

**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

REPLY BRIEF OF APPELLANT DAVID VIPOND

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INTRODUCTION

Does a farmer's forecasted appropriation of water, under a state permit, downstream of all tribal land, and only 1.13 stream miles from the western border of the White Earth Reservation, imperil the White Earth Band? For Appellee to apply its tribal ordinance to Appellant, a nonmember, acting on his fee-owned lands, the answer to this question must be yes. Because it is plain that, under these facts, Appellee cannot satisfy the second *Montana* exception, exhaustion of tribal court remedies here serves no purpose other than delay. Thus, the tribal court action should be enjoined. The district court erred in denying Appellant's motion for preliminary injunction and requiring that Appellant exhaust in tribal court.

In his Response, Appellee does not cite a single case requiring exhaustion when the issue involves a tribe applying tribal law to a nonmember acting on fee lands. Instead, Appellee cites to Supreme Court passages in ways that have been expressly disclaimed by the Court. Appellee even improperly raises evidence not in the record on appeal.

Appellee's case against Appellant is, in fact, an action against the State of Minnesota's water permitting decisions. Previously, when White Earth did not like a permit decision, it sued the State.¹ Appellee appears to prefer

¹ See *Manoomin et al. v. Minnesota Department of Natural Resources, et al.*, No. AP21-0516 (White Earth Ct. App., March 10, 2022) and *Minnesota*

litigating against Appellant than the State (or a large corporate farm).² It thought it could intimidate Appellant into compliance with a tribal law that does not apply to him, which until May 2025 had a \$5,000 application fee, and which still contains an open-ended “cost reimbursement” clause for any experts WEDNR hires to review the application.

Equity is clear: there is no reason to exhaust in a forum that lacks jurisdiction over Appellant, cannot join a necessary party—the State of Minnesota—and is causing him irreparable harm. Enjoining Appellee does not leave Appellee without recourse. Appellee may bring an action in federal court to determine whether its Ordinance applies to Appellant, and the State can be joined in that action, thus avoiding incomplete resolutions and potentially conflicting outcomes, as well as protecting the State’s sovereign interests.

Department of Natural Resources et al. v. White Earth Band of Ojibwe et al., No. 21-cv-01869-WMW-LIB (D. Minn. 2021) (White Earth suing on behalf of wild rice (“manoomin”) regarding MDNR’s water appropriation permit issued to Enbridge).

² *R.D. Offutt Farms Co. v. White Earth Division of Natural Resources et al.*, No. 24-cv-1600-JMB-LIB (D. Minn. 2025) (corporate farming enterprise suing to enjoin enforcement of the Water Protection Ordinance against its operations). Within one month of the lawsuit, the Reservation Business Council amended the Ordinance to only apply to “New Sources,” and paused enforcement against State permittees, such as R.D. Offutt Farms. (App. 52; R. Doc. 4-1, at 19.)

The legal presumption is that Appellee lacks jurisdiction over Appellant *unless* it can show Appellant's conduct on his fee lands will imperil its subsistence or cause catastrophic harm. Because it cannot make this showing, exhaustion serves no purpose other than delay.

ARGUMENT

I. Appellee's inclusion of material outside the appellate record should be disregarded by the Court.

Appellee makes several references to evidence that is not part of the record before the district court and therefore improperly before this Court. This Court may consider only the record and facts before the district court on appeal. Fed. R. App. P. 10(a); *see Huelsman v. Civic Ctr. Corp.*, 873 F.2d 1171, 1175 (8th Cir. 1989). In lieu of bringing a motion to strike, Appellant respectfully requests that this Court decline to consider the following quoted material in its entirety (ellipses inserted to provide brevity and indicate the beginning and end of content that violates Fed. R. App. P. 10(a)):

- Resp. 26, n.12: "Mr. Vipond's own claims in tribal court ... the tribal constitution."
- Resp. 27: "but four months later he attached an entirely new set of opinions from his expert ... *despite* the tribal court having excluded them from the tribal court record as untimely." (Emphasis in original.)

This assertion is false. Appellee requested the district court strike the declaration, but the court did not do so. (Tr. 29:17-20; App. 559.) Mr.

Kramka's federal declaration was not excluded by the tribal court as untimely; it was never offered in tribal court.³

- Resp. 37: "Tribal members and WEDNR staff testified in tribal court, ... evidentiary iceberg."
- Resp. 38, n.21: "The record developed ... aquatic species."
- Resp. 40-41: "The evidentiary record ... to tribal members."
- Resp. 42: "While WEDNR has identified for the tribal court ... wells overall."

II. Because WEDNR cannot meet the second *Montana* exception, exhaustion serves no purpose other than delay.

"[T]ribes do not, as a general matter, possess authority over non-Indians who come within their borders." *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 328 (2008). "This general rule ... is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians." *Id.* The *Montana* "exceptions concern regulation of 'the *activities* of nonmembers' or 'the *conduct* of non-Indians on fee land.'" *Id.* at 330. "The burden rests on the tribe to establish one of the exceptions," and "[t]hese exceptions are 'limited' ones ... and cannot be

³ Appellee cites generously from Appellee's aquatic species experts' tribal court testimony and reports introduced in tribal court. (Resp. 6-9, 14, 37.) Though citing the Declaration that repeats opinions from the reports, (App. 369-391; R. Doc. 43 at 19-21, ¶¶ 67-73), the recitation of contents of the reports themselves is double hearsay.

construed in a manner that would ‘swallow the rule.’” *Id.* (quoting *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 651 (2001).)

A. Appellee inverts the standard for tribal jurisdiction over nonmembers.

Appellee claims, without authority, that “[n]o clearly established law precludes the Nation’s exercise of jurisdiction here—quite the opposite—and there accordingly exists no basis for Appellant to avoid the exhaustion requirement.” (Appellee’s Response (“Resp.”) at 33.) But Supreme Court jurisprudence dictates the *reverse*: “Our case law establishes that, absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances.” *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997).⁴ To accept Appellee’s position, one must ignore all of the precedent that narrowly construes tribal jurisdiction over nonmembers and *Strate*’s exception to exhaustion.

B. Courts rarely require exhaustion when the basis for tribal jurisdiction is the second *Montana* exception.

When the tribe’s jurisdiction hinges on the second *Montana* exception, courts do not require exhaustion. (See Br. 24-27.) *Strate*, 520 U.S. at 438 (establishing fourth exception to exhaustion); *Nevada v. Hicks*, 533 U.S. 353, 369 (2001) (applying fourth exception, as tribe lacked authority to

⁴ *Strate* was a unanimous decision authored by Justice Ginsburg.

regulate conduct at issue); *Fort Yates Pub. Sch. Dist. No. 4 v. C.M.B.*, 786 F.3d 662, 670, 672 (8th Cir. 2015) (same); *Evans v. Shoshone-Bannock Land Use Policy Com’n*, 736 F.3d 1298, 1302-1306 (9th Cir. 2013) (nonmember conduct did not imperil the tribe; exhaustion would serve no purpose other than delay); *Burlington N. R. Co. v. Red Wolf*, 196 F.3d 1059, 1065-66 (9th Cir. 1999) (holding wrongful death action for deceased tribal members did not satisfy second *Montana*; exhaustion not required); *Otter Tail Power Co. v. Leech Lake Band of Ojibwe*, No. 11-CV-1070-DWF-LIB, 2011 WL 2490820, at *5 (D. Minn. June 22, 2011) (impact of power company’s project did not imperil the tribe; exhaustion not required); *McKesson Corp. v. Hembree*, No. 17-CV-323-TCK-FHM, 2018 WL 340042, at *7-9 (N.D. Okla., Jan. 9, 2018) (harm caused by opioid overdoses and deaths did not meet second *Montana*; exhaustion was not required); *Zurich Am. Ins. Co. v. McPaul*, No. CV-19-08227-PCT-SPL, 2020 WL 4569559, at *4 (D. Ariz. Aug. 7, 2020) (second *Montana* was not met; exhaustion not required).

Appellee confusingly refers to the second *Montana* **exception** in his brief as “the *Montana* standard.” (Resp. 23-24.) He then refers to Appellant’s argument that courts tend to reject exhaustion when the second *Montana* exception is at issue as “simply incorrect.” (Resp. 25 (citing Appellant’s Brief (“Br.”) at 16-17).) But Appellee does not distinguish Appellant’s authority on

the issue. Appellee then claims, without authority, that “the policies motivating the exhaustion rule are at their zenith when a tribe regulates to protect the welfare of the reservation community.” (Resp. 25.) But in tribal jurisdiction cases, the tribe always asserts tribal regulation is required to protect its community. So, Appellee’s assertion would swallow *Montana*. The cases Appellee cites do not refute the central problem of its claim to jurisdiction: namely, that Appellant’s conduct will not cause catastrophic harm to Appellee.

1. Appellee’s authority involves tribal members, conduct on *tribal land*, or the first *Montana* exception.

Appellee first attempts to minimize the applicability of *Strate*, as it is factually dissimilar. (Resp. 32.) But just five years later, the court applied *Strate* in a factually-dissimilar matter:

Though this 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.

Nevada v. Hicks, 533 U.S. 353, at 369.

Appellee then cites a series of cases requiring exhaustion, but each is inapposite. *Dish Network Service LLC v. Laducer*, 725 F.3d 877 (8th Cir.

2013), arose out of a contract governing activities on tribal land. The second *Montana* exception did not apply, nor was there an issue of regulation of nonmember fee lands. *WPX Energy Williston, LLC v. Jones*, 72 F.4th 834 (8th Cir. 2023), also involved a contract (“side agreement”) and conduct on tribal member-owned land. *Stanko v. Oglala Sioux Tribe*, 916 F.3d 694 (8th Cir. 2019), involved conduct by tribal officers against a nonmember on reservation land. There was also no issue of applying *tribal law* to a nonmember.

Appellee writes: “[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.” (Resp. 33, quoting *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), emphasis added.) But in *Strate*, the Supreme Court expressly rejected an attempt to use these parts of *Iowa Mutual* to fashion a rule limiting *Montana*’s general holding:

In light of the citation of *Montana*, *Colville*, and *Fisher*, the *Iowa Mutual* statement emphasized by petitioners does not limit the *Montana* rule. In keeping with the precedent to which *Iowa Mutual* refers, the statement stands for nothing more than the unremarkable proposition that, **where tribes possess authority to regulate the activities of nonmembers**, ‘[c]ivil jurisdiction over [disputes

arising out of] those activities presumptively lies in the tribal courts.’ [...] Subject to controlling provisions in treaties and statutes, and the two exceptions identified in *Montana*, the civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally ‘do[es] not extend to the activities of nonmembers of the tribe.’

520 U.S. at 453 (internal citations omitted, emphasis added). *Iowa Mutual* neither broadens tribal jurisdiction over nonmembers nor weakens *Montana*’s general rule and exceptions. Appellee’s argument otherwise shows its position is not legally supported.

Appellee’s other authority is similarly inapposite. *Gaming World Intern., Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840 (8th Cir. 2003), required exhaustion under the first *Montana* exception. *Iowa Mutual*, 480 U.S. 9 (1987), involved a tribal member’s suit against its insurance company in tribal court. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), addressed the personal injury damages claim of an Indian minor injured on State-owned lands located within the Crow Indian Reservation. *Duncan Energy Co. v. Three Affiliated Tribes of Fort Berthold Reservation*, 27 F.3d 1294 (8th Cir. 1994), involved a dispute regarding tribal taxation and employment rights. This Court determined that summary judgment for the energy company was “clearly inappropriate,” and “we make no judgment as to the merits of the case, but

hold that the district court erred by failing to analyze the applicability of the *Montana* exceptions and by finding this exercise of regulatory authority impermissible as a matter of law.” *Id.* at 1299. It explained that the tribe faced a “heavy burden” in justifying the regulations at issue under *Montana*. *Id.* at 1301. *Bruce Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412 (8th Cir. 1996), was a contract dispute regarding casino operations on tribal (trust) land. *Temple v. Mercier*, 127 F.4th 709 (8th Cir. 2025), involved a tribal member whose cattle were impounded by the tribe for trespassing on lands owned by another tribal member. *Attorney’s Process & Investigation Servs., Inc. v. Sac and Fox Tribe of Miss. in Iowa*, 609 F.3d 927 (8th Cir. 2010), involved conduct on tribal-owned land and the power to exclude. The court found the tribe did not meet second *Montana*. *Id.* at 940-41.

2. Eighth Circuit precedent holds that exhaustion, to determine tribal court jurisdiction, does not require full merits litigation.

Appellee claims that the tribal court’s jurisdiction “turns upon whether the actions at issue in the litigation are regulable by the tribe,” and that because Appellant contests the Nation’s regulatory authority, factual development at the tribal court is required. (Resp. 26-27, quoting *Atty’s Process*, 609 F.3d at 936.) Not so. In cases not requiring exhaustion, the federal courts were able to determine, *without a record developed at the*

tribal court, that tribal jurisdiction was plainly lacking. *See supra* Part II.B. As the State of Minnesota has already considered the potential impacts of the appropriation, determined it would not cause environmental harm, and granted the permit, even if the court wanted to review facts, it could rely on this evidence without resorting to exhaustion. (App. 35; R. Doc. 4-1, at 2-5.)

Even White Earth’s Court of Appeals anticipated a simpler action than what Appellees have insisted upon. In its Order reversing the *ex parte* order granting WEDNR’s preliminary injunction, the court of appeals ordered the matter on for a hearing on the issue of jurisdiction just *thirty days* after its order in October 2023. (App. 95; R. Doc. 4-1, at 62.) Dissatisfied, WEDNR instead proposed a *five-day* hearing on jurisdiction to take place more than *seven months* in the future. It also included deadlines for expert discovery. (App. 98; R. Doc. 4-1, at 65.) Just because Appellee wants to litigate “jurisdiction” to the hilt does not mean it may do so. It is unsupported by precedent in this circuit: “Requiring the development of a factual record where the jurisdictional challenge does not turn on issues of fact would not serve the ‘orderly administration of justice’ and ‘would serve no purpose other than delay.’” *Kodiak Oil & Gas (USA), Inc. v. Burr*, 932 F.3d 1125, 1134 (8th Cir. 2019) (internal citations omitted).

Here, there is no need for a record to be developed at the tribal court, as the State has already determined the appropriation will not cause harm. Any dispute WEDNR has with that determination is properly taken up with the State, not the permit recipient.

III. The undisputed facts overwhelmingly show Appellant's appropriation would not imperil the tribe.

MDNR already considered environmental impacts and granted the permit. The harms alleged by WEDNR are speculative and unsupported by the undisputed facts of geographical location and direction of river flow. (Br. 21-23.) *See Evans*, 736 F.3d at 1306 and n.8. Appellee's claim that Appellant's appropriation would occur only in summer months, making the impact worse, not better, is baseless. (Resp. n.20.) Appellant cannot pump the river dry. If Appellant complies with the terms of the permit, the pump would shut off if water levels reach Q90. And MDNR has determined that Q90 is the appropriate level to cease appropriations to protect aquatic species. (App. 499; R. Doc. 46-1, at 21.)

A. WEDNR’s accommodation of the State’s regulation of water appropriations shows the Ordinance—as applied to nonmembers—is not necessary for tribal self-government.

In *Montana*, the court found that the tribe’s accommodation to the state’s regulation in the same area as the tribal resolution undercut its assertion of tribal jurisdiction:

Any argument that Resolution No. 74-05 is necessary to Crow tribal self-government is refuted by the findings of the District Court that the State of Montana has traditionally exercised ‘near exclusive’ jurisdiction over hunting and fishing on fee lands with the reservation, and that the parties to this case had accommodated themselves to the state regulation.

450 U.S. at 565 n.13.

As in *Montana*, this court should look to the State’s longtime regulation and Appellee’s equally-long accommodation to it. Because of long-standing state regulation, Appellee’s claims of harm fall apart under even cursory examination. The State has been regulating appropriations on these waters—exclusively, until the 2023 Ordinance—for decades. Appellee may have recent concerns about these appropriations. But the idea that Appellant’s permit is *the* tipping point for catastrophic harm is nonsensical.⁵

⁵ Appellee falsely states that Appellant raised a doctrinal issue solely before the tribal court when it discussed WEDNR’s novel “class of activity” lens.

WEDNR’s amendment of its Ordinance to pause tribal regulation over those with State permits further undercuts its claims of harm. (Br. 7, 18, 22; App. 52; R. Doc. 4-1, at 19.) It makes no sense that current State permittees may continue to appropriate water without tribal regulation—and *that* activity does not imperil Appellee—but *any* new permittees, on *any* terms, cause catastrophic harm.

Contrary to Appellee’s claim, Appellant is not asserting that a tribe may never regulate if a state is also regulating. (Resp. 38-39.) Appellant has no concerns about the Band regulating its members, who are also subject to state regulation. Appellee offers *no* authority to support his argument that a tribe may regulate a nonmember when that nonmember’s activity is regulated by the state, and the individual is not in violation of the state’s permit or laws.

Further, Appellee’s references to the concentration of high-capacity agricultural wells refer to appropriations in an entirely different watershed than Appellant. (See Resp. 7; see App. 439.)

(Resp. 41-42.) In fact, Appellee first raised its revised *Montana* standard in its Opposition to Vipond’s Motion for Preliminary Injunction (ECF 42 at 27), to which Appellant replied. (ECF 44 at 4-5.) Just because Appellee appears to have abandoned this argument on appeal does not make it a “doctrinal issue” “subject to tribal court review in the first instance.” (Resp. 41.)

Even employing the “class of threat” lens that Appellee suggests, Appellee does not address exactly *how* Appellant’s appropriation in a different watershed will work in conjunction with existing appropriations to imperil the tribe.

IV. The State of Minnesota is an indispensable party because its sovereign interests and regulatory authority are central to WEDNR’s claims.

While Appellee seeks a declaration and injunction against Appellant, the claims in this case go directly to how the State regulates the River to which it holds title. In its Response, Appellee avoids addressing the critical issues that a Rule 19 inquiry requires – indeed, doing so would lead to the unavoidable conclusion that joinder of the State is required.⁶

That inquiry considers four interests:

First, the plaintiff has an interest in having a forum. ... Second, the defendant may properly wish to avoid multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another ... Third, there is the interest of the outsider whom it would have been desirable to join ... Fourth, there remains the interest of the courts and the public in complete, consistent, and efficient settlement of controversies.

⁶ White Earth employs the Federal Rules of Civil Procedure in its own judiciary and has its own rule concerning joinder. (Resp. 48.) Accordingly, these principles are consistent with existing tribal court rules.

Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 110 (1968).

On the first interest, Appellee does not even mention that federal court provides an unsatisfactory alternative forum. As for the other interests, Appellant addressed all in his opening brief and will use this Reply to address Appellee's arguments.

A. WEDNR has placed MDNR's regulatory decisions at the center of its claims against Appellant.

Appellee's lawsuit against Appellant is a direct challenge to the state's permitted appropriation. WEDNR's Second Amended Complaint makes clear that it is the state's exercise of its authority that is at issue – not anything Appellant has done. (App. 59; R. Doc. 4-1, at 26.)

Despite not participating during the (extended) comment period of the permit application (Br. at 6), Appellee alleges that when it learned of Appellant's application, Appellee contacted MDNR expressing its opposition. (App. 62; R. Doc. 4-1, at 29, ¶ 20.) Appellee had other private communications with MDNR regarding Appellee's opposition prior to the permit being issued. (*Id.*) Notwithstanding this and "[d]isregarding Appellee's multiple objections, the MNDNR issued [Appellant] a permit ..." (*Id.* ¶ 23.) Dissatisfied with MDNR's decision, Appellee sued Appellant.

That this is actually a dispute Appellee has with MDNR is also obvious from Appellee's issues with MDNR's methodology. At the hearing for the preliminary injunction, Appellee stated:

And the record in this case will show in tribal court that when Minnesota DNR is getting a permit for tens of hundreds of millions of gallons of water appropriation, they have a sort of check-the-box process that they go through. They're not asking about whether or not there's minnows in this area that tribal members might be using to feed their families and literally make their entire annual income off of catching minnows. It's just simply not part of the equation. And so the statutes that the Minnesota DNR operates under, they just don't share the same value system or, frankly, the same worldview as the tribe does in terms of water priorities and that sort of thing.

(Tr. 37:5-16; App. 561.)

As much as Appellee prefers to litigate against a single individual and his limited resources, and as much as Appellee wants to expand tribal authority over nonmembers, Appellant is not the proper party to address or defend MDNR's regulatory decision-making. This is where joinder comes in: the principles of equity guide "the proper dimensions of litigation." 7 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1602 (3d ed.) "[T]he impulse is towards entertaining the broadest possible scope of action, consistent with fairness to parties; joinder of claims, parties and

remedies is strongly encouraged.” *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 (1966).

Here, Appellant must defend against the *State’s* permitting decisions. If there was ever a case in which “the rule should be employed to promote the full adjudication of disputes with a minimum of litigation effort,” this case is it. 7 Wright & Miller, *Federal Practice and Procedure* § 1602 (3d ed.). The tribal court litigation, though still in its preliminary stage, has been extensive and costly—all while the State is not present. Continuing to litigate this case without joinder is futile, and this futility falls squarely under one of the four recognized exceptions to the prudential rule of exhaustion. *Strate*, 520 U.S. at 459 n.14. Continuing to litigate this case without joinder of the State is futile, and this futility falls squarely under one of the four recognized exceptions to the prudential rule of exhaustion. *Id.*

B. The State’s sovereign interests make it an indispensable party.

Appellee argues that Appellant’s authority is inapposite because those cases did not involve a federal court requiring joinder in a tribal court proceeding. (Resp. 50-51.) Appellee misses the point. Here, given Minnesota’s sovereign interests and its regulating authority over the River, the principles of equity that underlie Rule 19 outweigh the prudential rule of

exhaustion. Authority is clear: when sovereignty is at stake, joinder of the sovereign is required.

In *Florida Wildlife Federation Inc. v. U.S. Army Corps of Engineers*, 859 F.3d 1306 (11th Cir. 2017), the South Florida Water Management District was a required party under Rule 19(a) in an action concerning the Army Corps of Engineers' decisions on releasing water from locks along Florida's cross-state water channel. *Id.* at 1316. The Eleventh Circuit dismissed the action because it concluded that the water district, a sovereign entity, was both necessary and indispensable. *Id.* at 1318. It noted that when a necessary party asserts sovereign immunity, "the Supreme Court has instructed us to give '[s]ufficient weight to [the party's] sovereign status' out of recognition that any consideration of the merits in the sovereign's absence is 'itself an infringement on ... sovereign immunity.'" *Id.* (citing *Republic of Philippines v. Pimentel*, 553 U.S. 851, 864-65 (2008)). The court further concluded that adjudicating the plaintiff's claims without the water district's involvement would be an affront to Florida's sovereignty, because the "case was fundamentally about Florida's protection of its own natural resources." *Id.* Finally, the court concluded that the adequacy of the judgment would suffer, and that any prejudice to the organizations was outweighed by the prejudice to the water district. *Id.* at 1319.

Appellee suggests that Appellant's reliance on *Hood ex rel. Mississippi v. City of Memphis, Tenn.*, 570 F.3d 625 (5th Cir. 2009) is unwarranted, arguing it is factually distinguishable. (Resp. 50.) The facts of *Hood* are different, but here's what's the same: the absent party's rights (and the State's regulatory role) must be present and considered before complete relief may be granted. It is undisputed that the State is charged with conserving and managing the State's natural resources. (App. 19; R. Doc. 4, at 19, ¶ 84.)

Based on its findings of fact and the record on file, MDNR concluded that Appellant's appropriation would not cause harm and recommended that his permit be issued. (App. 35; R. Doc. 4-1, at 2.) It is precisely this regulatory authority and the State's sovereign interest in the River that must be represented before complete relief can be achieved.

Finally, the government is nearly always required to assure proper adjudication of a dispute when that interest conflicts with the interest of a tribe. *See Spirit Lake Tribe v. North Dakota*, 262 F.3d 732, 738 (8th Cir. 2001) (abrogated on other grounds by *Wilkins v. United States*, No. 21-1164, 2023 WL 2655449 (Mar. 28, 2023) (United States indispensable party to action concerning claims to Devils Lake); *Manypenny v. United States*, 948 F.2d 1057, 1067 (8th Cir. 1991) (action dismissed because federal

government was indispensable and did not waive sovereign immunity); *Navajo Tribe of Indians v. State of New Mexico*, 809 F.2d 1455, 1473 (10th Cir. 1987) (affirming dismissal because federal government was indispensable and did not waive sovereign immunity). Here, according to WEDNR's complaint, it's the State's regulatory authority that conflicts with what WEDNR believes are safe appropriations from the River. Accordingly, the State is a required party.

C. Joinder is required because WEDNR effectively seeks to preempt the State's sovereign regulatory authority.

Appellee does not dispute Minnesota has sovereign interests in the River or the State's regulatory authority over the River. Yet, Appellee's Ordinance, lawsuit, and allegations against Appellant – and the State – are precisely activities that evince an intention that its regulatory scheme preempts the State's. Appellee now denies it ever argued that tribal regulations preempt MDNR: “WEDNR has not alleged or argued in tribal court that state regulatory authority is preempted – Appellant's claim to the contrary.” (Resp. 49 n.30). The record, however, plainly belies such an assertion:

This ground for Appellee's regulatory jurisdiction clearly supports the Court's exercise of civil adjudicatory jurisdiction over Vipond. As set forth in the affidavits submitted in favor of the WEDNR's preliminary injunction motion, Vipond's proposed

pumping directly threatens water necessary for exercise of Appellee's fishing and gathering activities [...] But as set out above, under *Winters* and its progeny, ***the State of Minnesota's actions in this area are preempted*** as they relate to waters on and appurtenant to the Reservation to which Appellee has federal reserved water property rights.

(App. 100; R. Doc 4-1, at 67, emphasis added.) Appellee continues to rely on *Winters*. (Resp. 44.)

Here, MDNR determined that Appellant can safely appropriate water. WEDNR, however, alleges the opposite, before Appellant has even applied for a tribal permit.⁷ Appellee concluded that Vipond's pumping "**would have** serious and substantial adverse impacts on the wildlife, baitfish, sturgeon, and other treaty resources by reducing streamflow in the Wild Rice River below levels necessary to protect those resources." (App. 64; R. Doc. 4-1, at 6, ¶ 34 (emphasis added); see also App. 65; R. Doc. 4-1, at 7, ¶ 35 (Appellant's permitted conduct "threatens the subsistence, health and welfare, political integrity, and economic security" of the Band).) This determination directly conflicts with the State's. See *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 158 (1980)

⁷ Appellee argues it has not decided the terms or issuance of a tribal permit for Appellant as he has not applied for one. (Resp. 44, n.24.) But Appellee's jurisdiction *depends* on Appellant's state appropriation *imperiling* the Band. Appellee does not attempt to reconcile these issues.

(preemption occurs when there is a “direct conflict between state and tribal schemes”); *Crow Tribe of Indians v. State of Mont.*, 650 F.2d 1104, 1112 n.8 (9th Cir. 1981), *opinion amended on denial of reh’g*, 665 F.2d 1390 (9th Cir. 1982) (same). Minnesota is therefore an indispensable party that must be joined. *See, e.g., CSX Transp., Inc. v. Leon*, No. 1:09-CV-3157-RLV, 2010 WL 11597718, at *1, n.1 (N.D. Ga. Feb. 26, 2010) (finding alternative basis to dismiss lawsuit for failure to join City of Atlanta when plaintiff claimed city ordinances preempted by federal law).

D. Continued litigation in the tribal court without the State will result in necessarily incomplete adjudication.

Appellee argues that complete relief can be granted without the State’s joinder, citing *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916 (9th Cir. 2019) where the United States regulated the same activity as the tribe but was not joined as a party. (Resp. 49.) *FMC*, however, has no relevance to the Rule 19 analysis here: *FMC* involved a nonmember corporation storing twenty-two million tons of hazardous waste on the reservation. *Id.* at 920-21. The tribe sought to assess fees for the storage of hazardous waste. *Id.* While the EPA had regulatory authority over *FMC* and the plant due to the site’s designation as a Superfund Site, there was no interest of the United States at issue in *FMC* – the legal issue was whether the tribe could impose those fees. *Id.* Regardless, there was no joinder issue in *FMC*.

Rule 19(a)(1)(B)(ii) requires evaluating the risk of double and inconsistent obligations when an indispensable party is absent. This requirement touches on the equity concerns the rule intends to address: “The plaintiff has the right to ‘control’ his own litigation and to choose his own forum. This ‘right’ is, however, like all other rights, ‘defined’ by the rights of others. Thus the defendant has the right to be safe from needless multiple litigation and from incurring avoidable inconsistent obligations.” *Schutten v. Shell Oil Co.*, 421 F.2d 869, 873 (5th Cir. 1970).

The State is required here because without its interests addressed in tribal court, Appellant is subject to a substantial risk of protracted, piecemeal litigation incurring double and inconsistent obligations. Appellant will be left with one set of obligations owing to the State and another set of obligations owing to the Band. This is precisely what Rule 19 is designed to avoid.

E. The equitable principles of Rule 19 weigh in favor of not requiring exhaustion given the inability of the State to be joined.

Appellee is correct that Rule 19 does not present a jurisdictional question.⁸ Indeed, as early as 1827, the United States Supreme Court said the

⁸ Appellant’s fourth issue statement regarding joinder in his opening brief incorrectly references jurisdiction. (See Br. at 3.) The issue statement should read: “Whether the district court erred in failing to address whether the State

rule is based “upon the much broader ground” of equity. *Mallow v. Hinde*, 25 U.S. 193, 198 (1827). In dismissing a suit for specific performance for lack of an indispensable party, *Mallow* did so on equitable grounds, “that no court can adjudicate directly upon a person’s right, without the party being either actually or constructively [sic] before the Court.” *Id.*

The absence of a required party is such a significant defect that it may be raised for the first time after trial or on appeal. *See Fetzer v. Cities Service Oil Co.*, 572 F.2d 1250, 1253 n.6 (8th Cir. 1978) (“indispensability of parties may be raised at any stage of the proceedings, and as late as on appeal.”). Indispensability “is not waivable” and a reviewing court has “an independent duty to raise [it] *sua sponte*,” if there is reason to believe dismissal on such grounds may be warranted. *Enter. Mgmt. Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 892-93 (10th Cir. 1989) (internal quotations omitted). The question Rule 19 raises is “whether the court *ought* to proceed without the absent party, not whether it has jurisdiction to proceed against those who are present.” *Rippey v. Denver U.S. Nat’l Bank*, 42 F.R.D. 316, 318-19 (D. Colo. 1967) (emphasis in original). Thus, the decision that a suit

of Minnesota is a required party to be joined under Federal Rule of Civil Procedure 19.”

should not proceed is “based on equitable considerations alone.” 7 Wright & Miller, *Federal Practice and Procedure* § 1611 (3d ed.).

The equitable interests here weigh abundantly in favor of not requiring exhaustion in light of the State’s inability to be joined. The first factor of Rule 19(b) weighs “the extent to which a judgment rendered in the person’s absence might prejudice that person or the existing parties.” Appellant has been prejudiced from the get-go with the State absent from the tribal court proceedings. He has been faced with an onslaught of experts and witnesses that seek to dismantle MDNR’s determinations. The State will also be affected, as discussed, as WEDNR seeks to launch a regulatory scheme over the State’s.

Appellee makes much of the fact that the State could have intervened or appeared as *amici* but did not, thus indicating the State must agree it is not required. (Resp. 48-49.) The fact that the State could have intervened, but chose not to, cannot be considered as a mitigating factor to weigh against this likelihood of prejudice. *See Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 775 (D.C. Cir. 1986) (declining to hold that “the de facto opportunity to file position papers with the court on a cross-claim is sufficient to mitigate the prejudice of non-joinder”); *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990) (amicus status or ability to

intervene does not lessen prejudice); *Northern Arapaho Tribe v. Harnsberger*, 660 F. Supp. 2d 1264, 1281 (D. Wyo. 2009), *aff'd in part, vacated in part*, 697 F.3d 1272 (10th Cir. 2012) (considering lack of intervention as mitigating prejudice “would invade the province of the sovereign and penalize it for making decisions it has the sovereign right to make.”)⁹

The second factor is “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.” Fed. R. Civ. P. 19(b)(2). Here, Appellee does not concede any prejudice whatsoever on the part of Appellant or the State and offers *no* suggestions for how it could fashion relief to avoid prejudice. *See Epsilon Energy USA, Inc. v. Chesapeake Appalachia, LLC*, 80 F.4th 223 (3d Cir. 2023) (remanding to district court to provide specificity regarding how to shape remedies to avoid prejudice). Appellant can conceive of no remedy that would lessen the prejudice to him as Appellee seeks declaratory and injunctive relief that Appellant must obtain a permit from

⁹ There are untold reasons why the State may have decided not to intervene, none of which are relevant or negate the fact that it is a required party here. In any event, whether an absent party “agrees” it is necessary and indispensable is not part of any Rule 19 analysis.

Appellee to exercise his State-permitted rights. According to Appellee, this is a black-and-white issue: no tribal permit, no appropriation.

The final two factors of Rule 19(b) concern “whether a judgment rendered in the person’s absence would be adequate,” and “whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.” Fed. R. Civ. P. 19(b)(3)-(4). Appellant sets forth in his opening brief how any judgment in the State’s absence will be duplicative and create conflicting and inconsistent obligations. (Br. 49-50.) For the fourth factor, as stated above and also in Appellant’s opening brief, Appellee has an adequate remedy if joinder is required here – it can bring its claims in federal court.

CONCLUSION

Because WEDNR lacks jurisdiction, exhaustion serves no purpose other than delay. Therefore, the district court erred in denying Appellant’s motion for preliminary injunction. Appellant respectfully requests the court reverse that decision and enjoin the tribal court action.

Dated: July 23, 2025

Respectfully submitted,

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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 for Mac 16.99 and contains 6,177 words, including headings, footnotes and quotations and that the brief has been scanned for viruses and is virus-free.

Dated: July 23, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on July 23, 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: July 23, 2025

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