

Case No. AP21-0516

WHITE EARTH BAND OF OJIBWE
IN TRIBAL COURT OF APPEALS

MINNESOTA DEPARTMENT OF NATURAL RESOURCES, et al.,

Defendants-Appellants,

vs.

MANOOMIN, et al.,

Plaintiffs-Respondents.

REPLY BRIEF OF APPELLANTS

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ARGUMENT

As set forth in the defendants-appellants' ("DNR") opening brief, this Court should reverse the district court's ("Tribal Court") order denying DNR's motion to dismiss for lack of subject matter jurisdiction for at least three reasons. First, DNR and its officials enjoy sovereign immunity with respect to all counts pled by the plaintiffs-appellees (the "Band"). Second, *Ex parte Young* did not abrogate the state's sovereign immunity or vest the Tribal Court with jurisdiction over state officials. Third, even in the absence of sovereign immunity, the Tribal Court lacks subject matter jurisdiction to hear suits against DNR because none of the defendants are tribal members and the actions taken by DNR occurred off-reservation.

The Band offers two responses – neither of which is germane to the issues before this Court. First, the Band argues that DNR is required to exhaust its tribal remedies before seeking a federal court remedy. Second, the Band argues that the federal district court properly dismissed the related suit DNR brought in federal court. Neither of these issues are before the Court on this appeal. The issue before this Court is whether the Tribal Court can exercise jurisdiction over state officials for actions occurring off-reservation. It cannot, and this Court should reverse and remand with instructions to dismiss.

I. TRIBAL COURT EXHAUSTION IS IRRELEVANT TO THIS APPEAL.

The Band argues that DNR is required to exhaust its tribal court remedies before seeking relief in federal court. This is incorrect. Tribal court exhaustion is not required where a tribal court clearly lacks jurisdiction. *Nevada v. Hicks*, 533 U.S. 353, 374 (2001) ("And since the lack of authority is clear, there is no need to exhaust the jurisdictional

dispute in tribal court.”) For this reason, no federal court has ever required state officials to exhaust their tribal court remedies before seeking a federal forum – the lack of jurisdiction in such a case is clear.

The issue of exhaustion is also irrelevant to this appeal. Even if DNR were required to exhaust tribal court remedies, DNR did by filing its motion to dismiss in the district court, and by filing this appeal. It is unclear why the Band has raised the issue here, but this Court need not give it any consideration.

II. KODIAK ALLOWS DNR’S SUIT IN FEDERAL COURT TO DETERMINE THIS COURT’S JURISDICTION.

Next, the Band argues that DNR’s suit in federal court is not permissible because the Band is pursuing tribal law claims against DNR in this suit, and that the cases DNR relies on to establish federal court jurisdiction (primarily *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1139 (8th Cir. 2019)) involved federal law claims. The Band is incorrect on the law, and the issue is irrelevant to this appeal.

The Band *is* bringing federal law claims in this suit – including claims under the 1855 Treaty (Counts I & II), the Fourteenth Amendment (Count III), the Fourth Amendment (Count IV); the First Amendment and American Indian Religious Freedom Act (Count V); and a federal failure to train claim (Count VI). Only one Count (Count VII) was brought under tribal law. Even there, to the extent the Band is attempting to regulate off-reservation conduct, it would need a federal law authorizing to do so. *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997). It would also need a basis in federal law for exercising jurisdiction over non-members and sovereign states, irrespective of the nature

of the claim. *Duro v. Reina*, 495 U.S. 676, 679 (1990). Finally, as a matter of law, *all* assertions of tribal court jurisdiction over non-members are grounded in the federal common law. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 853-53 (1985).

The issue is also irrelevant to this appeal. Whether DNR can bring a federal court action has nothing to do with whether the Tribal Court has jurisdiction over DNR. The Eighth Circuit will decide the issue of whether the DNR's federal suit was properly pled. The issue before this Court is whether the Tribal Court can exercise jurisdiction over state officials for actions taken pursuant to state law occurring off-reservation. It cannot, and this Court should reverse the Tribal Court decision and remand with instructions to dismiss.

III. CONCERNS OF COMITY REQUIRE THIS COURT TO RECOGNIZE DNR'S SOVEREIGN IMMUNITY.

In addition to being plainly barred by well-established case-law, a failure by this Court to recognize DNR's sovereign immunity would also endanger the Band's own sovereign immunity to suit in other courts. The underlying principle behind sovereign immunity is comity. *Franchise Tax Bd. of California v. Hyatt*, --- U.S. ----, 139 S. Ct. 1485, 1492 (2019). For a sovereign to assert immunity, it must in turn confer immunity on other sovereigns. *Id.* Although the fact that both the Band and state officials have immunity from suit in each other's courts can produce a challenge in disputes between them, that is not a basis to reject sovereign immunity. Rather, it mandates a solution that respects each sovereign's rights, which is why both the constitution and comity require limiting suits like this one – between a tribe and state officials – to federal courts through

official capacity suits under *Ex parte Young*. See *State of Montana v. Gilham*, 133 F.3d 1133, 1135 (9th Cir. 1998). For these reasons, this case should be dismissed.

RELIEF SOUGHT AND CONCLUSION

For the reasons stated above, this Court should reverse the Tribal Court’s orders denying DNR’s motion to dismiss and enter an order requiring that the Tribal Court dismiss the Band’s Complaint against all DNR defendants.

Dated: October 11, 2021.

Respectfully submitted,

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