127 F.4th at 715 (brackets omitted) (quoting *Gaming World Int’l, Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 849 (8th Cir. 2003)). “The burden is on the movant to establish the need for a preliminary injunction, and on appeal from its denial [this Court] review[s] the district court’s factual findings for clear error, its legal conclusions de novo, and its exercise of equitable judgment for abuse of discretion.” *DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 881 (8th Cir. 2013) (quotation marks omitted).

II. The District Court Properly Denied Mr. Vipond's Motion for Preliminary Injunction Because He Failed To Exhaust Tribal Court Remedies.

Mr. Vipond may not pursue his claim disputing tribal jurisdiction or obtain relief in federal court until he first exhausts his tribal court remedies. The district court's order denying Mr. Vipond's motion to preliminarily enjoin the ongoing tribal court proceedings and staying the action pending exhaustion is a hornbook application of controlling precedent. That the court reached this conclusion without applying the traditional four-factor injunction test is likewise faithful to this Court's precedent. If the tribal judiciary ultimately determines that Mr. Vipond's water appropriation is validly subject to regulation under the Ordinance, then this action may proceed, at which time the district court will have the benefit of the factual record developed in tribal court.

A. A Party Who Disputes Tribal Jurisdiction Must Exhaust Tribal Court Remedies Before Seeking Relief in Federal Court.

In *National Farmers Union*, the Supreme Court rendered two holdings: “[1] that [28 U.S.C.] § 1331 encompasses the federal question whether a tribal court has exceeded the lawful limits of its jurisdiction, and [2] that exhaustion is required before such a claim may be entertained by a federal court[.]” 471 U.S. at 857. Accordingly, while “[t]he question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law,” *id.* at 852, a federal

court must “stay[] its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction,” *id.* at 856-57; *see also, e.g., Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987); *Temple*, 127 F.4th at 715.

“Exhaustion is mandatory,” *Gaming World*, 317 F.3d at 849, unless one of four exceptions applies, *see infra* pp. 31-32 & n.16. Until tribal remedies are exhausted, “it would be premature for a federal court to consider any relief.” *Nat’l Farmers Union*, 471 U.S. at 857; *see also, e.g., WPX Energy*, 72 F.4th at 837-39.

“Exhaustion includes both an initial decision by the tribal trial court and the completion of appellate review.” *DISH Network*, 725 F.3d at 882; *see also, e.g., Iowa Mut.*, 480 U.S. at 17. “Once tribal remedies have been exhausted, the Tribal Court’s determination of tribal jurisdiction may be reviewed in the federal district court.” *Duncan Energy Co. v. Three Affiliated Tribes of Fort Berthold Rsrv.*, 27 F.3d 1294, 1300 (8th Cir. 1994).¹⁰

The tribal court exhaustion rule recognizes 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; *see also, e.g., WPX Energy*, 72 F.4th at 837. Exhaustion thus ensures “the orderly administration of justice” and “allow[s] a full record to be developed in the Tribal

¹⁰ A district court has discretion to stay or dismiss the action pending exhaustion. *Iowa Mut.*, 480 U.S. at 20 n.14; *Nat’l Farmers Union*, 471 U.S. at 857; *Duncan Energy*, 27 F.3d at 1295-96.

Court” before any review by a federal court. *Nat’l Farmers Union*, 471 U.S. at 856; *see also, e.g., Duncan Energy*, 27 F.3d at 1300 (“[T]ribal exhaustion contemplates the development of a factual record[.]”). Further, by enabling “tribal courts to explain to the parties the precise basis for accepting jurisdiction,” *WPX Energy*, 72 F.4th at 837 (quotation marks omitted), exhaustion “provid[es] federal courts with the benefit of tribal expertise, and clarif[ies] the factual and legal issues that are under dispute and relevant for any jurisdictional evaluation,” *DISH Network*, 725 F.3d at 882.

B. The District Court Correctly Held Exhaustion Is Required.

As the district court correctly recognized, this is a quintessential case for application of the exhaustion requirement. (Add. 9-11; App. 547-49; R. Doc. 55, at 9-11.) WEDNR’s claim requires the tribal court to determine whether the Nation may lawfully regulate Mr. Vipond’s water appropriation under the Ordinance, and hence whether the tribal court has authority to adjudicate that question and enforce the Ordinance’s permit requirement. To make that determination, the tribal court must decide whether the Nation’s regulation of high-capacity water appropriations on the Reservation is warranted under *Montana*, which recognizes a tribe’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 (“the *Montana* standard”). This standard determines the scope of both tribal regulatory and adjudicatory jurisdiction. *See Att’y’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[.]”).

The tribal court’s analysis under the *Montana* standard is fact-intensive. It must determine whether the threats posed by high-capacity pumping, *see supra* pp. 7-10, are sufficiently serious to justify tribal regulation under *Montana*. (*See generally* Add. 7; App. 545; R. Doc. 55, at 7.)¹¹ In *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125 (8th Cir. 2019), this 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, such as cases involving “tribal laws relating to public health and safety or environmental protection,” *id.* at 1138. This is just such a case. *See also, e.g., Duncan Energy*, 27 F.3d at 1296, 1300 (requiring exhaustion in dispute as to permissibility under

¹¹ The district court alluded to some of these factual disputes, (Add. 3 n.2, 10 n.4, 10 n.5; App. 541 n.2, 548 n.4, 548 n.5; R. Doc. 55, at 3 n.2, 10 n.4, 10 n.5), but did not undertake to resolve them, (Add. 11; App. 549; R. Doc. 55, at 11 (“The question of whether the Nation has the power, pursuant to *Montana*, to regulate Mr. Vipond’s high-capacity well and water withdrawals will hinge on a factual record that remains undeveloped before this Court.”)).

Montana standard of applying tribal oil and gas production and property taxes and tribal employment ordinance to non-Indian company on fee lands); *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916 (9th Cir. 2019) (reviewing tribal court record and validity of tribal hazardous-waste regulation under *Montana* following tribal court exhaustion). Thus, Mr. Vipond’s claim that when the *Montana* standard is at play “courts tend to reject that the nonmember exhaust tribal court remedies,” Vipond Br. 16-17, is simply incorrect. To the contrary, the policies motivating the exhaustion rule are at their zenith when a tribe regulates to protect the welfare of the reservation community.

The exhaustion rule applies with particular force in this case because “[a]t the time the [federal] action was initiated [in August 2024], proceedings involving the same parties and based on the same dispute were pending before the [tribal court],” *Iowa Mut.*, 480 U.S. at 11. In fact, Mr. Vipond and WEDNR had been litigating in tribal court for a full year—they had recently disclosed expert witness reports and were engaged in discovery in preparation for an October 2024 jurisdictional hearing. *See supra* pp. 12-13, 15. It was only after the tribal court case schedule had been extended, *see supra* p. 13, that Mr. Vipond filed his injunction motion on October 11, 2024. The parties filed pre-hearing briefs in November and December 2024, and the tribal court held a two-day evidentiary hearing in February 2025. It heard live testimony from five lay and seven expert

witnesses and took into evidence scores of exhibits, deposition transcripts, and affidavits. *See supra* p. 14. After the hearing, the parties filed post-hearing briefs and proposed findings of fact (more than 100 each) and conclusions of law. The tribal court is now engaged in the “careful examination of tribal sovereignty” to determine “the existence and extent of [its] jurisdiction” called for by the exhaustion rule, *Nat’l Farmers Union*, 471 U.S. at 855. This is the proper course. *See, e.g., Temple*, 127 F.4th at 715 (“[T]he examination of tribal sovereignty and jurisdiction should be conducted in the first instance by the tribal court itself.” (quoting *Duncan Energy*, 27 F.3d at 1299)).¹²

Mr. Vipond complains that resolution of the jurisdictional issues in tribal court has become “full-scale litigation.” Vipond Br. 29. But the tribal court’s jurisdiction over the parties’ dispute “turns upon whether the actions at issue in the litigation are regulable by the tribe,” *Att’y’s Process*, 609 F.3d at 936 (quoting *Nevada v. Hicks*, 533 U.S. 353, 367 n.8 (2001)),¹³ and Mr. Vipond vehemently

¹² Mr. Vipond’s own claims in tribal court, moreover, cut directly against his request for federal court intervention before exhaustion is complete. He has argued that WEDNR has no cause of action under tribal law, a declaratory judgment is not available under tribal law, and the Ordinance is not valid under the tribal constitution. These threshold questions of tribal law *must* be answered by the tribal court. *See Iowa Mut.*, 480 U.S. at 16 (“[T]ribal courts are best qualified to interpret and apply tribal law.”)).

¹³ As the district court observed, “what the Nation seeks from the tribal court is leave to exercise regulatory jurisdiction over Mr. Vipond, which requires largely the same analysis that will go into the court’s own determination of whether it has

contests the Nation’s regulatory authority. Mr. Vipond cannot vigorously litigate the matter in tribal court and simultaneously complain here that the tribal court is taking his jurisdictional challenge too seriously.

Moreover, Mr. Vipond is multiplying litigation burdens significantly through his own actions. His motion for preliminary injunction and the present appeal are “a clear attempt to evade tribal court jurisdiction,” *Gaming World*, 317 F.3d at 852.¹⁴ He would cast aside the sizeable factual record developed in tribal court that will serve as the basis for its jurisdictional determination and (if jurisdiction is upheld) subsequent federal court review. He has instead sought to build a *competing* record in this case. His tribal court deadline to disclose expert testimony was in July 2024, (App. 223; R. Doc. 16-6, at 2), but four months later he attached an entirely new set of opinions from his expert, Mr. Kramka, to his district court reply briefing in support of his preliminary injunction motion. *See supra* pp. 16-17. He attempts to rely on those opinions extensively here, *see supra* n.9, *despite* the tribal court having excluded them from the tribal court record as untimely. In doing so, he would “place [the federal courts] in direct competition with the tribal courts,” *Iowa Mut.*, 480 U.S. at 16. This is exactly what the exhaustion rule

jurisdiction to consider the Nation’s request.” (Add. 12 n.7; App. 550 n.7; R. Doc. 55, at 12 n.7.)

¹⁴ At the same time, he continues to aggressively litigate the tribal court action, filing a motion for summary judgment just a few days ago, on June 27, 2025.

operates to prevent. Mr. Vipond’s request that this Court enjoin the tribal court from completing its fact-finding and jurisdictional analysis contravenes the fundamental purposes of the exhaustion rule, and it should be rejected.

The district court’s conclusion that Mr. Vipond must exhaust his tribal court remedies before seeking a preliminary injunction was correct. *See Nat’l Farmers Union*, 471 U.S. at 856 (“[A] full record [should] be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed.”). If the tribal court determines it has jurisdiction, and if the tribal court of appeals affirms, then Mr. Vipond may proceed with his challenge in district court. (Add. 12; App. 550; R. Doc. 55, at 12.)

C. The District Court Properly Denied a Preliminary Injunction for Failure To Exhaust Without Reaching the *Dataphase* Factors.

The district court found its ruling that “Mr. Vipond must exhaust his tribal remedies before seeking relief from this Court ... effectively denies Mr. Vipond’s motion for a preliminary injunction.” (Add. 11; App. 549; R. Doc. 55, at 11.) The court accordingly did not evaluate Mr. Vipond’s motion under the four-factor test set forth in *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981). (Add. 11 & n.6; App. 549 & n.6; R. Doc. 55, at 11 & n.6.) While Mr. Vipond objects that the court should have applied the *Dataphase* test, Vipond Br. 19, 27-31, its approach conforms to Supreme Court and Circuit precedent.

In *National Farmers Union*, the Supreme Court explained that until tribal court remedies have been exhausted, “it would be premature for a federal court to consider *any relief*.” 471 U.S. at 857 (emphasis added). The Court thus found the district court had erred by entering a temporary restraining order enjoining tribal court judges and a permanent injunction against further tribal court proceedings when exhaustion had not occurred. *Id.* at 847-48, 857. The Court reached this conclusion without reviewing the equitable factors that traditionally govern an injunction. *See id.* at 857. This Court followed the same course in *WPX Energy*—it vacated a preliminary injunction enjoining tribal court proceedings without applying the *Dataphase* test because the plaintiff “did not exhaust its tribal court remedies” and thus “a ruling in federal court on the question of tribal court jurisdiction was premature,” 72 F.4th at 835.

It is true that in some cases this Court has viewed the exhaustion rule through the prism of the four-factor test, specifically as going to the “likelihood of success on the merits” factor. *See DISH Network*, 725 F.3d at 882-885; *Kodiak Oil & Gas*, 932 F.3d at 1133 & n.3. But even under that approach, this Court has effectively treated the conclusion that exhaustion is required as dispositive, as the “likelihood of success on the merits” is the “most significant” factor in the *Dataphase* test, *DISH Network*, 725 F.3d at 882 (citation omitted), and hence sufficient to resolve the motion, *id.* at 882-885; *see also id.* at 885 (“Since it is not

‘plain’ that the tribal courts lack jurisdiction . . . , the order of the district court denying a preliminary injunction is therefore affirmed.”). This Court nowhere held in those cases that when exhaustion has not occurred, a district court nevertheless must apply the four-factor test.

Nor do the cases cited by Mr. Vipond that apply the other preliminary injunction factors, Vipond Br. 29-31, support his argument. In *Kodiak Oil & Gas*, the movant had already satisfied the exhaustion requirement, 932 F.3d at 1133, and in *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140 (10th Cir. 2011), an exception to the exhaustion rule applied because the tribal court “plainly did not have jurisdiction,” *id.* at 1153. Neither circumstance exists here.¹⁵

In short, the proper resolution of Mr. Vipond’s motion is the same regardless of whether the Court treats tribal court exhaustion as an issue antecedent to the four-part test or as part of that test. The district court did not err by taking the former approach.

¹⁵ Mr. Vipond’s claim of irreparable harm, moreover, is undermined by his active litigation in tribal court for fourteen months before seeking federal court relief. *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)).

III. The District Court Properly Determined that No Exception to the Exhaustion Requirement Applies Because the Assertion of Tribal Jurisdiction Is Not “Frivolous or Obviously Invalid Under Clearly Established Law.”

Mr. Vipond argues that he should not be required to exhaust tribal court remedies because the Nation “plainly” cannot regulate his pumping. *E.g.*, Vipond Br. 20. He urges the Court to dive headlong into the merits and resolve his underlying jurisdictional dispute with WEDNR. But as the district court explained, this approach to determining whether exhaustion is required “creates a risk of analytical circularity that swallows the exhaustion rule entirely.” (Add. 8-9; App. 546-547; R. Doc. 55, at 8-9.) This Court has accordingly rejected it, holding that a party may avoid exhaustion only if it shows that the assertion of tribal jurisdiction is frivolous or obviously invalid under clearly established law. Mr. Vipond does not acknowledge this standard, and he falls well short of meeting it. The Nation’s assertion of jurisdiction to protect reservation water resources is well-grounded in precedent. Mr. Vipond’s arguments—rooted entirely in disputed factual issues and his efforts to establish novel, per se limits on tribal jurisdiction—do not allow him to escape the exhaustion requirement.

A. The Nation’s Assertion of Jurisdiction over High-Capacity Water Appropriations Is Not Frivolous or Obviously Invalid Under Clearly Established Law.

In *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), the Supreme Court held that exhaustion is not required where “it is plain” that tribal jurisdiction is lacking,

such that exhaustion “would serve no purpose other than delay.” *Id.* at 459 n.14.¹⁶

This was the case in *Strate*—a dispute “between two non-Indians involved in a run-of-the-mill highway accident,” *id.* at 457 (brackets and citation omitted). In *DISH Network*, this Court made clear that exhaustion is waived under the *Strate* exception “only if the assertion of tribal court jurisdiction is frivolous or obviously invalid under clearly established law.” 725 F.3d at 883; *see also WPX Energy*, 72 F.4th at 837 (same). The Court emphasized that “[i]n circumstances where the law is murky or relevant factual questions remain undeveloped, the prudential considerations outlined in *National Farmers Union* require that the exhaustion requirement be enforced.” *DISH Network*, 725 F.3d at 883.

The Court’s recent decision in *WPX Energy* illustrates the rigor of this standard. Although the Court had ruled in *Kodiak Oil & Gas* that a tribal court lacked jurisdiction over a dispute arising under a federal oil and gas lease, the Court still required exhaustion in *WPX Energy*, which involved a dispute arising under a *side agreement* to such a lease, because “the precise issue [was] not settled” or “directly controlled by *Kodiak*,” 72 F.4th at 838-39.

¹⁶ In *National Farmers Union*, 471 U.S. at 856 n.21, the Supreme Court recognized three other exceptions to the exhaustion doctrine, but Mr. Vipond does not claim any of those exceptions apply, (R. Doc. 33, at 9 (“Vipond is only asserting the fourth exception[.]”)).

No clearly established law precludes the Nation’s exercise of jurisdiction here—quite the opposite—and there accordingly exists no basis for Mr. Vipond to avoid the exhaustion requirement. This Court has repeatedly observed that “[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty” and that “[c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.”¹⁷ *Stanko v. Oglala Sioux Tribe*, 916 F.3d 694, 699 (8th Cir. 2019) (quoting *Iowa Mut.*, 480 U.S. at 18); *see also, e.g., Temple*, 127 F. 4th at 715 (quoting *Duncan Energy*, 27 F.3d at 1299); *Gaming World*, 317 F.3d at 849; *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1419-20 (8th Cir. 1996). The Supreme Court recently reaffirmed that “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).

Tribal regulatory authority to safeguard reservation water resources, in particular, is well-established and rooted in *Montana* itself. In *Montana*, the Court described a tribe’s power to regulate to protect its health and welfare as a “corollary” to the rule that “Indian tribes retain rights to river waters necessary to make their reservations livable.” 450 U.S. at 566 n.15 (citing *Arizona v. California*,

¹⁷ Mr. Vipond cites no such statutory or treaty provision here and none exists.

373 U.S. 546, 599 (1963)).¹⁸ The Court thus contemplated that regulation of non-Indian water use may be appropriate to safeguard natural resources that sustain a tribal nation's way of life.

Accordingly, federal courts have upheld tribal jurisdiction over non-Indian conduct, including riparian uses, water appropriations, and activities impacting water quality, that threatens tribal health or welfare. *See, e.g., Montana v. U.S. E.P.A.*, 137 F.3d 1135, 1139-41 (9th Cir. 1998) (affirming tribal authority to set water quality standards to protect all reservation waters from pollution sources, including on non-Indian fee lands); *Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951, 964 (9th Cir. 1982) (upholding tribal ordinance regulating riparian structures on non-Indian waterfront property because of potential harm to lake ecology; the tribal economy, health, and welfare; and treaty fishing rights); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52 (9th Cir. 1981) (recognizing tribal authority over non-Indian riparian landowner whose groundwater and surface water pumping “imperiled the agricultural use of downstream tribal lands and the [tribal] trout fishery, among other things”).

In *Montana v. U.S. E.P.A.*, the Ninth Circuit explained why tribal regulatory interests are particularly strong in the context of water resources.

¹⁸ In *Arizona v. California*, 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.” 373 U.S. at 599.

[I]t 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: A water system is a unitary resource. The actions of one user have an immediate and direct effect on other users.

137 F.3d at 1141 (quotation marks omitted). This reasoning is no less true with respect to consumptive water uses—“[r]egulation 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,” *Walton*, 647 F.2d at 52.¹⁹

The four cases cited by Mr. Vipond, Vipond Br. 24-26, do not at all suggest that the Nation’s regulation of high-capacity water appropriations is obviously invalid under clearly established law. Only one, *Fort Yates Public School District # 4 v. Murphy ex rel. C.M.B.*, 786 F.3d 662 (8th Cir. 2015), is from this Circuit, and it did not involve a tribal regulatory scheme at all but rather individual tort claims against a school district (a state political subdivision) arising from a fight between two students. In *Evans v. Shoshone-Bannock Land Use Policy Commission*, 736

¹⁹ The United States filed an amicus brief in support of WEDNR in the tribal court action, which further verifies the absence of frivolity or obvious legal invalidity. (See R. Docs. 48, 48-1.) The United States explains: “Congress has never divested the Nation of its inherent sovereign power to regulate this class of activity—the use of high-capacity water wells and pumps within the exterior boundaries of the Reservation.... Further, the class of activity that the Nation seeks to regulate here is the exact type of non-Indian conduct that *Montana* contemplates.” (R. Doc. 48-1, at 12-13.)

F.3d 1298 (9th Cir. 2013), the panel conducted, at the exhaustion stage, a full-blown inquiry into the jurisdictional facts, *id.* at 1302-07, which is plainly inconsistent with this Court’s precedent and makes *Evans* an outlier even in the Ninth Circuit, *see, e.g., Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 896-99, 904-06 (9th Cir. 2017), *as amended* (Aug. 3, 2017) (reversing district court injunction enjoining tribal proceedings, requiring exhaustion because tribal jurisdiction was “colorable or plausible,” and declining to adjudicate the factual and legal disputes relevant to the tribal forum’s jurisdictional inquiry).

Burlington Northern Railroad Co. v. Red Wolf, 196 F.3d 1059 (9th Cir. 1999), involved tort claims arising from an accident on a railroad right-of-way granted by Congress, placing it squarely within *Strate*’s ambit, *id.* at 1065. And in *Otter Tail Power Co. v. Leech Lake Band of Ojibwe*, Civil No. 11-cv-1070, 2011 WL 2490820 (D. Minn. June 22, 2011), the tribe merely alleged that construction of a power line (to which the tribe had previously consented) on non-Indian land would temporarily, on a one-time basis, “disrupt” hunting, fishing, and gathering, without developing a factual record of the sort at issue here. *Id.* at *5.²⁰

²⁰ Mr. Vipond contends that his conduct would be “similarly constrained” because “it is seasonal.” Vipond Br. 26. But the seasonal nature of his 65.2-million-gallon pumping makes the impact *worse*, not better, because it would be entirely concentrated in the season when river flow is lowest and aquatic resources are most vulnerable. *See supra* p. 8; *infra* n.21. Mr. Vipond’s annual diversion is therefore nothing like the one-time minor disruption alleged in *Otter Tail*.

None of these cases waived exhaustion on facts remotely comparable to the Nation's regulation of the pumping of millions of gallons of reservation waters in order to safeguard resources vital to the traditional subsistence lifestyle of hundreds of tribal families. Tribal members and WEDNR staff testified in tribal court, for example, to baitfishing in the Wild Rice River near Mr. Vipond's appropriation site, the paramount role of that income to their economic welfare, the lethal impact of low water on baitfish, and the sharp baitfish population decline in a nearby tributary where Mr. Vipond is already pumping. *See generally supra* pp. 6, 8-9, 14. As another example, WEDNR staff testified to the decades-long effort to reintroduce lake sturgeon on the Reservation, a locally extirpated species of tremendous cultural importance. *See generally supra* pp. 6-7, 14. The Nation has planted over 50,000 sturgeon fingerlings in the Wild Rice River, the first natural spawning event is imminent, and maintaining natural water levels in the river is crucial for juvenile rearing habitat and upstream and downstream migration. *See generally supra* pp. 9, 14. Experts in aquatic species, economics, hydrology, and cultural resources reinforced all this testimony. (*See generally* App. 387-389 ¶¶68-69, 71-72; R. Doc. 43, at 19-21 ¶¶68-69, 71-72) (describing subjects of expert testimony.) This is just the tip of the evidentiary iceberg. *See supra* p. 14.

Mr. Vipond simply pretends that none of this evidence exists, reciting a series of bullet points, Vipond Br. 21-23, from which he concludes that “the harms

that WEDNR has alleged ... are wholly speculative or unsupported by the facts,” *id.* at 24. But his bullet points are erroneous at best and misleading at worst, and they serve only to highlight the fact-bound nature of the inquiry that makes exhaustion of tribal court fact-finding and decision-making especially appropriate.²¹ (*See* Add. 10-11; App. 548-549; R. Doc. 55, at 10-11.)

B. The Existence of State Regulation Does Not Prohibit Tribal Regulation.

In addition to his fact-bound arguments, Mr. Vipond posits two per se rules that he claims preclude the Nation’s exercise of jurisdiction over high-capacity water appropriations and obviate the need for exhaustion. Neither rule has any basis in the law.

Mr. Vipond first claims that state regulation and his MDNR permit bar Nation regulation under *Montana*. Vipond Br. 32-35. But Mr. Vipond does not cite a single case in which a court has struck down tribal regulation because “the conduct at issue has been permitted by the State,” *id.* at 2, and none exists. Simply

²¹ For example, Mr. Vipond states that his appropriation is just “one percent” of the annual average daily flow of the Wild Rice River. Vipond Br. 10, 12, 23, 37, 38. The record developed in tribal court establishes that this statistic is meaningless in the context of threats to aquatic species. As Mr. Vipond acknowledges, Vipond Br. 26 n.5, and the district court observed, (Add. 10 n.4; App. 548 n.4; R. Doc. 55, at 10 n.4), his pumping would occur almost entirely in the month of August, when streamflow is at its lowest ebb and aquatic species are most vulnerable. His state permit would allow him to use a full twelve percent of the river’s flow during dry periods. Vipond Br. 10.

put, “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). In *Montana* itself, non-Indians were subject to state fish and game laws, 450 U.S. at 548-49, but the jurisdictional question turned on whether their “conduct threaten[ed] or ha[d] some direct effect on the political integrity, the economic security, or the health or welfare of the tribe,” *id.* at 566. Likewise, in *Lower Brule Sioux Tribe v. South Dakota*, 104 F.3d 1017 (8th Cir. 1997), this Court held the tribe lacked “the power to regulate hunting and fishing by nonmembers on nonmember-owned fee lands” based on a detailed factual analysis—not because the state was also regulating. *Id.* at 1023-1024. It “hasten[ed] to add ... that the Tribe may seek relief ... in the future if circumstances change in kind or degree so as to” implicate the *Montana* standard. *Id.* at 1024.

In *Montana v. U.S. EPA*, the Ninth Circuit flatly rejected the argument (in the context of water quality regulation) that “[t]ribes should be able to engage in nonconsensual regulation of non-tribal entities only when all state or federal remedies to alleviate threats to the welfare of the tribe have been exhausted and have proved fruitless.” 137 F.3d at 1140. Similarly, in *FMC Corp.*, the company argued that EPA’s regulation of on-reservation hazardous-waste storage eliminated any basis for tribal regulation under the *Montana* standard, 942 F.3d at 927, but the

Ninth Circuit again disagreed: “Tribal jurisdiction under the second *Montana* exception may exist concurrently with federal regulatory jurisdiction,” *id.* at 935; *see also Mandan, Hidatsa & Arikara Nation v. U.S. Dep’t of Interior*, 95 F.4th 573, 584 (8th Cir. 2024) (where federal government regulates setback of oil and gas operations from reservation lake, validity of tribal setback regulation under *Montana* standard remains “an open question”). Certainly no warrant exists for distinguishing state jurisdiction in this regard—“tribal sovereignty is [neither] dependent on, [nor] subordinate to, ... the States.” *Washington v. Confederated Tribes of Colville Indian Rsrv.*, 447 U.S. 134, 154 (1980).

While state regulation by itself does not usurp tribal authority to regulate, one might imagine circumstances in which a state or federal regulatory scheme is so robust, consistent, and longstanding as to remove any threat to tribal interests from non-Indian actors, thereby eliminating *as a factual matter* the warrant for the exercise of tribal authority over their conduct. This is decidedly not such a case. The evidentiary record developed in tribal court establishes that, among other things, MDNR has repeatedly stated in official reports that its permitting standards do not adequately protect aquatic species and habitat, irrigators regularly exceed permitted pumping volumes, and MDNR *did not consider* the impacts of the Vipond appropriation (and the cumulative impacts of other appropriations) on the sturgeon, baitfish, wild rice, and other aquatic resources of vital importance to

tribal members. Indeed, MDNR hardly views itself as the exclusive authority on Reservation pumping—it expressly advised Mr. Vipond “of the need to obtain any other permits that may apply including any permits required by White Earth Nation,” (App. 36 ¶17; R. Doc. 4-1, at 3 ¶17).²²

Mr. Vipond also cites *Strate and Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001), Vipond Br. 33, but neither case suggests that state regulation precludes tribal regulation of non-Indian water appropriations. As he acknowledges, *Strate* involved a state highway accident between two non-Indians, and *Atkinson* involved a tax on the “operation of a hotel on non-Indian fee land,” 532 U.S. at 657. Vipond Br. 33-34.

Mr. Vipond also alludes to a doctrinal issue briefed in tribal court, Vipond Br. 34, which is not implicated at this stage of the federal proceedings and is subject to tribal court review in the first instance. That issue is whether, when a tribe regulates to guard against threats posed by a class of activity, it must prove that each individual’s conduct standing alone—in isolation, without considering

²² Mr. Vipond’s driver’s license analogy, Vipond Br. 35, misses the mark. The reason a tribe might have difficulty justifying a requirement that non-Indians obtain tribal driver’s licenses to use state-owned rights-of-way (assuming a competent state licensing regime) is that, as a factual matter, such a requirement would not be needed to protect the tribe’s economic security, political integrity, or health or welfare. By contrast, based on the evidence presented in tribal court, the Nation’s regulation of high-capacity appropriations is very much required to safeguard those interests.

cumulative impacts of others engaged in the same conduct—meets the *Montana* standard before it can administer a permitting requirement. While WEDNR has identified for the tribal court ample precedent establishing that federal courts evaluate tribal authority by reference to the entire class of activity,²³ it has also submitted factual evidence to satisfy *Montana* regardless of whether the tribal court considers the threats posed by Mr. Vipond alone or by high-capacity Reservation pumps and wells overall. If the tribal court ultimately concludes that jurisdiction exists, it will “explain to the parties the precise basis” for its conclusion, *Nat’l Farmers Union*, 471 U.S. at 857, which then will be subject to federal court review.

²³ See, e.g., *Cooley*, 593 U.S. at 350-351 (2021) (considering class of threats confronting tribal law enforcement—“for instance, non-Indian drunk drivers, transporters of contraband, or other criminal offenders operating on [reservation] roads”); *Montana*, 450 U.S. at 566 (considering non-Indian hunting and fishing generally); *Lower Brule Sioux Tribe*, 104 F.3d at 1023-24 (considering reservation-wide threats of non-Indian hunting and fishing to sustenance, economic livelihood, and welfare of tribe and its members); *Montana v. U.S. E.P.A.*, 137 F.3d at 1139-40 (considering impacts of “several facilities on fee lands within the Reservation that have the potential to impair water quality and beneficial uses of tribal waters,” including “feedlots, dairies, mine tailings, auto wrecking yards and dumps, construction activities and landfills”); *Namen*, 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.”); *Big Horn Cnty. Elec. Coop., Inc. v. Big Man*, 526 F.Supp.3d 756, 759 (D. Mont. 2021) (considering effect of termination of electrical service in wintertime on “a class of approximately 1,700 [tribal] members—and therefore the Tribe itself,” not just on individual tribal member litigant), *aff’d*, No. 21-35223, 2022 WL 738623 (9th Cir. Mar. 11, 2022).

C. No Prohibition Exists Against Tribal Regulation of Non-Indian Use of Reservation Water Resources.

Mr. Vipond also argues that tribal jurisdiction is per se barred because the Ordinance concerns subject matter off-limits to tribal regulation: the use and management of reservation water resources. Vipond Br. 36-39. Mr. Vipond relies on *Hicks*, *id.* at 3, 36-37, but the case is wholly inapposite. *Hicks* “present[ed] the question whether a tribal court may assert jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation.” 533 U.S. at 355. But WEDNR has brought no claim against state officials. The sole question before the tribal court is whether Mr. Vipond is subject to tribal regulation.

Mr. Vipond argues that even if WEDNR is not bringing claims “directly” against the State, it is nonetheless bringing “a challenge to state regulatory authority” because tribal regulation would affect his ability to exercise his “rights under the State permit he was issued.” Vipond Br. 36-37. This would transform *Hicks*’ holding that “tribal courts lack jurisdiction over state officials for causes of action relating to their performance of official duties,” 533 U.S. at 369, into a monumental, heretofore-unknown restriction on tribal authority—namely, that tribes may not assert regulatory or adjudicatory jurisdiction if doing so would affect a person’s ability to exercise his or her rights under state law. At bottom, this is just a variation of Mr. Vipond’s argument that a tribe may not regulate activity

regulated by the state—an argument that finds no support in case law, *see* Section III.B., pp. 38-42.

Mr. Vipond’s efforts to erect a *per se* barrier to tribal regulation of water fare no better with his scattershot invocation of water law concepts. The law is clear that states do *not* have exclusive authority over reservation waters, and thus, regardless of whether Mr. Vipond has riparian rights under state law, Vipond Br. 37, they do not exempt him from tribal regulation when the *Montana* standard is satisfied. *See supra* pp. 33-35; *Walton*, 647 F.2d at 52 (recognizing tribal regulatory authority over non-Indian riparian landowner irrigating reservation farmland under state permit); *Namen*, 665 F.2d at 962 (reversing district court’s conclusion that tribe “had no power to regulate the federal common law riparian rights of non-Indians who own reservation land”); *see also generally Winters v. United States*, 207 U.S. 564, 567-69, 578 (1908) (affirming injunction against non-Indian irrigators and declining to reach parties’ riparian rights arguments).²⁴

Nor does the question of navigability alter the jurisdictional inquiry, *contra* Vipond Br. 19, 46. Whether a river is navigable under federal law is a factually and

²⁴ Mr. Vipond mischaracterizes WEDNR as having taken the position that he cannot appropriate *any* water from the river, *e.g.*, Vipond Br. 19, based on an out-of-context statement from WEDNR’s aquatic species expert regarding the seasonal availability of aquatic habitat. WEDNR has not received a permit application from Mr. Vipond, and thus WEDNR has not had occasion to make a decision regarding the terms and conditions under which Mr. Vipond could pump without imperiling crucial aquatic resources.

legally complex question, *see PPL Mont., LLC v. Montana*, 565 U.S. 576, 591-92 (2012) (reciting test), and not one the tribal court needs to resolve.²⁵ Even if the Wild Rice River were navigable and the state owned the riverbed, tribal regulation would be appropriate if the Nation can satisfy the second *Montana* exception. *Montana* makes this crystal clear. There, *despite* the state’s ownership of the riverbed, 450 U.S. at 556, the Supreme Court held that the tribe could regulate non-Indian fishing on the Big Horn River and its banks if it could show that this activity threatened “the political integrity, the economic security, or the health or welfare of the tribe,” *id.*²⁶ While the tribe lost the case, it did so because it failed to carry this burden, not because of the legal status of the riverbed. *See id.*

Finally, Mr. Vipond argues, erroneously, that the Nation’s only recourse to protect Reservation waters is through a “general water rights adjudication,” Vipond Br. 38-39—the process of comprehensively quantifying the water rights (whether arising under state or federal law) of all persons, including the United States and

²⁵ Mr. Vipond points to a Mahnomen County list of “public waters,” Vipond Br. 43 n.14, but Minnesota law defines “public waters” by an expansive eleven-part standard, Minn. Stat. § 103G.005(15)(a), and states explicitly that “public waters” are much broader than “navigable” waters under federal law, *id.*

§ 103G.005(15)(b). To Director Roy’s knowledge, the navigability of the Wild Rice River has never been adjudicated for federal law purposes.

²⁶ In articulating the *Montana* standard, moreover, the Court cited *Arizona v. California*, in which the Court rejected Arizona’s claim that the navigability of the Colorado River and the state’s ownership of the riverbed gave it exclusive jurisdiction over the use of river waters, 373 U.S. at 596-97. *See Montana*, 450 U.S. at 566 n.15.

Indian tribes, in a given hydrologic system. Such cases often take decades to complete and have only occurred in western states that use a “prior appropriation” system of water law, which Minnesota does not.²⁷ No case law supports Mr. Vipond’s position that the Nation’s regulatory hands are tied in the absence of such an adjudication, which would not, in any event, resolve the question of tribal regulatory authority over non-Indian water use, *see United States v. Anderson*, 736 F.2d 1358, 1365 (9th Cir. 1984) (applying *Montana* standard to determine tribal jurisdiction over “excess” waters, i.e., waters already adjudicated as not being subject to the tribe’s reserved water rights).²⁸

²⁷ Felix Cohen, Handbook of Federal Indian Law (2012 ed.) § 19.01[2] (“No court has adjudicated a tribal reserved-rights claim in a riparian jurisdiction.”); *id.* § 19.05[2] (“The disadvantages of state general stream adjudications are well-documented. For all parties, litigation is time-consuming and extremely expensive.”); Cong. Rsch. Serv., *Indian Water Rights Settlements* 3 (updated Dec. 3, 2024), https://www.congress.gov/crs_external_products/R/PDF/R44148/R44148.31.pdf (“Litigation of Indian water rights is a costly process that may take several decades to complete.”).

²⁸ Contrary to Mr. Vipond’s argument, Vipond Br. 38-39, *Havasupai Tribe v. Anasazi Water Co.*, 321 F.R.D. 351 (D. Ariz. 2017), says nothing about tribal regulatory authority. There, the tribe brought a tort claim for trespassory interference with its reserved water rights, *id.* at 353, under a legal theory that would have prohibited groundwater pumping in “a vast area of northern Arizona that extends for apparently thousands of square miles beyond any reservation land,” *id.* at 356. Based on these unique facts, the court concluded that the United States—which held the tribe’s water rights in trust and had its own potentially adverse rights in the same aquifer, *id.* 356—was an indispensable party under Rule 19, *id.* 354-358. But the court also noted the case “could go forward” as a “piecemeal” case against “select [d]efendants” if the United States intervened. *Id.*

In sum, a tribe may regulate activities affecting reservation water resources if the tribe can satisfy its burden under the *Montana* standard. And even if the Court were to conclude that “the law is murky” on this question, *DISH Network*, 725 F.3d at 883, Mr. Vipond could not escape exhaustion, as tribal jurisdiction certainly is not “frivolous or obviously invalid under clearly established law,” *id.*

IV. Mr. Vipond’s Rule 19 Argument Does Not Support an Exhaustion Waiver.

Mr. Vipond’s final argument—“the State of Minnesota is a required party to be joined under Federal Rule of Civil Procedure 19, thereby barring tribal court jurisdiction over the matter,” Vipond Br. 3; *see also id.* at 39-54—has no merit. No precedent supports a federal court waiving exhaustion and enjoining tribal court proceedings on the basis of Rule 19 or any other rule of civil procedure.

To begin, “[t]he issue of want of indispensable parties is *not a jurisdictional one.*” *Warner v. First Nat’l Bank of Minneapolis*, 236 F.2d 853, 857 (8th Cir. 1956) (emphasis added); *see also Kansas City S. Ry. Co. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 824 n.2 (8th Cir. 1980); 7 Charles Alan Wright et al., Federal

at 355, 358. Nowhere does *Havasupai* suggest that tribal regulation of reservation water use is an improper “piecemeal water rights adjudication,” Vipond Br. 38, or “a general adjudication of rights,” *id.* 39. Indeed, if a government improperly “adjudicated” or “quantified” water rights by virtue of regulating high-capacity appropriations, this would be equally true for MDNR’s regulation as for WEDNR’s. By Mr. Vipond’s logic, *any* regulation would be “piecemeal water rights adjudication,” and *no* government could regulate water use in Indian country absent the resolution of a decades-long general stream adjudication.

Practice and Procedure § 1611 n.21 (3d ed.) (collecting cases). That alone makes this issue an improper basis upon which to excuse tribal court exhaustion. The *Strate* exception to the exhaustion rule applies only where “it is plain that tribal jurisdiction does not exist,” *DISH Network*, 725 F.3d at 883 (quotation marks omitted), and the basis for Mr. Vipond’s federal claim is the tribal court’s alleged lack of jurisdiction, *see Iowa Mut.*, 480 U.S. at 19; *Nat’l Farmers Union*, 471 U.S. at 857. By definition, a non-jurisdictional rule of civil procedure cannot deprive the tribal court of jurisdiction.

Further, party joinder in the tribal court is a matter of *tribal* law governed by White Earth Rule of Civil Procedure (WERCP) § 9.04, (App. 258; R. Doc. 16-15, at 12), not Federal Rule of Civil Procedure 19. WERCP § 9.04 sets forth the standard for joinder of interested parties, providing that “[t]o the extent possible, all persons or parties interested in a particular action shall be joined,” but where an interested party cannot be joined, non-joinder “will not require dismissal of the action unless it would be impossible to reach a just result without such party.” *Id.* It is for the White Earth judiciary, not the federal courts, to apply this rule. *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) (“[R]esolution of ... disputes involving questions of interpretation of the tribal constitution and tribal law is not within the jurisdiction of the [federal] district

court.”). And the tribal court is indeed reviewing Mr. Vipond’s indispensability argument in the proceedings before it.²⁹

Even if the joinder inquiry were relevant here, the sole claim before the tribal court is whether the Ordinance is a valid exercise of *tribal* regulatory authority and whether Mr. Vipond must obtain a *tribal* permit.³⁰ The tribal court can grant complete relief on this claim (a declaratory judgment and corresponding injunctive relief) without the State’s joinder—as was the case in *FMC Corp.*, where the tribal court could determine the tribe’s regulatory jurisdiction and grant complete relief without joining the United States, which was regulating the same activity.

Indeed, there is every indication the State agrees it is not a required party. The State has not claimed exclusive power to regulate Reservation water use—MDNR specifically advised Mr. Vipond that the Ordinance may apply to his pumping and encouraged him to reach out to WEDNR. (*See* App. 368; R. Doc. 34-

²⁹ Mr. Vipond’s Rule 19 argument is also self-defeating. If the State’s joinder were required in a declaratory judgment action to determine the Nation’s jurisdiction over Mr. Vipond, that rationale would apply with equal force to this action, which is a mirror image of WEDNR’s tribal court action, (App. 32 ¶B; R. Doc. 4, at 32 ¶B; App. 66 ¶B; R. Doc. 4-1, at 33 ¶B).

³⁰ WEDNR has not alleged or argued in tribal court that state regulatory authority is preempted—Mr. Vipond’s claim to the contrary, Vipond Br. 42, 46, is incorrect. WEDNR’s second amended complaint speaks for itself, (App. 59-67; R. Doc. 4-1, at 26-34), and a preliminary status report filed several months earlier by former counsel for case scheduling purposes is of no consequence.

1, at 1; App. 36 ¶17; R. Doc. 4-1, at 3 ¶17.) The State also has not come forward to claim an interest in the tribal court action (or this action) as a prospective intervenor or amicus curiae. *See generally Sch. Dist. of City of Pontiac v. Sec’y of U.S. Dep’t of Educ.*, 584 F.3d 253, 266 (6th Cir. 2009). Nor has the State objected to the tribal court adjudicating the Nation’s regulatory authority in its absence. Instead, it has participated, at Mr. Vipond’s behest, in the tribal court action as a third party by producing documents and making MDNR staff available for depositions.³¹

Mr. Vipond’s Rule 19 cases—none of which involved a *federal* court’s determination that joinder was required in a *tribal* court proceeding—are wholly inapposite. In *Hood ex rel. Mississippi v. City of Memphis*, 570 F.3d 625 (5th Cir. 2009), the dispute required the court to adjudicate the legal rights of Tennessee—specifically, whether Mississippi or Tennessee held property rights to certain aquifer waters. *Id.* at 627, 629. The court, moreover, could not grant the requested relief (equitable and monetary) without Tennessee’s joinder, *id.* at 631, and

³¹ The absence of a jurisdictional dispute between the Nation and the State makes this case different from *Montana* cases, including *Walton* and *Anderson*, *see* Vipond Br. 46-48, in which a state was a party and asserted exclusive regulatory authority over the use of certain reservation waters. *See Walton*, 647 F.2d at 44 (Washington as intervenor-defendant); *Anderson*, 736 F.2d at 1360 (Washington as defendant); *see also, e.g., South Dakota v. Bourland*, 39 F.3d 868 (8th Cir. 1994) (lawsuit by state against tribal officials to enjoin tribal regulation of non-Indian hunting and fishing).

Tennessee itself asserted that it was a necessary and indispensable party whose non-joinder required dismissal, *id.* at 629 n.4. None of these facts exist here. As for *Kickapoo Tribe of Indians of Kickapoo Reservation v. Babbitt*, 43 F.3d 1491 (D.C. Cir. 1995), it concerned the validity of a gaming compact to which Kansas was a party. Thus, like *Hood*, it required a binding determination of the absent state's legal rights.

In sum, the district court did not err by declining to waive exhaustion and enjoin tribal court proceedings on the basis of an inapplicable, non-jurisdictional rule of civil procedure. The tribal court may adjudicate the Nation's regulatory authority without the State's joinder.

CONCLUSION

For the foregoing reasons, the order of the district court should be affirmed.

Dated: June 30, 2025

Riyaz A. Kanji
Joshua H. Handelsman
KANJI & KATZEN, P.L.L.C.
P.O. Box 3971
Ann Arbor, Michigan
(734) 769-5400
rkanji@kanjikatzen.com
jhandelsman@kanjikatzen.com

Respectfully submitted,

/s/ Cory J. Albright
Cory J. Albright
Jane G. Steadman
KANJI & KATZEN, P.L.L.C.
811 1st Avenue, Suite 640
Seattle, Washington 98104
(206) 344-8100
calbright@kanjikatzen.com
jsteadman@kanjikatzen.com

Sara K. Van Norman
VAN NORMAN LAW, PLLC
400 South 4th Street, Suite 401
Minneapolis, Minnesota 55415
(612) 299-1794
sara@svn.legal

*Counsel for Defendant-Appellee Dustin Roy,
in his official capacity as Director of Natural Resources,
White Earth Division of Natural Resources*

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2025, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Cory J. Albright

Cory J. Albright

KANJI & KATZEN, P.L.L.C.

811 1st Avenue, Suite 640

Seattle, Washington 98104

(206) 344-8100

calbright@kanjikatzen.com

CERTIFICATE OF COMPLIANCE

1. In compliance with Fed. R. App. P. 32(a)(7)(B)(i) and excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 12,998 words.
2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Times New Roman font.
3. I hereby certify that the document was filed using the CM/ECF system, no privacy redactions are required for this filing, the electronic copy of this filing was scanned for viruses using Microsoft Defender, v1.431.310.0 (updated on June 30, 2025), and no viruses were detected.

Dated: June 30, 2025

/s/ Cory J. Albright
Cory J. Albright
KANJI & KATZEN, P.L.L.C.
811 1st Avenue, Suite 640
Seattle, Washington 98104
(206) 344-8100
calbright@kanjikatzen.com