

**In the
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 Natural Resources, White Earth Division of Natural
Resources,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
CIVIL NO. 24-CV-03125 KMM-LIB

BRIEF OF APPELLANT DAVID VIPOND

NOLAN, THOMPSON,
LEIGHTON & TATARYN, PLC
Randy V. Thompson (#122506)
Courtney E. Carter (#390284)
1011 First Street South, Suite 410
Hopkins, MN 55343
(952) 405-7171

Attorneys for Appellant David Vipond

SUMMARY AND REQUEST FOR ORAL ARGUMENT

Appellant David Vipond is a nonmember, non-Indian living on his fee land within the White Earth Reservation in Mahanomen, Minnesota. He obtained a permit from the State of Minnesota to pump surface water from the adjacent Wild Rice River for supplemental crop irrigation. The White Earth Division of Natural Resources (“WEDNR”) sued to prevent Mr. Vipond from appropriating water unless he obtains a permit under a tribal ordinance. To assert jurisdiction, WEDNR must meet the second *Montana* exception—i.e., that Mr. Vipond’s conduct threatens the tribe’s subsistence. His permitted appropriation is downstream from all tribal lands and would not affect 98.7% of the stream channel or 99.992% of the River’s drainage area. Moreover, the State found the appropriation would not harm natural resources when it granted the permit. WEDNR thus plainly lacks jurisdiction under the second *Montana* exception. Because Minnesota regulates the River and holds title to its bed, its sovereign interests are implicated, making it a required party to be joined. But the State has sovereign immunity and cannot be joined in the tribal court. The district court erred in denying Mr. Vipond’s motion for a preliminary injunction and in requiring him to exhaust tribal remedies.

Oral argument will assist the Court in considering the issues involved in this case. Appellant requests fifteen minutes to present its case.

TABLE OF CONTENTS

JURISDICTIONAL STATEMENT	1
STATEMENT OF ISSUES	2
INTRODUCTION	4
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	17
ARGUMENT	20
I. Mr. Vipond need not exhaust his tribal court remedies, as WEDNR plainly lacks jurisdiction.	20
II. When a regulatory agency has already determined that the conduct to be regulated is permissible and will not cause harm, a tribe cannot prove the harm required for jurisdiction under the second <i>Montana</i> exception.	32
A. MDNR considered the environmental impacts on the surrounding natural resources before approving the permit.	32
B. Because the State has already determined that the water may be appropriated safely under the terms of the State permit, WEDNR cannot show that this conduct will imperil the Band.	33
III. Exhaustion is not required when a tribe lacks jurisdiction over the subject matter presented in the case.	36
IV. The district court erred by failing to address whether the State is a necessary party to the tribal court action.	39
A. Standard of Review	40
B. The State is a necessary party and must be joined in the tribal court action.	41
C. The State cannot be joined in tribal court.	50

D. The tribal court action cannot proceed without the State.	51
CONCLUSION	55

TABLE OF AUTHORITIES

CASES

<i>Adams v. Bell</i> , 711 F.2d 161 (D.C. Cir. 1983).....	53
<i>Arizona v. Navajo Nation</i> , 599 U.S. 555 (2023)	37
<i>Arizona v. San Carlos Apache Tribe</i> , 463 U.S. 545 (1983).....	37
<i>Atkinson Trading Co., Inc. v. Shirley</i> , 532 U.S. 645 (2001)	33
<i>Bandag, Inc. v. Jack’s Tire & Oil, Inc.</i> , 190 F.3d 924 (8th Cir. 1999).....	29
<i>Bomer-Blanks Lumber Co. v. Oryx Energy Corp.</i> , 837 F. Supp. 769 (M.D. La. 1993)	43, 49
<i>Burlington N. R.R. Co. v. Red Wolf</i> , 196 F.3d 1059 (9th Cir. 1999)	25
<i>Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc.</i> , 815 F.2d 500 (8th Cir. 1987)	28, 29
<i>Colo. River Water Conservation Dist. v. United States</i> , 424 U.S. 800 (1976)	37
<i>Colville Confederated Tribes v. Walton</i> , 647 F.2d 42 (9th Cir. 1981) ..	46, 47
<i>Crowe & Dunlevy, P.C. v. Stidham</i> , 640 F.3d 1140 (10th Cir. 2011)	31
<i>Dataphase Sys., Inc. v. C.L. Sys., Inc.</i> , 640 F.2d 109 (8th Cir. 1981) ..	27, 30, 31
<i>DISH Network Serv. L.L.C. v. Laducer</i> , 725 F.3d 877 (8th Cir. 2013).....	27
<i>Enterprise Mgmt. Consultants, Inc. v. U.S. ex rel. Hodel</i> , 883 F.2d 890 (10th Cir. 1989)	53
<i>Evans v. Shoshone-Bannock Land Use Policy Comm’n</i> , 736 F.3d 1298 (9th Cir. 2013)	24, 25
<i>Fort Yates Pub. Sch. Dist. No. 4 v. C.M.B.</i> , 786 F.3d 662 (8th Cir. 2015) ..	25
<i>Franchise Tax Bd. of California v. Hyatt</i> , 587 U.S. 230 (2019)	50
<i>Gavle v. Little Six, Inc.</i> , 555 N.W.2d 284 (Minn. 1996)	50
<i>Gwartz v. Jefferson Mem’l Hosp. Ass’n</i> , 23 F.3d 1426 (8th Cir. 1994)	41
<i>Harper v. White Earth Hum. Res.</i> , No. 16-CV-1797 (JRT/LIB), 2017 WL 701354 (D. Minn. Feb. 22, 2017)	50
<i>Havasupai Tribe v. Anasazi Water Co., LLC</i> , 321 F.R.D. 351 (D. Ariz. 2017)	38
<i>Hood ex rel. Mississippi v. City of Memphis, Tenn.</i> , 570 F.3d 625 (5th Cir. 2009)	36, 42, 43, 44

<i>Kickapoo Tribe of Indians of Kickapoo Reservation in Kansas v. Babbitt</i> , 43 F.3d 1491 (D.C. Cir. 1995)	41, 52, 53, 54
<i>Kodiak Oil & Gas (USA), Inc. v. Burr</i> , 303 F. Supp. 3d 964 (D.N.D. 2018)	21, 30
<i>Kodiak Oil & Gas (USA), Inc. v. Burr</i> , 932 F.3d 1125 (8th Cir. 2019) ..	20, 29
<i>Koon v. United States</i> , 518 U.S. 81 (1996)	40
<i>Leonhardt v. Holden Bus. Forms Co.</i> , 828 F. Supp. 657 (D. Minn. 1993) ..	27
<i>McCowen v. Jamieson</i> , 724 F.2d 1421 (9th Cir. 1984)	40
<i>Mine Safety Appliances Co. v. Forrestal</i> , 326 U.S. 371 (1945)	50
<i>Minnesota v. Mille Lacs Band of Chippewa Indians</i> , 526 U.S. 172 (1999)	44
<i>Minnesota v. United States</i> , 305 U.S. 382 (1939)	51
<i>Montana v. United States</i> , 450 U.S. 544 (1981)	4, 8
<i>National Farmers Union Ins. Cos. v. Crow Tribe of Indians</i> , 471 U.S. 845 (1985)	30
<i>Nevada v. Hicks</i> , 533 U.S. 353 (2001)	passim
<i>Oklahoma v. Castro-Huerta</i> , 597 U.S. 629 (2022)	44
<i>Otter Tail Power Co. v. Leech Lake Band of Ojibwe</i> , No. 11-CV-1070-DWF- LIB, 2011 WL 2490820 (D. Minn. June 22, 2011)	26
<i>PCTV Gold, Inc. v. SpeedNet, LLC</i> , 508 F.3d 1137 (8th Cir. 2007)	28
<i>Pottgen v. Mo. State High Sch. Activities Ass’n</i> , 40 F.3d 926 (8th Cir. 1994)	30
<i>Provident Tradesmens Bank & Trust Co. v. Patterson</i> , 390 U.S. 102 (1968)	40, 52
<i>Republic of Philippines v. Pimentel</i> , 553 U.S. 851 (2008)	50
<i>South Carolina v. North Carolina</i> , 558 U.S. 256 (2010)	45, 46
<i>State by Head v. Slotness</i> , 185 N.W.2d 530 (Minn. 1972)	44
<i>State of Montana v. Gilham</i> , 133 F.3d 1133 (9th Cir. 1998)	50
<i>Strate v. A-1 Contractors</i> , 520 U.S. 438 (1997)	passim
<i>United States v. Anderson</i> , 736 F.2d 1358 (9th Cir. 1984)	44, 47, 48
<i>United States v. Cooley</i> , 593 U.S. 345 (2021)	17, 34
<i>Wichita & Affiliated Tribes of Oklahoma v. Hodel</i> , 788 F.2d 765 (D.C. Cir. 1986)	52
<i>Winters v. United States</i> , 207 U.S. 564 (1908)	37

STATUTES

28 U.S.C. § 1331	31
Minn. Stat. § 105.391, subd. 1.....	43
Nelson Act, 25 Stat. 642	14

OTHER AUTHORITIES

7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, <i>Federal Practice & Procedure</i> , § 1617	53
S. Rep. No. 755, 82nd Cong., 1st Sess. 2 (1951)	38

RULES

Federal Rule of Civil Procedure 19	passim
--	--------

TREATIES

1867 Treaty, 16 Stat. 719.....	13
--------------------------------	----

JURISDICTIONAL STATEMENT

Appellant David Vipond appeals from the denial of his motion for preliminary injunction by the District Court for the District of Minnesota, the Honorable Katherine M. Menendez, dated March 5, 2025. Appellant asserted jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1362. Appellant timely filed a Notice of Appeal dated April 3, 2025. Fed. R. App. P. 4(a)(1). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES

1. Whether the district court erred in denying Appellant's Motion for Preliminary Injunction on the basis that Appellant must exhaust his tribal court remedies before seeking relief in the federal court.

Apposite Authorities:

Strate v. A-1 Contractors, 520 U.S. 438 (1997).

Kodiak Oil & Gas (USA), Inc. v. Burr, 932 F.3d 1125 (8th Cir. 2019).

Evans v. Shoshone-Bannock Land Use Policy Comm'n, 736 F.3d 1298 (9th Cir. 2013).

Fort Yates Pub. Sch. Dist. No. 4 v. C.M.B., 786 F.3d 662 (8th Cir. 2015).

2. Whether a nonmember must exhaust tribal remedies even when the conduct at issue has been permitted by the State, which has determined that said conduct will not harm the area's natural resources, precluding a showing under the second *Montana* exception that the nonmember's conduct imperils the subsistence of the tribe.

Apposite Authorities:

Montana v. United States, 450 U.S. 544 (1981).

Strate v. A-1 Contractors, 520 U.S. 438 (1997).

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

3. Whether exhaustion is required when an allocation of water rights to a navigable river running through a reservation is at issue.

Apposite Authorities:

Nevada v. Hicks, 533 U.S. 353 (2001).

4. Whether the district court erred in failing to address whether 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.

Apposite Authorities:

Hood ex rel. Mississippi v. City of Memphis, Tenn., 570 F.3d 625 (5th Cir. 2009).

Kickapoo Tribe of Indians of Kickapoo Reservation in Kansas v. Babbitt, 43 F.3d 1491 (D.C. Cir. 1995).

INTRODUCTION

This case presents the question of the scope of an Indian tribe's jurisdiction over a nonmember for the nonmember's conduct on their fee lands, located within a reservation. Here, it is undisputed that the tribe only has jurisdiction if it can demonstrate that the nonmember's conduct will imperil the tribe or cause catastrophic harm, under the second exception articulated in *Montana v. United States*, 450 U.S. 544 (1981). But when a state has already evaluated the conduct that the tribe seeks to regulate and issued a permit for that activity, having determined that the conduct will not cause harm, it is plain that the tribe cannot meet the second *Montana* exception and that further proceedings in the tribal court will “serve no purpose other than delay.” *Strate v. A-1 Contractors*, 520 U.S. 438, 459-60 and n.14 (1997); *see also Nevada v. Hicks*, 533 U.S. 353, 369 (2001) (holding that adherence to the tribal exhaustion rule in a case where a tribal court lacked jurisdiction was unnecessary). Because the district court erred when denying Appellant's motion for preliminary injunction, Appellant now seeks a reversal of that decision and to enjoin further proceedings in the tribal court.

STATEMENT OF THE CASE

A. Background of the state water permit.

David Vipond is a non-Indian farmer in Mahnomen County, Minnesota. Mr. Vipond has been farming his land in Mahnomen County for 35 years. Like all of the County of Mahnomen, his home and farmland are entirely within the White Earth Reservation. He owns, in fee, a combined 611 riparian acres of farmland adjacent to the Wild Rice River. (Joint Appendix (“App.”) 35; R. Doc. 4-1, at 2, ¶ 7.)

On March 27, 2023, Mr. Vipond applied to the Minnesota Department of Natural Resources (“MDNR”) for a permit to appropriate up to 65.2 million gallons of surface water annually for irrigation on 353 acres. (App. 35; R. Doc. 4-1, at 2, ¶ 1.) At the time, the Band’s Water Protection Ordinance did not exist. The application proposed using one surface water pump at a rate of up to 1,000 gallons per minute to irrigate corn, dry beans, soybeans, wheat, sugar beets, and alfalfa. (App. 35; R. Doc. 4-1, at 2, ¶¶ 2-3.) This appropriation requires a state permit under Minnesota Statutes section 103G.271, subdivision 4. (App. 35; R. Doc. 4-1, at 2, ¶¶ 4-5.)

Mr. Vipond complied with all application requirements, including providing a justification for water use, conservation plans per Minnesota Rule 6115.0660, subpart 3F, and a contingency plan if restrictions arise due

to low water levels. (App. 36; R. Doc. 4-1, at 3, ¶¶ 11-13.) He committed to implementing low-flow irrigation, soil moisture monitoring, and buffer strips, and accepted the risk of potential water restrictions. (App. 36; R. Doc. 4-1, at 3, ¶¶ 12-13.)

MDNR began tribal coordination with WEDNR on April 24, 2023, initially soliciting comments through May 25 and then extending the comment period to accommodate the Band. Despite this, WEDNR failed to respond by August 2023. (App. 36; R. Doc. 4-1, at 3, ¶¶ 16-17.) After contacting WEDNR on August 8 without response, MDNR informed WEDNR’s Divisional Director on August 11 that the permit would be issued. (App. 36; R. Doc. 4-1, at 3, ¶ 17.) Although Mr. Vipond received the state permit, he has neither installed a pump nor begun pumping water from the Wild Rice River and has not decided whether to do so.

B. The Water Protection Ordinance.

On May 5, 2023, before Mr. Vipond’s State permit was issued, the White Earth Reservation Business Committee (“RBC”) adopted Resolution No. 057-23-017, enacting the White Earth Reservation Groundwater and Surface Water Protection Ordinance (“Water Protection Ordinance” or “Ordinance”). (App. 40; R. Doc. 4-1, at 7.) The Ordinance requires anyone with a current or pending State water appropriation permit—regardless of

tribal membership—to apply for a Band permit. It mandates a \$5,000 application fee and obligates applicants to enter into an open-ended cost-reimbursement agreement to cover WEDNR’s permit application review, including fees for “Retained Experts.”¹ (App. 44; R. Doc. 4-1, at 11, section 6.2(b).)

C. The tribal court action.

WEDNR filed suit against Mr. Vipond in tribal court on August 23, 2023, seeking declaratory relief that (1) Mr. Vipond cannot operate a high-capacity pump on the Wild Rice River without a WEDNR permit under the Ordinance; (2) the Ordinance governs his water appropriation rights; and seeking a temporary and permanent injunction barring water appropriation without a WEDNR permit. (App. 59; R. Doc. 4-1, at 26.)

WEDNR also contemporaneously moved for a preliminary injunction. On September 13, 2023, before the time to answer had run and without a hearing, Judge DeGroat granted the injunction *ex parte*. (App. 69; R. Doc. 4-1, at 36.) On September 20, 2023, Mr. Vipond filed a Special Appearance Answer denying WEDNR’s claims and asserting jurisdictional defenses.

¹ On June 12, 2024, the White Earth RBC adopted Resolution No. 057-24-030, that “suspended” the permit requirement and other regulatory provisions of the Water Protection Ordinance for “Existing Sources” duly permitted by MDNR as of May 5, 2023 and operating in compliance with a valid permit. (App. 53; R. Doc. 4-1, at 20.)

(App. 73; R. Doc. 4-1, at 40.) On October 10, 2023, Mr. Vipond appealed the order, arguing it had been entered without a hearing, without allowing a response, and that the tribal court lacked jurisdiction under *Montana v. United States*, 450 U.S. 544 (1981). He also challenged the basis for the injunction. (App. 83; R. Doc. 4-1, at 50.)

The White Earth Court of Appeals dismissed the appeal without prejudice on October 26, 2023, remanding the case for further proceedings. The court of appeals converted the injunction to a temporary restraining order, pending a hearing within thirty days, with the tribal court directed to issue detailed jurisdictional findings. (App. 91; R. Doc. 4-1, at 58.)

After remand, the parties failed to agree on the scope of the litigation before the hearing on jurisdiction. Prior to the November 14, 2023 status conference, WEDNR submitted its proposed scheduling order seeking discovery, including expert reports and depositions, and the jurisdiction hearing to take place in June 2024. (App. 97; R. Doc. 4-1, at 64.) WEDNR also asserted, for the first time, that the State's permitting authority is preempted by the Band's federally reserved water rights under the *Winters* doctrine. (App. 100; R. Doc. 4-1, at 67.)

Judge DeGroat granted WEDNR's proposed scheduling order. (App. 106; R. Doc. 4-1, at 73.) Due to the serious health issues of Mr. Vipond's lead

counsel, the parties agreed to and the tribal court granted multiple extensions beginning February 13, 2024. On June 14, 2024, WEDNR delivered five expert witness reports and supporting affidavits from fourteen lay witnesses.

D. The State’s findings of fact on the proposed appropriation and relevant data on the natural resources of the Wild Rice River.

Under the permit issued by MDNR, Mr. Vipond may install a surface water pump directly in the Wild Rice River, approximately 0.6 miles (1.13 stream miles) upstream from the Reservation’s western boundary. (App. 37; R. Doc. 4-1, at 4, ¶ 18.) No tribal or tribal-member-owned lands are downstream from the proposed pumping site. (App. 14; R. Doc. 4, at 14 ¶ 54.) The River flows west from Mr. Vipond’s property for approximately 44 miles (about 150 stream miles) to the Red River of the North. (App. 37; R. Doc. 4-1, at 4, ¶ 18.)

One active MDNR-issued Water Appropriation Permit exists downstream—27 miles away in Norman County—allowing up to 19.6 million gallons annually at 1,200 gallons per minute (gpm). (App. 37; R. Doc. 4-1, at 4, ¶ 20.) Mr. Vipond’s permit is subject to low-flow suspensions triggered at 18 cubic feet per second (cfs), based on a gage 10.5 miles downstream. (App. 37; R. Doc. 4-1, at 4, ¶ 22.) Since 2008, surface water appropriations have

been suspended twice in the watershed (2008 and 2021). (App. 37; R. Doc. 4-1, at 4, ¶ 27.)

From 2015 to 2020, average growing season flows (May–October) were 275 cfs at the Twin Valley gage and 205 cfs near Mahnomen. (App. 37; R. Doc. 4-1, at 4, ¶ 24.) From 2021 to 2023, average flows near Mahnomen were 208 cfs (June), 66 cfs (July), and 29 cfs (August). Historical flow data from Twin Valley shows higher monthly means of 365 cfs (June), 263 cfs (July), and 121 cfs (August). *See* MDNR, Cooperative Stream Gaging (CSG), <https://www.dnr.state.mn.us/waters/csg/index.html> (last visited May 26, 2025). Mr. Vipond’s proposed 1,000 gpm (2.2 cfs) would amount to roughly one percent of average daily flow and twelve percent of Q90 flows (18 cfs). (App. 37; R. Doc. 4-1, at 4, ¶¶ 24-25.) MDNR has established that Q90 is the threshold for maintaining environmental viability and sustainable ecological integrity. (App. 499; R. Doc. 46-1, at 21.)

Long-term data show increasing flows: since 1992, annual flow at the Twin Valley gage has risen by 163 cfs. Regional precipitation is also rising—by 1.5 inches annually from 1989 to 2018 compared to 1895–2018. (App. 534; R. Doc. 46-1, at 56.)

The proposed appropriation is less than natural variability. Evaporation from temperature or wind has more effect on river flow than the

permitted pumping volume. (App. 470-71; R. Doc. 46, at 12-13, ¶¶ 34-37.) The pumping site is 84.35 stream miles from the Reservation's eastern boundary and just 1.13 miles from the western border, affecting only 0.008% of the drainage area and 1.3% of stream length within the Reservation. (App. 468-69; R. Doc. 46, at 10-11, ¶ 29.) No known appropriations occur directly from the Wild Rice River within the Reservation. (App. 37; R. Doc. 4-1, at 4, ¶ 20.)

Wild rice does not grow downstream of the proposed site due to seasonal water variability and flow speed. (App. 439; R. Doc. 40-2, at 2; App. 454; R. Doc. 45, at 9, ¶ 23.) Fish passage is already impeded upstream by the Lower Rice Lake dam operated by the Band.² (App. 469-470; R. Doc. 46, at 11-12, ¶ 31.) Although the Band has undertaken sturgeon stocking, reproduction may take decades and is not guaranteed. (App. 454-455; R. Doc. 45, at 9-10, ¶ 24.) Sturgeon migrate mid-May to June, while irrigation would occur July to mid-September, outside the migration period. *See* Minnesota Pollution Control Agency, Wild Rice River Watershed Stressor Identification Report, (January 2018), <https://www.pca.state.mn.us/sites/default/files/wq-ws5-09020108a.pdf>

² Other locations have surface water pumps and sturgeon migration, and WEDNR has not made a showing that there were negative impacts on sturgeon from those appropriations. (App. 475; R. Doc. 46, at 17, ¶ 50.)

(last visited May 26, 2025); *see also* MDNR, Species Profile—Lake Sturgeon, https://www.dnr.state.mn.us/minnaqua/speciesprofile/lake_sturgeon.html (last visited May 26, 2025). The permit requires screened intakes to protect aquatic species. (App. 37; R. Doc. 4-1, at 4, ¶ 28.)

MDNR found no anticipated negative impacts from Mr. Vipond's appropriation. (App. 37; R. Doc. 4-1, at 4, ¶ 26.) Although WEDNR later presented its expert reports to MDNR officials alleging ecological harm, MDNR neither revoked nor modified the terms of Mr. Vipond's permit. (App. 18; R. Doc. 4, at 18, ¶ 78.)

In summary, the proposed appropriation would impact less than one percent of river flow, 1.3% of stream length, and 0.008% of the drainage area within the Reservation—making it one of the least impactful locations for irrigation on the Reservation.³

E. MDNR's application of Minnesota's statutory criteria.

Under Minnesota Statutes section 103G.315, subdivision 3, MDNR may issue a permit for the appropriation of surface water only if it determines that the use is reasonable, practical, and will adequately protect public safety

³ Appellee Dustin Roy, in his declaration in the district court, stated there are 530 lakes over ten acres in size, hundreds of ponds, and more than 300 miles of rivers and streams on the Reservation. (App. 379; R. Doc. 43, at 11, ¶ 35.) In other words, Mr. Vipond's proposed appropriation would take far less than one percent of Reservation waters.

and promote public welfare under the statute. (App. 38; R. Doc. 4-1, at 5, ¶ 30.)

Based on its findings of fact and the record on file, MDNR concluded that Mr. Vipond's water appropriation permit was consistent with state water appropriation statutes and recommended that his permit be issued. (App. 38; R. Doc. 4-1, at 5.)

MDNR is charged with conserving and managing the State's natural resources. Its mission, as set forth on the Department's website, states in relevant part: "DNR manages natural lands such as forests, wetlands, and native prairies; maintains health populations of fish and wildlife; and protects rare plant and animal communities throughout the state. DNR manages the state's water resources, sustaining healthy waterways and ground water resources." See MDNR, Our Mission, <https://www.dnr.state.mn.us/aboutdnr/mission.html#:~:text=DNR%20manages%20natural%20lands%20such,waterways%20and%20ground%20water%20resources> (last visited May 26, 2025).

F. Background of the White Earth Band Of Ojibwe.

The White Earth Reservation was created by the 1867 Treaty, 16 Stat. 719, after Minnesota became a state in 1858. Minnesota took ownership to

the bed of the Wild Rice River upon statehood under the enabling act, before the Reservation was created.

The Reservation is a so-called “open” reservation. Following the Nelson Act, 25 Stat. 642, after lands were allocated to members of the Ojibwe Bands who moved there, the remaining lands were made available for settlement and sale to nonmembers. Some Ojibwe who obtained fee title to their allotted lands also eventually sold those lands to non-Indians. Today, nonmembers are slightly more than fifty percent of the resident population of the Reservation. Approximately half of the land is in fee ownership, while the remainder of the Reservation is owned by federal, state, and county governments and the Band, with the majority in non-tribal government ownership.

G. Federal district court proceedings.

On August 2, 2024, Mr. Vipond filed his complaint in district court, seeking declaratory and injunctive relief from the tribal court action. (App. 1, R. Doc. 4.) The White Earth Court of Appeals had initially ordered a hearing on the issue of jurisdiction to take place thirty days after its order. (App. 95; R. Doc. 4-1, at 62.) However, before an initial status conference in the tribal court, opposing counsel indicated plans to engage in extensive discovery, including expert reports, and requested a five-day hearing on

jurisdiction. (App. 98; R. Doc. 4-1, at 65.) Shortly thereafter, Mr. Vipond's lead counsel faced serious health issues, prompting agreed-upon delays in tribal court. (App. 284; R. Doc. 25.) It had become clear that WEDNR intended to extensively litigate the question of jurisdiction, but Mr. Vipond's counsel also believed that filing a federal action while having negotiated extensions of time in tribal court would appear to be bad faith. (App. 285; R. Doc. 25, at 2.) Only after tribal court proceedings resumed did Mr. Vipond seek federal relief.

Mr. Vipond filed his motion for preliminary injunction on October 11, 2024, seeking expedited handling of the motion, as depositions of tribal witnesses were beginning and the jurisdiction hearing would follow.⁴ (R. Doc. 22.) The district court denied Mr. Vipond's request for expedited handling. (R. Doc. 32.) The court did not set a hearing date for the motion. Undersigned counsel contacted the court to inquire about a hearing date for the motion. Finally, after contacting the court again in mid-January, the court set a hearing date for January 28, 2025, less than one month before the tribal court hearing set for February 24 and 25, 2025. (R. Doc. 51.)

⁴ Judge DeGroat granted WEDNR's request for a five-day hearing. After Mr. Vipond filed suit in federal court and named Judge DeGroat in his official capacity as a means of enjoining the tribal court, Judge DeGroat recused himself from the case, and Judge B.J. Jones was substituted as tribal court judge. Judge Jones reduced the hearing on jurisdiction to two days.

At the January 28, 2025 hearing, the district court acknowledged the upcoming proceedings in the tribal court: “I am not going to rule from the bench on the motion for preliminary injunction, but I am aware that time is moving forward and that we have a large proceeding set for the end of February,” (Tr. 38:1-4; App. 561) and indicated she would try to get the order out “as soon as we can.” (Tr. 39:11-13; App. 561.)

The district court issued its order March 5, 2025, one week after the tribal court hearing had concluded, denying Appellant’s motion for preliminary injunction. (Addendum (“Add.”) 1; App. 539; R. Doc. 55.)

The district court’s order focuses on the issue of exhaustion of tribal court remedies and does not substantively discuss the *Dataphase* factors for a preliminary injunction. (Add. 11; App. 549; R. Doc. 55, at 11.) The district court disagreed that it was “plain” that the tribal court lacked jurisdiction over the case, per the exception first articulated in *Strate*. The court did not address Appellant’s arguments regarding whether the State was a required party to be joined in the litigation, nor the issue of whether the fact that the State had already permitted the conduct at issue forecloses a showing of harm to the tribe sufficient to meet the second *Montana* exception. The court did not address Appellant’s authority showing that, when the second

Montana exception applies, courts tend to reject that the nonmember exhaust tribal court remedies.

SUMMARY OF ARGUMENT

The district court's order should be reversed, as this Court has made clear that exhaustion, a prudential rule based on comity, is not required in every case, and that, when it is plain that a tribe lacks jurisdiction over a nonmember, exhaustion would serve no purpose other than delay.

WEDNR plainly lacks jurisdiction over Mr. Vipond and may not apply or enforce the “general regulatory scheme” of its Water Protection Ordinance against Mr. Vipond. Instead of acknowledging the holding of *Montana*, that a tribe presumptively lacks jurisdiction over a nonmember, WEDNR passed an Ordinance that assumes it possesses jurisdiction over all people and all land within the Reservation, despite binding precedent to the contrary. 450 U.S. at 566. *United States v. Cooley*, 593 U.S. 345 (2021), did not establish that a tribe may look to a “class of activity” in order to apply *tribal law* to a nonmember. *Id.* at 352-53. *Cooley* only explained that, when there are exigent circumstances involving crime and safety, a tribal police officer may temporarily detain a suspect and then turn the suspect over to state or federal authorities. *Id.*

The State of Minnesota has had jurisdiction to regulate the waters within its boundaries since before the creation of the Reservation. WEDNR claims that the totality of state high-capacity water appropriation permits is imperiling its political integrity, economic security and health and welfare. But the State's regulation, until May 5, 2023, when the Water Protection Ordinance was passed, was apparently not imperiling the Band's subsistence. Moreover, in June 2024, the RBC suspended the Water Protection Ordinance's application to appropriations that were presently permitted by the State ("Existing Sources"). The State is entrusted with protecting the natural resources and, in its permitting decision, made findings of fact foreclosing a showing by the Band that it can satisfy *Montana*. WEDNR's claim that the State's issuance of high-capacity appropriation permits is imperiling the Band's core interests requires the State be joined to the litigation as Mr. Vipond has nothing to do with those permitting decisions. Exhaustion is not required under such circumstances.

The questions of allocation or adjudication of water rights, which are necessarily embedded within WEDNR's action against Mr. Vipond, are questions of federal law that may not be heard in a tribal court. Tribal courts are not courts of general jurisdiction. *See Nevada v. Hicks*, 533 U.S. at 366-

67. Exhaustion is not required when a subject in the litigation may not be heard in the tribal court. *Id.* at 369.

The district court did not address the issue of whether the State is a necessary and indispensable party to the action. Precedent is clear that when a sovereign's interests are at stake it is prejudicial to continue in the absence of that sovereign and any adjudication would be necessarily incomplete or potentially lead to multiple or inconsistent results. WEDNR's position in the tribal court has been that there is *zero* surplus water available for Mr. Vipond to safely appropriate from the Wild Rice River. That position is a *de facto* adjudication of his water rights as a riparian landowner and appears to preempt and invalidate his state permit. Further, the State has interests in the River as a navigable body of water and owns the River's bed. In such circumstances, proceeding without the State would lead to unjust results. The State is a required party to be joined.

The district court erred when it held that Mr. Vipond must exhaust tribal remedies and denied his motion for preliminary injunction without examining the factors underlying the request for that injunction. Even if the tribal court action is enjoined, WEDNR may still pursue its claims in federal court, so entering an injunction does not prevent WEDNR from seeking an adjudication of these issues.

ARGUMENT

STANDARD OF REVIEW

A review of a denial of preliminary injunction is layered: findings of fact are reviewed for clear error, legal conclusions are reviewed de novo, and the ultimate decision to grant or deny the injunction is reviewed for abuse of discretion. *Kodiak Oil & Gas (USA), Inc. v. Burr*, 932 F.3d 1125, 1133 (8th Cir. 2019). The district court reasoned that exhaustion was required and therefore denied Appellant’s motion for preliminary injunction. The determination of whether tribal court remedies must be exhausted here is a question of law reviewed de novo. *Id.*

I. Mr. Vipond need not exhaust his tribal court remedies, as WEDNR plainly lacks jurisdiction.

Exhaustion of remedies before the tribal court is a prudential rule, not a prerequisite. *Strate*, 520 U.S. at 453. “[T]his requirement is not jurisdictional, it is a prudential rule based in ‘[r]espect for tribal self-government’[...]” *Kodiak*, 932 F.3d at 1133. It is well-established that exhaustion is not required where it would be futile for the action to continue in the tribal court or serve no purpose other than delay. *Strate*, 520 U.S. at 459 n.14. “Since the United States Supreme Court’s decision in *Strate*, the Eighth Circuit has not required litigants to adjudicate the full merits of a case in tribal court before a federal court can exercise jurisdiction.” *Kodiak Oil &*

Gas (USA) Inc. v. Burr, 303 F. Supp. 3d 964, 972 (D.N.D. 2018), *aff'd*, 932 F.3d 1125 (8th Cir. 2019) (citing *Belcourt Pub. Sch. Dist. v. Herman*, 786 F.3d 653, 656 n.2 (8th Cir. 2015)). When a tribal court plainly lacks jurisdiction, exhaustion serves no purpose other than delay and is not required. *Strate*, 520 U.S. at 459 n.14; *see also Nevada v. Hicks*, 533 U.S. at 369.

This is exactly the kind of circumstance where jurisdiction is plainly lacking. It is undisputed here that the only means through which WEDNR may exercise jurisdiction over Mr. Vipond is by satisfying *Montana's* second exception and showing that Mr. Vipond's proposed water appropriation will imperil the tribe's subsistence, political integrity, or economic security. WEDNR cannot satisfy this difficult standard, for a series of reasons:

- Mr. Vipond has not appropriated any water under his state permit, so the conduct that WEDNR seeks to regulate has not yet occurred;
- Mr. Vipond's water appropriation is subject to the State's permitting requirements, including shutting off the pump if water levels are too low for safe appropriation to continue;
- Until the passage of the tribal Ordinance, MDNR was exclusively regulating water appropriations within the Reservation, and such appropriations have not imperiled the Band;

- The State sought the Band's comment on the permit application and even extended the time for the Band to provide comment. The Band chose to not respond, thus undermining its claim that this appropriation would imperil the Band and waiving its right to object to the State permit;
- The State determined that the proposed appropriation would not harm resources, and issued the permit;
- The language of the Revised Water Protection Ordinance indicates that "further study is needed" to understand the impact of presently permitted appropriations, thus suspending the Ordinance from applying to "Existing Sources." The Band is still enforcing the Ordinance against "New Sources," however, and does not attempt to explain how it has sufficient data on the impact of pumps that have not yet pumped water but insufficient data on the impact of existing pumps to satisfy the second *Montana* exception over nonmember appropriators;
- When WEDNR shared its expert reports in the tribal court case with MDNR officials, supposedly showing the harm of the appropriation, the State neither revoked nor modified Mr. Vipond's permit;

- Mr. Vipond's permitted appropriation would appropriate up to one percent of the average daily flow of the River;
- WEDNR has taken the position in the tribal action that there is *no* amount of water that Mr. Vipond could safely appropriate;
- Mr. Vipond's proposed appropriation site is downstream of all tribal-owned lands within the Reservation boundaries;
- Mr. Vipond's proposed appropriation site is approximately 1.13 stream miles from the western border of the Reservation, and the Wild Rice River flows from east to west (Add. 14; App. 458; R. Doc. 45-1, at 2);
- WEDNR claims that Mr. Vipond's appropriation would harm baitfishing, wild ricing, and its goal of having a self-sustaining sturgeon population, but:
 - There are no public access sites downstream of Mr. Vipond's site to allow for baitfishing post-appropriation and no baitfishing has occurred near the site;
 - There is no wild rice growing near or downstream of the site;
 - There are no sturgeon of spawning age in the River, and, in any event, spawning sturgeon would not be affected by a pump, as the pump would not be in the water during sturgeon migration in early spring.

In sum, the harms that WEDNR has alleged that Mr. Vipond's appropriation will cause are wholly speculative or unsupported by the facts. In such cases, where the harm forecasted to meet the second *Montana* exception is speculative at best, courts have determined that exhaustion is not required. In *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298 (9th Cir. 2013), a nonmember landowner sought a declaratory judgment that the tribe lacked jurisdiction to regulate the construction of his single-family home within reservation boundaries. The Ninth Circuit expressly held that exhaustion of tribal remedies was not required: "There is no dispute that Evans failed to exhaust tribal remedies. But the exhaustion requirement is not absolute." *Id.* at 1302. The court explained that exhaustion depends on whether the tribal court's assertion of jurisdiction is "colorable or plausible." *Id.* The tribe invoked the second *Montana* exception, citing concerns such as groundwater contamination, improper waste disposal, and fire hazards. *Id.* at 1305. The court found these concerns insufficient, holding that Evans' construction did not pose "catastrophic risks." The reservation had long faced groundwater contamination, and the tribe failed to show how the project would meaningfully worsen the issue. *Id.* at 1306. Other concerns were speculative and unsupported by specific

evidence. *Id.* at 1306 & n.8. Evans was therefore not required to exhaust in tribal court.

Similarly, in *Fort Yates Public School District No. 4 v. C.M.B.*, 786 F.3d 662 (8th Cir. 2015), the Eighth Circuit found that tribal jurisdiction under the second *Montana* exception was unjustified and exhaustion unnecessary. The court held that the threat of a federal lawsuit did not imperil tribal subsistence or justify tribal jurisdiction, emphasizing that jurisdiction must be “necessary to avert catastrophic consequences.” *Id.* at 670 (internal quotations omitted). Because the tribe’s jurisdictional claim was not colorable, exhaustion “would serve no purpose other than delay.” *Id.* at 672 (citing *Strate*, 520 U.S. at 459 n.14).

In *Burlington Northern Railroad Co. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999), tribal members argued that wrongful deaths of members warranted jurisdiction under the second *Montana* exception due to their importance to the community. The Ninth Circuit rejected this rationale, explaining that such a reading would “severely shrink the rule.” *Id.* at 1065. The court also dismissed claims of economic harm—such as burial allowance expenses—as insufficient to show “demonstrably serious” consequences. *Id.* at 1065–66. Accordingly, exhaustion was not required.

Likewise, in *Otter Tail Power Co. v. Leech Lake Band of Ojibwe*, No. 11-CV-1070-DWF-LIB, 2011 WL 2490820 (D. Minn. June 22, 2011), the court found tribal jurisdiction lacking and held that exhaustion was not required. The Band sought to regulate the construction of a high-voltage transmission line, claiming it required tribal consent. The court disagreed, finding neither *Montana* exception satisfied. As for the second exception, the court noted that while the project might affect treaty rights to hunt, fish, and gather, those impacts were “limited in scope and duration” and did not threaten tribal subsistence. *Id.* at *5. Thus, exhaustion would serve only to delay. *Id.*

Mr. Vipond’s proposed appropriation, though different in kind from the project in *Otter Tail*, is similarly constrained—it is seasonal and governed by state permitting requirements.⁵ Even assuming *arguendo* that there is some effect on tribal hunting, fishing, or gathering rights—which WEDNR has not demonstrated—such an impact does not rise to the level required under *Montana*’s second exception. As in the cases above, where the tribal court lacks jurisdiction, exhaustion is unnecessary and only causes delay.

⁵ Indeed, WEDNR asserted that Mr. Vipond’s appropriation would take place “essentially entirely in August. That’s the only time his fields would need extra water.” (Tr. 35:21-23; App. 560.)

Mr. Vipond raised this line of authority in both his opposition to WEDNR's motion to stay and during oral argument on his motion for a preliminary injunction. (Tr. 15:1-22; App. 555; R. Doc. 33, at 19-22.) Yet, the district court did not address any of these precedents in its order requiring exhaustion.

A. The *Dataphase* factors weigh in Mr. Vipond's favor.

In this Circuit, courts evaluate four factors to determine whether a preliminary injunction is warranted: (1) the threat of irreparable harm to the movant absent injunctive relief; (2) the balance between that harm and any injury the injunction would cause to other parties; (3) the movant's likelihood of success on the merits; and (4) the public interest. *Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). No single factor is dispositive; rather, courts must weigh and balance all four to assess whether they collectively support granting relief. *Leonhardt v. Holden Bus. Forms Co.*, 828 F. Supp. 657, 664 (D. Minn. 1993) (quoting *West Pub. Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1222 (8th Cir. 1986)). Of these, the most critical is the movant's probability of success on the merits. *DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 882 (8th Cir. 2013). Here, all four factors weigh in favor of granting the preliminary injunction.

1. Mr. Vipond is likely to succeed on the merits.

When considering a party's probability of success on the merits, a court should "flexibly weigh the case's particular circumstances to determine 'whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined.'" *Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc.*, 815 F.2d 500, 503 (8th Cir. 1987). The court does not decide whether the movant will ultimately win. *PCTV Gold, Inc. v. SpeedNet, LLC*, 508 F.3d 1137, 1143 (8th Cir. 2007). The movant must only demonstrate a fifty percent likelihood of success. *Id.* (quoting *Dataphase*, 640 F.2d at 113).

The likelihood of success factor here hinges on the question of tribal jurisdiction over a nonmember acting on fee lands. As discussed, *supra* part I and *infra* part II, WEDNR cannot satisfy *Montana* for Mr. Vipond's state-permitted conduct. And because the State's sovereign interests in a navigable body of water it has been exclusively regulating until the passage of the tribal Ordinance are at stake, the State is a required party to be joined. These factors necessarily preclude continued litigation in tribal court.

2. Continued litigation in a forum that lacks jurisdiction over him constitutes irreparable harm.

It is long-established that the basis for injunctive relief in federal court is irreparable harm and the absence of adequate remedies at law. *Bandag, Inc. v. Jack's Tire & Oil, Inc.*, 190 F.3d 924, 926 (8th Cir. 1999). A court may presume irreparable harm if the movant is likely to succeed on the merits. *Calvin Klein Cosmetics Corp.*, 815 F.2d at 503.

Requiring Mr. Vipond to continue litigating in tribal court imposes significant and unnecessary burdens—time, expense, and effort—in a forum that lacks jurisdiction over him. The Eighth Circuit has held that such circumstances favor injunctive relief: “Without the injunction, the oil and gas companies would be forced to expend the time and cost associated with continuing litigation in a tribal court that lacks jurisdiction over them, whereas the only possible injury to the tribal court plaintiffs and tribal court officials from the injunction is delay.” *Kodiak*, 932 F.3d at 1139.

Rather than limiting proceedings to the threshold issue of jurisdiction, WEDNR has transformed the matter into full-scale litigation. WEDNR submitted five expert reports alleging harm under the second *Montana* exception, and the parties engaged in numerous depositions, mostly due to the number of WEDNR witnesses providing supporting affidavits. Exhaustion of tribal court remedies is not intended to require a litigation of

the merits.⁶ As the district court in *Kodiak* noted, “Since the United States Supreme Court’s decision in [*Strate*, 520 U.S. at 450], the Eighth Circuit has not required litigants to adjudicate the full merits of a case in tribal court before a federal court can exercise its jurisdiction.” *Kodiak*, 303 F. Supp. 3d at 972 (D.N.D. 2018), *aff’d*, 932 F.3d 1125. WEDNR’s expansive approach—litigating the adequacy of the State’s regulatory scheme under the guise of determining jurisdiction—is inconsistent with the prudential exhaustion principles set forth in *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985).

Mr. Vipond’s compelled participation in this protracted and jurisdictionally improper process strongly supports the issuance of a preliminary injunction.

3. The balance of harms favors Mr. Vipond.

The next *Dataphase* factor considers the balance of harms—specifically, the harm the movant would suffer without an injunction versus the harm other parties might suffer if an injunction is granted. *Pottgen v. Mo. State High Sch. Activities Ass’n*, 40 F.3d 926, 929 (8th Cir. 1994). This analysis goes beyond irreparable harm and includes consideration of the

⁶ At the hearing on the motion for preliminary injunction, WEDNR argued that its version of jurisdiction is the merits of the case: “So the jurisdictional question is the merits.” (Tr. 23:6; App. 557.)

impact on all parties involved, as well as other interested entities, including the public. *See Dataphase*, 640 F.2d at 114.

Here, the balance favors Mr. Vipond. Because the district court denied Mr. Vipond's motion, Mr. Vipond was required to continue litigating in a forum that lacks jurisdiction. That litigation imposes time, expense, and effort on a party who, under federal law, is not subject to the tribal court's authority. In contrast, if the litigation is enjoined, WEDNR is not without recourse. It may pursue its claims in federal district court under 28 U.S.C. § 1331. Thus, while WEDNR may lose its preferred forum, it retains the ability to challenge Mr. Vipond's permitted appropriation.

4. A preliminary injunction serves the public interest.

Preliminary injunctive relief is only proper if the moving party establishes that entry of an injunction serves the public interest. *Dataphase*, 640 F.2d at 113. Here, the public interest is not served by continuing to allow WEDNR to litigate against Mr. Vipond in a forum that lacks jurisdiction over him. *See Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1158 (10th Cir. 2011) ("We simply are not persuaded the exertion of tribal authority over Crowe, a non-consenting, nonmember, is in the public's interest."). This factor also weighs in Mr. Vipond's favor.

II. When a regulatory agency has already determined that the conduct to be regulated is permissible and will not cause harm, a tribe cannot prove the harm required for jurisdiction under the second *Montana* exception.

A. MDNR considered the environmental impacts on the surrounding natural resources before approving the permit.

MDNR is charged with conserving and managing the State's natural resources. Its mission statement explains: "DNR manages the state's water resources, sustaining healthy waterways and ground water resources." (App. 19; R. Doc. 4, at 19.) Under Minnesota Statutes section 103G.315, subdivision 3, MDNR may issue a water appropriation permit for appropriations from surface water only if it determines that the use is reasonable, practical, and will adequately protect public safety and promote public welfare within the meaning given in the statute. (App. 38; R. Doc. 4-1, at 5.) Based on its findings of fact and the record on file, MDNR concluded that Mr. Vipond's water appropriation permit was consistent with state water appropriation statutes and recommended that his permit be issued. (App. 38; R. Doc. 4-1, at 5.) A state agency, entrusted with managing the natural resources of the state, equipped with experts in their respective fields, evaluated the criteria to receive a high-capacity pump and determined that the appropriation would not negatively impact the area's natural resources. This fact makes satisfaction of the second *Montana* exception nearly impossible. MDNR did

not conclude that the appropriation would cause harm at all, let alone “catastrophic” harm. Surely, if the appropriation would cause such harm, MDNR would not have granted it.

B. Because the State has already determined that the water may be appropriated safely under the terms of the State permit, WEDNR cannot show that this conduct will imperil the Band.

The Supreme Court has explained that “[r]ead in isolation, the *Montana* rule’s second exception can be misperceived.” *Strate*, 520 U.S. at 459. Rather, “a tribe’s inherent power does not reach beyond what is necessary to protect tribal self-government or to control internal relations.” *Id.* The Court then explained further, in *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 657 n.12 (2001):

The [second *Montana*] exception is only triggered by *nonmember conduct* that threatens the Indian tribe; it does not broadly permit the exercise of civil authority wherever it might be considered “necessary” to self-government. Thus, unless the drain of the nonmember’s conduct upon tribal services and resources is so severe that it actually “imperil[s]” the political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands.

Under that framework, the Court held that the tribe’s imposition of a tax on nonmembers was “presumptively invalid” because the tribe failed to establish that the tax was “necessary to vindicate the Navajo Nation’s

political integrity.” *Id.* at 659. Similarly, in *Strate*, the Court explained that neither regulatory nor adjudicatory authority over the state highway accident were needed to preserve the tribe’s right to make its own laws and be ruled by them. 520 U.S. at 459.

WEDNR knows that it cannot satisfy the second *Montana* exception looking to Mr. Vipond’s proposed conduct alone. It has therefore crafted, without authority, a new standard under *Montana*; one that looks not to the defendant nonmember’s conduct, but to the “class of threat” that the tribe is seeking to regulate. WEDNR has argued that *Cooley* allows a more expansive view of threatened harm—for example, crime committed on public highways running through a reservation. But *Cooley* does not employ a “class-of-threat lens” to apply a general regulatory scheme of *tribal law* to nonmembers. *Cooley* held that a tribe could, to protect public safety, temporarily stop, detain, and turn over a suspect to local or state law enforcement. 593 U.S. at 352-53. It did not hold that a tribe could apply *its own criminal laws* to a suspect to protect the tribe in the name of public safety. *Cooley* explained that *Montana* in fact *rejected* a tribe’s “general regulatory scheme” over nonmembers: “In that case we asked whether a tribe could *regulate* hunting and fishing by non-Indians on land that non-Indians owned in fee simple on a reservation. We held that it could not.” *Id.* at 350 (emphasis added).

WEDNR’s interpretation of *Cooley* would mean that a non-Indian driver, fully complying with state law, could nonetheless be subject to a tribal ordinance requiring a tribal driver’s license—simply because other non-Indians’ driving allegedly poses a threat to the tribe. *Cooley* offers no support for such a novel and expansive interpretation. And *Montana* does not counsel such a lens.

The standard under the second *Montana* exception is a difficult standard to meet. Indeed, the Supreme Court has never found that a tribe has satisfied the second *Montana* exception to apply *tribal law* to a nonmember acting on fee lands. And when a state’s regulatory system is already in place, and has determined, in its expert opinion, that such conduct will not harm the natural resources it is charged with protecting, the standard is nearly an impossible one. When a nonmember is acting on his fee lands and is engaging in activity that is regulated by the State, there is *no authority* that supports a general regulatory scheme of *tribal law* to the same conduct on the basis that, if left unregulated by the tribe, the conduct will cause “catastrophic” harm to the tribe.⁷

⁷ Surely, if this is WEDNR’s position, its claim is properly against the State.

III. Exhaustion is not required when a tribe lacks jurisdiction over the subject matter presented in the case.

In *Nevada v. Hicks*, the Supreme Court explained that, when a tribal court lacks jurisdiction over the question before it, exhaustion is not required:

Though [the *Strate* exception] too is technically inapplicable, the reasoning behind it is not. Since it is clear, as we have discussed, that tribal courts lack jurisdiction over state officials for causes of action relating to their performance of official duties, adherence to the tribal exhaustion requirement in such cases “would serve no purpose other than delay,” and is therefore unnecessary.

533 U.S. at 369. Such a situation is similarly presented here.

Though WEDNR claims it does not have any claims against the State directly⁸, its case in tribal court hinges on its assertion that the State’s regulation in the area of high-capacity water appropriations is inadequately protecting the natural resources in the area. It cannot have jurisdiction over Mr. Vipond under *Montana*’s second exception unless the conduct imperils the tribe; it has therefore argued that the entire “class of threat” of high-capacity water appropriations threatens the tribe’s resources. But this

⁸ The same claim was made and rejected in *Hood ex rel. Mississippi v. City of Memphis, Tenn.*, 570 F.3d 625 (5th Cir. 2009). The state of Mississippi denied it had any direct claims against the state of Tennessee, but the Court found Tennessee’s sovereign interests were at stake and that Tennessee was a necessary party to be joined.

presents a question that cannot be adjudicated in tribal court. It is a challenge to state regulatory authority that may be brought in a state court proceeding.

WEDNR has also alleged that the basis for its authority over water in the River stems from its federally reserved water rights, and cites to *Winters v. United States*, 207 U.S. 564 (1908) and *Arizona v. Navajo Nation*, 599 U.S. 555 (2023). Federally reserved water rights present a federal question, which is properly adjudicated in the federal courts.⁹

Further, by arguing that Mr. Vipond's proposed one-percent appropriation of water would cause catastrophic harm to the tribe, WEDNR has *de facto* preempted Mr. Vipond's riparian rights and the rights under the State permit he was issued. That constitutes a direct interference with the State's administration of its regulatory program of DNR-issued water appropriation permits. Those present questions of state law, which also may not be adjudicated in tribal court.¹⁰

⁹ Supreme Court authority has also established that, through water rights adjudication under the McCarran Amendment, states can also adjudicate federally reserved water rights, including those belonging to tribes. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 809-11 (1976); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 564 (1983). Such an action could therefore also be brought in state court.

¹⁰ Tribal courts are not courts of general jurisdiction. *See Nevada v. Hicks*, 533 U.S. at 367 ("Respondents' contention that tribal courts are courts of 'general jurisdiction' is also quite wrong [...] Tribal courts, it should be clear,

Although WEDNR claims it is not seeking an allocation of water rights, indicating that even one percent of the water may not be appropriated safely indicates that its lawsuit necessarily encompasses such a determination. Courts have rejected similar attempts at piecemeal water rights adjudication. In *Havasupai Tribe v. Anasazi Water Co., LLC*, 321 F.R.D. 351, 357-58 (D. Ariz. 2017), the tribe argued there was no need to have a general water rights adjudication, as their suit only sought to establish the relative rights to use the aquifer among a small group of defendants. The court rejected that position: “While the Havasupai may prefer to proceed in a piecemeal fashion against select Defendants [...] there is a clear federal policy against piecemeal adjudication of water rights in a river system.”¹¹ *Id.* The court indicated that the United States could not be joined as a Defendant in a “private suit for

cannot be courts of general jurisdiction in this sense, for a tribe’s inherent adjudicative jurisdiction over nonmembers is only at most as broad as its legislative jurisdiction.”)

¹¹ The *Havasupai* court is referencing the United States’ waiver of sovereign immunity for cases adjudicating water rights in state court under the McCarran Amendment. The Senate Judiciary Committee Report plainly lays out this policy and the reasoning behind it: “In the administration of and the adjudication of water rights under State law the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. *Accordingly, all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings.*”). Senate Judiciary Committee Report regarding the McCarran Amendment, S. Rep. No. 755, 82nd Cong., 1st Sess. 2, at 4-5 (1951) (emphasis added).

water rights” because of that policy. *Id.* It explained: “While of course the [tribe] can choose the claim it wishes to pursue, it cannot, in this setting, pursue a claim for which there is an immunity bar when there is an available alternative.” *Id.*

In sum, WEDNR argues it does not have claims against the State, as it knows that the State may not be sued in its tribal court. It claims it does not need a general adjudication of rights, also because it knows its tribal court is not the proper forum for such an adjudication. But these claims underlie the claims against Mr. Vipond and WEDNR’s attempts to assert tribal jurisdiction over him. If Mr. Vipond’s state-permitted conduct presents catastrophic risks, it is difficult to envision how he could exercise his rights under the permit. WEDNR’s claims encompass both questions of state and federal law, and these claims may not be heard and determined by a court of limited jurisdiction like the tribal court.

IV. The district court erred by failing to address whether the State is a necessary party to the tribal court action.

In support of his motion for preliminary injunction, Mr. Vipond argued that exhaustion of tribal remedies was inappropriate because the State is a necessary party to be joined to the tribal action. (Pl.’s Mem., R. Doc. 24, at 4-

5, 12, 31.)¹² The district court erred in not considering whether the State was a necessary party to the tribal court action.

A. Standard of Review

“A district court by definition abuses its discretion when it makes an error of law.” *Koon v. United States*, 518 U.S. 81, 100 (1996). Rule 19 makes clear the court’s obligation to ensure required parties are present in a litigation: a party “must” be joined and the court “must order that person be made a party.” *See* Fed. R. Civ. P. 19(a)(1) and (2). In cases where joinder is not feasible (as in this case), the court “must determine, whether, in equity and good conscience, the action should proceed . . . or be dismissed.” *Id.* at 19(b). The issue of necessary parties and joinder is sufficiently important that it can be raised at any stage of the proceedings—even sua sponte. *McCowen v. Jamieson*, 724 F.2d 1421, 1424 (9th Cir. 1984) (citing *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111 (1968) (“When necessary, however, a court of appeals should, on its own initiative, take steps to protect the absent party, who of course had no opportunity to plead and prove his interest below.”)). Here, the district court erred by not addressing this critical issue.

¹² Appellant also raised this argument in opposing Defendant’s Motion to Stay. (Pl.’s Mem., R. Doc. 33, at 24-27.)

Federal Rule of Civil Procedure 19 sets forth a three-part procedure for determining whether litigation may proceed in the absence of a particular person or entity. First, a court must determine if the absent party is “necessary to the litigation;” second, if so, whether the party can be joined; and third, if joinder is infeasible, whether the action can nevertheless proceed “in equity and good conscience.” Fed. R. Civ. P. 19; *see Kickapoo Tribe of Indians of Kickapoo Reservation in Kansas v. Babbitt*, 43 F.3d 1491, 1494 (D.C. Cir. 1995).

B. The State is a necessary party and must be joined in the tribal court action.

Under Rule 19(a)(1), a party is “required” under two scenarios.¹³ First, the party is required if in that party’s absence the court cannot accord complete relief among the existing parties. Fed. R. Civ. P. 19(a)(1)(A). Second, and alternatively, a party is required if it:

claims an interest relating to the subject matter of the action and is so situated that disposing of the action in the person’s absence may: (i) as a practical matter impair or impede the person’s ability to protect the interest; or (ii) leave an existing party

¹³ Fed. R. Civ. P. 19(a) covers “Persons Required to be Joined if Feasible.” As a threshold matter, “a court must first determine whether a [person] should be joined if ‘feasible’ under Rule 19(a), . . . i.e., whether a person is ‘necessary.’” *Gwartz v. Jefferson Mem’l Hosp. Ass’n*, 23 F.3d 1426, 1429 (8th Cir. 1994) (quoting *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399 404 (3d Cir. 1993) (internal citations omitted)).

subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations because of that interest.

Fed. R. Civ. P. 19(a)(1)(B)(i)-(ii).

1. The tribal court's adjudication of the State's water interests at issue cannot be complete between Mr. Vipond and WEDNR because the State has rights to the Wild Rice River.

By continuing in tribal court, the State's interests in its navigable waters are being adjudicated in its absence. WEDNR has asserted that the State's regulatory authority over the River is preempted and of no force and effect because of the Band's federally reserved water rights. (App. 100; R. Doc. 4-1, at 67.) Litigating the sovereign rights of a government in its absence will necessarily require an incomplete adjudication of water rights, because the State retains sovereign rights in the River. This is precisely when the courts consider a party required to be joined under Fed. R. Civ. P. 19. *See Hood*, 570 F.3d 625.

In *Hood*, the Fifth Circuit held that the State of Tennessee was a party required to be joined in an action between the State of Mississippi and the City of Memphis. Mississippi had sued Memphis, alleging that the City was wrongfully appropriating groundwater from an interstate aquifer. The Fifth Circuit held that the State of Tennessee was required to be joined because "Tennessee's presence in the lawsuit was necessary to accord complete relief"

to the other parties. 570 F.3d at 631; *see also Bomer-Blanks Lumber Co. v. Oryx Energy Corp.*, 837 F. Supp. 769, 770 (M.D. La. 1993) (State Conservation Commissioner was a necessary party because the plaintiff alleged that the defendant breached its duty by following the Commissioner's order).

Like Tennessee, Minnesota has sovereign interests in the navigable bodies of water within its borders. The Wild Rice River is a navigable body of water.¹⁴ The State possesses regulatory authority over the River and issues permits to appropriate water from the River. The central questions in this case are which government holds the appropriate regulatory authority and over which citizens that authority extends. Excluding one of the sovereigns who has an interest in the water from a determination about water interests would result in only partial relief to both Mr. Vipond and WEDNR, just as in *Hood*.

2. Litigating in tribal court without the State will impair and impede the State's ability to protect its interests.

The State has authority, even within Indian country, over criminal and civil matters. "Indian country is part of the State, not separate from the State [...] as a matter of state sovereignty, a State has jurisdiction over all of its

¹⁴ The Wild Rice River is designated as public waters by the Commissioner of Natural Resources under Minn. Stat. § 105.391, subd. 1 (App. 486; R. Doc. 46-1, at 8.)

territory, including Indian country.” *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 636 (2022) (citing U.S. Const., Amend. X). Tribes retain inherent sovereign authority over their members and on tribal lands and have authority over nonmembers and nonmember fee lands in certain limited circumstances, as exhaustively discussed above. “Indian treaty rights can coexist with state management of natural resources [...] This ‘conservation necessity’ standard accommodates both the State’s interest in management of its natural resources and the Chippewa’s federally guaranteed treaty rights.” *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204-05 (1999).

The State has a sovereign interest in regulating the waters within the boundaries of the State, including waters that pass through an Indian reservation, and it has inherent authority to regulate the natural resources in those waters. *Id.*; see also *Hood ex rel. Mississippi*, 570 F.3d at 631 (holding that the state of Tennessee had a sovereign interest in regulating its waters); *United States v. Anderson*, 736 F.2d 1358, 1365-66 (9th Cir. 1984) (holding that the state, not the tribe, was the proper government to regulate surplus water appropriation by nonmembers within a reservation); see, e.g., *State by Head v. Slotness*, 185 N.W.2d 530, 532 (Minn. 1972)(explaining the rights of the state to navigable waters and riparian rights). Minnesota’s permitting

decisions and the adequacy of its protection of natural resources are squarely at issue in the litigation, having been called into question by WEDNR's expert reports and expert testimony in the tribal court proceeding.¹⁵ Minnesota has been regulating the waters of the River and the natural resources at issue in this litigation through MDNR exclusively or nearly-exclusively. *See supra* Part E.

WEDNR's claims necessarily implicate the adequacy of the State's regulation, as WEDNR cannot satisfy the second *Montana* exception absent a showing that the high-capacity pumping permitted by the State is imperiling its subsistence. That is not something that Mr. Vipond, an individual landowner, can defend or explain.

In *South Carolina v. North Carolina*, 558 U.S. 256 (2010), the Supreme Court denied intervention by the city of Charlotte on the basis that its rights were adequately and appropriately represented by the state in the water rights dispute:

Charlotte's interest falls squarely within the category of interests with respect to which a State must be deemed to represent all of its citizens. As we recognized in *New Jersey v. New York*, a State's sovereign interest in ensuring an equitable share of an interstate river's water is precisely the type of interest that the State, as *parens patriae*, represents

¹⁵ WEDNR also asserted this position at the hearing on the motion for preliminary injunction. (Tr. 37:5-16; App. 561.)

on behalf of its citizens [...] Thus respect for ‘sovereign dignity’ requires us to recognize that North Carolina properly represents Charlotte in this dispute over a matter of uniquely sovereign interest.

Id. at 274-75. If even a city may not adequately represent the state’s interests in a water dispute, it is difficult to see how an individual citizen can do so.

WEDNR has made the claim that its authority preempts the State’s interests in the waters. (App. 100; R. Doc. 4-1, at 67.) Yet, the State exercises regulatory authority of the River to this day—and indeed issued Mr. Vipond a permit pursuant to the authority. WEDNR ignores the navigable nature of the River and the State’s ownership of the bed of that River, as well as the State’s sovereign authority to regulate its waters.

Instead, WEDNR continues to rely on *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981) for its position that WEDNR may regulate Mr. Vipond’s water appropriation. There, under highly fact-specific circumstances, the Ninth Circuit held that the state’s regulatory authority was preempted and “of no force and effect.” *Id.* at 53. *Colville* stands for the proposition that a tribe has exclusive regulatory authority over the waters within its reservation, and WEDNR has relied on *Colville* for its preemption claim. (App. 100; R. Doc. 4-1, at 67.)

But *Colville* is plainly inapposite here. *Colville* involved a non-navigable body of water solely within the boundaries of the tribe’s

reservation. The Wild Rice River is 248 miles in length, flows through the Reservation, and then joins the Red River at Minnesota's western boundary, where it then flows north through Canada to Hudson Bay. In addition, the court explained that the decision was fact-specific and that *Colville* had a narrow holding:

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

647 F.2d at 52.

Just three years later, in *United States v. Anderson*, the Ninth Circuit distinguished *Colville* and held that the *state*, not the tribe, had the authority to regulate excess waters by nonmembers on fee lands. 736 F.2d at 1365-66. The court explained the state's role in regulating the waters within its borders, even within the boundaries of an Indian reservation:

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

waterways or aquifers transcend the exterior boundaries of Indian country.

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

WEDNR is litigating this case in tribal court as if its authority indeed preempts the State's. WEDNR has placed quantification of water rights at the forefront of its claims in tribal court. Its expert, Dr. Jody Kubitz, stated that there "is no surplus water available for out-of-stream uses during [July through October]." (App. 472-473; R. Doc. 46, at 14-15, ¶ 42; App. 451-452; R. Doc. 45, at 6-7, ¶ 18.) Because WEDNR has asserted that there is no surplus water available for Mr. Vipond to safely appropriate, its position is necessarily that the state has no authority to issue permits (not to mention that riparian owners have no rights). WEDNR's claim is an attack of MDNR's permitted appropriation, and therefore its authority. *Cf. Bommer-Blanks*

Lumber Co. v. Oryx Energy Corp., 837 F. Supp. 769, 770 (M.D. La. 1993) (paragraphs of the plaintiffs' complaint constitute a collateral attack on an order of the Commissioner). Mr. Vipond is not the party to defend against WEDNR's efforts to preempt the State's rights to regulate its waters—the State is.

Because a determination by this Court *absent* the State's presence in the litigation would impair the State's sovereign interests in its waters and natural resources, it was error for the district court to not address this issue.

3. There is a substantial risk to Vipond of incurring double or otherwise inconsistent obligations because of the State's interest.

As the State is not a party, Mr. Vipond is at substantial risk of being subject to double and inconsistent obligations. The risk cannot be denied as he obtained a State permit and was then sued in tribal court to adhere to the Band's Ordinance.

Mr. Vipond has gone through the exercise of applying for and obtaining a permitted appropriation from the State. (App. 35; R. Doc. 4-1, at 2.) The State granted Mr. Vipond a permit, consistent with its authority to do so, and consistent with his rights as a riparian landowner. (App. 35; R. Doc. 4-1, at 2.) The Band, in turn, adopted its Ordinance purporting to exercise civil regulatory authority over the conduct of nonmembers on fee lands. (App. 40-

41; R. Doc. 4-1, at 7-8.) The Ordinance requires a \$5,000 permit application fee for initial review, plus a cost reimbursement agreement with no monetary cap to pay a class of Retained Experts before completion of Permit Review. (App. 44; R. Doc. 4-1, at 11.) WEDNR's case therefore requires that the rights of those with an interest in the waters of the River be quantified and adjudicated so that Mr. Vipond is not subjected to double or inconsistent obligations.

C. The State cannot be joined in tribal court.

The State has sovereign immunity in tribal court.¹⁶ *Franchise Tax Bd. of California v. Hyatt*, 587 U.S. 230, 245 (2019); *State of Montana v. Gilham*, 133 F.3d 1133, 1137-38 (9th Cir. 1998). Because it enjoys sovereign immunity, it cannot be joined absent consent. *See Republic of Philippines v. Pimentel*, 553 U.S. 851, 867 (2008) (citing previous Supreme Court precedent and noting “where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential to injury to the interests of the absent sovereign”); *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371, 373-75 (1945) (dismissing

¹⁶ Minnesota courts, in turn, recognize tribal sovereign immunity, and White Earth asserts its own sovereign immunity in litigation in federal and state court actions when it has not consented to suit. *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 289 (Minn. 1996); *see Harper v. White Earth Hum. Res.*, No. 16-CV-1797 (JRT/LIB), 2017 WL 701354, at *1 (D. Minn. Feb. 22, 2017).

an action where the Under Secretary of the Navy was sued in his official capacity, because the Government was a required entity that could not be joined when it withheld consent to be sued); *Minnesota v. United States*, 305 U.S. 382, 386-88 (1939) (dismissing the action for nonjoinder of a required entity where the United States was the owner of the land in question but had not consented to suit). Accordingly, the State's joinder in the tribal court action is infeasible.

D. The tribal court action cannot proceed without the State.

The final inquiry, if joinder is infeasible, is whether the lawsuit can nevertheless proceed "in equity and good conscience." Fed. R. Civ. P. 19(b). In applying this standard, the rule instructs courts to consider, among other things, the following four "non-exclusive" factors:

- (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
- (2) the extent to which any prejudice could be lessened or avoided by:
 - (A) protective provisions in the judgment;
 - (B) shaping the relief; or
 - (C) other measures;
- (3) whether a judgment rendered in the person's absence would be adequate; and
- (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Kickapoo Tribe, 43 F.3d at 1496; Fed. R. Civ. P. 19(b). “These four factors are not rigid, technical tests, but rather ‘guides to the overarching equity and good conscience’ determination.” *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 774 (D.C. Cir. 1986) (citing *Cloverleaf Standardbred Owners v. Nat’l Bank*, 699 F.2d 1274, 1279 n.11 (D.C. Cir. 1983) (internal quotations omitted)).

The Supreme Court has explained that “the decision whether to dismiss . . . must be based on factors varying with different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests.” *Provident Tradesmens Bank*, 390 at 119. In *Wichita & Affiliated Tribes of Oklahoma*, the court observed that “one leading commentator has suggested that when a necessary party is immune from suit, there is very little room for balancing of other factors, because this ‘may be viewed as one of those interests compelling by themselves.’” 788 F.2d at 777 n.13 (quoting 3A *Moore’s Federal Practice* ¶ 19.15, at 19–266 n. 6 (1984) and citing 7 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 1617, at 172 (1972) (“No doubt because of the sovereign immunity concept, the application of Rule 19 in cases involving the government reflects a heavy emphasis on protecting its interests.”)).

In *Kickapoo Tribe*, the tribe brought an action against the Secretary of the Interior, seeking a declaration that the compact between the state and tribe to allow gambling on the tribe's land was approved under the Indian Gaming Regulatory Act. *See* 43 F.3d at 1493. The court concluded that the district court abused its discretion in denying the Secretary's motion to dismiss the complaint because Kansas was an indispensable party under Rule 19(b). *Id.* In considering whether Kansas was an indispensable party to the action, the court noted Kansas' indispensability¹⁷ was "hardly a formality; not only its contractual rights were at issue, but its fiscal interests are also potentially at stake." *Id.* at 1500. Further, "it was both a necessary party under 19(a) and immune from suit, thereby cabining the district court's discretion to consider other factors under Rule 19(b)." *Id.* (citing *Wichita & Affiliated Tribes*, 799 F.2d at 777 n.13). Thus, notwithstanding the discretion district courts are generally given to consider which factors to weight and emphasize, "the district court was confronted with a more circumscribed inquiry when it assessed whether the Tribe's lawsuit could proceed 'in equity

¹⁷ *See also Enter. Mgmt. Consultants, Inc. v. U.S. ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989); *Adams v. Bell*, 711 F.2d 161, 171 n.42 (D.C. Cir. 1983) (en banc), *cert. denied*, 465 U.S. 1021, (1984); 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure*, § 1617, at 257.

and good conscience’ in the absence of Kansas, which was both a necessary party and immune from the lawsuit.” *Id.* at 1497.

Here, inquiry into the 19(b) “equity and good conscience” factors can begin and end with the following: the State is a necessary party, it is immune from suit, and its water, regulatory, enforcement, and fiscal interests are all at stake. *See Kickapoo Tribe*, 43 F.3d at 1497, 1500. If this Court were to consider the other 19(b) factors, they all weigh in favor of concluding that the tribal court lawsuit cannot continue in equity and good conscience: the State will be prejudiced by any judgment issued in tribal court if it is absent from that proceeding, and there is little to be done to lessen or avoid that prejudice in any order by a tribal court that undermines the interests of the State’s sovereign interests. While the judgment might be adequate for WEDNR, it mostly certainly would be incomplete as to Mr. Vipond and the State.

As for whether WEDNR has an adequate remedy if the action in tribal court is enjoined – it most certainly does: (1) it could have commented during the MDNR comment period for Mr. Vipond’s application process; (2) it could bring suit in federal court; or (3) it can allow the State to do its job with its resources and regulate the appropriation as it has done here. WEDNR has made no showing that it meets the second *Montana* exception, and the State, as the regulating authority for the River, has taken into consideration all the

factors that might impair or injure the water and related resources and issued a permit that is appropriate and tailored to protect the River. In any event, the proper venue to pursue its concerns is federal court.

The district court should have undertaken an analysis of whether the State was a required party; its failure to do so was an error of law and therefore an abuse of discretion.

CONCLUSION

When it is plain that the tribe lacks jurisdiction over the nonmember, exhaustion of tribal court remedies is not required. Because such a situation exists here, when the nonmember's conduct has already been approved and permitted by the State, which held that it would not harm the natural resources, and the entirety of the tribe's claims of harm are speculative, it is plain that the second *Montana* exception is not satisfied. The district court's decision to deny the motion for preliminary injunction on the basis of exhaustion was therefore error. Appellant respectfully requests that the Court reverse the district court and enjoin the tribal court from further proceedings.

Dated: May 29, 2025

Respectfully submitted,

**NOLAN, THOMPSON, LEIGHTON
TATARYN, PLC**

By: s/ Randy V. Thompson

Randy V. Thompson (#122506)

Courtney E. Carter (#390284)

1011 First Street South, Suite 410

Hopkins, MN 55343

(952) 405-7171

Email: rthompson@nmtlaw.com

ccarter@nmtlaw.com

Attorneys for Appellant David Vipond

CERTIFICATE OF COMPLIANCE

The undersigned counsel for Appellant David Vipond certifies that this brief complies with the requirements of Fed. R. App. P. 32(a) in that it is printed in 14 point, proportionately spaced typeface utilizing Microsoft Word 16.97.1 and contains 12,867 words, including headings, footnotes and quotations and that the brief has been scanned for viruses and is virus-free.

Dated: May 29, 2025

**NOLAN, THOMPSON, LEIGHTON &
TATARYN**

By: s/Randy V. Thompson

Randy V. Thompson (#122506)

Courtney E. Carter (#390284)

1011 First Street South, Suite 410

80 South Eighth Street

Hopkins, MN 55343

(952) 405-7171

Email: rthompson@nmtlaw.com

ccarter@nmtlaw.com

Attorneys for Appellant David Vipond

CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2025, I electronically filed the foregoing 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.

Dated: May 29, 2025

**NOLAN, THOMPSON, LEIGHTON &
TATARYN**

By: s/Randy V. Thompson
Randy V. Thompson (#122506)
Courtney E. Carter (#390284)
1011 First Street South, Suite 410
80 South Eighth Street
Hopkins, MN 55343
(952) 405-7171
Email: rthompson@nmtlaw.com
ccarter@nmtlaw.com

Attorneys for Appellant David Vipond