Case No. ___

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.

ADDENDUM TO PRINCIPAL BRIEF OF APPELLANTS

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ADDENDUM INDEX

White Earth Band of Ojibwe
Tribal Court
Court Administrator Cover Sheet

Date: August 18, 2021
Regarding Case: General Civil
File No. GC21-0428

To: (list names and addresses)

Oliver Larson
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Enclosed Documents: **Order Denying Defendant's Motion to Dismiss**

By: JIO

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WHITE EARTH BAND OF OJIBWE
TRIBAL COURT

MANOOMIN; THE WHITE EARTH BAND OF OJIBWE,

Plaintiff,

vs.

MINNESOTA DEPARTMENT OF NATURAL RESOURCES,

Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

Court File No. GC21-0428

FINDINGS

1. On August 04, 2021, Plaintiff filed the above complaint.
2. On August 09, 2021, Defendant indicated it would be seeking dismissal of the complaint and oral arguments were scheduled for August 16, 2021.
3. On August 12, 2021, Defendant filed a motion to dismiss.
4. On August 12, 2021, Defendant filed written argument supporting its motion and a proposed order.
5. On August 16, 2021, Plaintiff submitted written argument opposing the motion.
6. On August 16, 2021, the parties appeared by zoom for oral argument in White Earth Tribal Court

MEMORANDUM

In what is likely a case of first impression for this Court, Plaintiffs seek declaratory and injunctive relief against the Minnesota Department of Natural Resources ("DNR"), its commissioner, two named DNR employees, and ten unnamed DNR conservation officers. The Plaintiffs plead causes of action based upon tribal codes, the 1855 Treaty with the Chippewa, (the "1855 Treaty"), and the U.S. Constitution. It is not absolutely unheard of for a State to be sued in Tribal Court[1], however it is no doubt rare for an issue similar to this to arise in any Tribal Court.

The Defendants move to dismiss for lack of subject matter jurisdiction on two bases. First, the Defendants argue they are entitled to sovereign immunity, and eleventh amendment

[1] *Dale Nicholson Trust v. Chavez*, 5 Am. Tribal Law 365 (2004)

immunity. They also argue that this Court has no subject matter jurisdiction because the Defendants are not members of the White Earth Band of Ojibwe and none of the alleged acts occurred on tribal lands. Defendants arguments center upon *Montana v. United States,* 450 U.S. 544 (1981) as support for their argument.

It is often difficult in analyzing the law concerning the indigenous peoples of the United States to reduce all of the rotating component parts to a stable center of gravity and address the issues that matter most. In 1831, Chief Justice John Marshall opined that:

"…the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else."[2]

In 1886 the United States Supreme Court observed that:

"The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States, has always been an anomalous one, and of a complex character."[3]

In more recent times, Supreme Court Justices have called the relationship "schizophrenic"[4] and "…bedeviled by amorphous and ahistorical assumptions."[5]

Leading Scholars have similarly written that:

"More than any other field of public law, federal Indian Law is characterized by doctrinal incoherence and doleful incidents. Its principles aggregate into competing clusters of inconsistent norms, and its practical effect has been to legitimate the colonization of this continent—the displacement of its Native peoples—by the descendants of Europeans." [6]

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[2] *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).
[3] Justice Miller in *United States v. Kagama*, 118 U.S. 375 (1886).
[4] Justice Thomas in *United States v. Lara*, 541 U.S. 193 (2004).
[5] Justice Thomas concurring in *United States v. Bryant,* 136 S.Ct. 1954 (2016)
[6] Philip P. Frickey, *Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 Harv L. Rev. 1754, 1754 (1997).

Felix Cohen, perhaps the most noted legal scholar in this area of law, has pointed out that: "Indian Legal policy is an inconsistent flow. Great fluctuations occur from era to era."[7]

Despite this uncertainty, for some five decades at least, the trend has clearly been towards a greater recognition of Tribal sovereignty and an interpretation of treaties that reflect the Canons of Treaty Construction developed over one hundred years ago, namely that treaties are interpreted liberally in favor of the Tribal signatories.[8] The trend has also been towards an interpretation of treaties that give actual effect to Tribal sovereignty. For instance, the recognition of usufructuary rights enunciated in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

The activity at issue here impacts the ecosystem of Manoomin in that it allows Defendants to control the water quantity and quality on which the plant depends. Manoomin is not only a gift from *Gitchee-Monitou* that has been historically, and continues, to be an important part of the diets of native peoples. It is also central to the culture and history of the Anishinaabe people and is an integral part of wetland ecosystems and natural communities. The possible impact of Defendant's activities has a *"direct effect on the political integrity, political security or the health or welfare of the Tribe"* as required by the second *Montana* exception. In addition, the activity threatens the cultural welfare and continuity of the Band due to the unique status of Manoomin.

In formally adopting laws to protect Manoomin both on and off its reservation (*1855 treaty authority establishing rights of Manoomin* and the *1855 treaty authority resolution for right to Travel, Use and Occupy Traditional Waters Code*), the Band is exercising its inherent authority to protect a necessary and vital resource. This authority predates the U.S. Constitution and is reflected in the numerous treaties made between the United States and the Anishinaabeg peoples. These treaties are profound expressions of Tribal sovereignty executed pursuant to the United States Constitution and fall under the Supremacy Clause of the Constitution. This Court agrees that the treaties in question here contain nothing that would indicate the signatories

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[7] Felix Cohen, *Cohen Handbook of Federal Indian law* (2012).
[8] Felix Cohen, *Cohen Handbook of Federal Indian law* § 2.02, 119 (2005).

intended to give up their rights to regulate, or at least have a say in the regulation of, such a vital resource. In fact, as the *Brown* court indicated in 2015, they sometimes specifically emphasized the importance of reserving usufructuary rights.

As such, the State's claim of sovereign immunity and eleventh amendment immunity must give way to the Band's inherent sovereignty. In passing legislation to protect its vital resources, the Band must also be able to exercise the jurisdiction to carry out that legislative purpose. To hold otherwise reduces Tribal sovereignty to a cynical legal fiction. The Court appreciates Defendant's discussion on page 6 of their brief concerning the problematic nature of finding a forum to resolve disputes such as this, however their answer to that conundrum is to exclude the one sovereign involved that has the most at stake, and the most to lose.

ORDER

1. Plaintiff's motion is denied.
2. The parties shall inform the Court as soon as possible if a continuance for the August 25, 2021, hearing is needed.
3. The parties shall inform the Court as soon as possible if a stay has been issued regarding these proceedings.
4. If not continued by the Court, the parties will appear as scheduled on August 25.

Date: 8/18/21

By: 

Chief Judge David DeGroat
White Earth Tribal Court

WHITE EARTH BAND OF OJIBWE
TRIBAL COURT

MANOOMIN; THE WHITE EARTH BAND OF OJIBWE,

Plaintiffs,

vs.

MINNESOTA DEPARTMENT OF NATURAL RESOURCES,

Defendants.

STATUS ORDER AND ORDER CLARIFYING 8/18/21 ORDER DENYING MOTION TO DISMISS

Court File No. GC21-0428

In this case the Plaintiffs seek declaratory and injunctive relief against the Minnesota Department of Natural Resources ("DNR"), its commissioner, two named DNR employees, and ten unnamed DNR conservation officers. The Plaintiffs allege causes of action based upon tribal codes, the 1855 Treaty with the Chippewa, (the "1855 Treaty"), and the U.S. Constitution. The Defendants moved this Court to dismiss the action, asserting that all Defendants are immune from suit and that this Court lacks subject matter jurisdiction over the causes of action alleged herein under Montana v. United States, 450 U.S. 544 (1981).

On August 18, 2021 this Court, per the Honorable Chief Judge David DeGroat, denied the motion to dismiss in a general order that does not differentiate between the two defenses invoked by the Defendants. The Defendants have not appealed that decision, as of the date of this order, although at hearing on August 26, 2021 counsel for the Defendant indicated that they are drafting an appeal, but have not decided if the appeal would be as a matter of right or an interlocutory appeal, which is discretionary under White Earth law.[1]The Defendants did commence a federal lawsuit against the Plaintiffs and Judge DeGroat, however, seeking to enjoin this Court from asserting jurisdiction over this suit and asking the federal court to rule that sovereign immunity barred this suit. They also seek a stay of these proceedings in this Court ,based upon the federal action being commenced and their inchoate appeal. Meanwhile, the

[1] As this Court indicated at hearing on August 26, 2021 an order denying a motion to dismiss on sovereign immunity grounds is generally considered a "final" order because the nature of that defense is one that is designed to avoid having the sovereign defend a suit. Ultimately however it will be up to the White Earth Court of Appeals to determine this issue if an appeal is filed.

Plaintiffs have moved this Court for a preliminary injunction to enjoin the conduct alleged in the complaint.

Judge DeGroat then recused himself because he was named as a litigant in the federal court case [2]and the matter was reassigned to the undersigned who serves as an Associate Judge for the Court. A hearing was held before the undersigned on August 26, 2021 with counsel for the Parties appearing by Zoom. The Court engaged the Parties in a discussion of the status of the case and also indicated that it would try to expand upon the bases for the denial of the motion to dismiss and address the stay request. The Defendants indicated that they are drafting an appeal from the August 18, 2021 order and plan to file it on Monday, the deadline for the fling of an interlocutory appeal under Band law. The Defendants emphasized at that hearing that they are concerned that the tribal nations in Minnesota and the State have had a strong relationship based on comity and respect and in general neither sovereign has hailed the other into its respective court system and that this case disturbs that mutual respect.

CLARIFICATION OF THE 8/18/21 ORDER DENYING MOTION TO DISMISS

As this Court enunciated at hearing on August 26, 2021 when a new Judge is reassigned to a case that Judge does not start with a blank slate. Rulings made prior to the reassignment are generally considered the "law of the case" unless a party has filed a timely motion for reconsideration. See Kinman v. Omaha Pub. School District, 171 F.3d 607 (8th Cir. 1999). No such motion has been filed herein. However, under the "law of the case" doctrine nothing prevents the presiding Judge from clarifying prior rulings when it appears that the parties are misunderstanding what the Court has ruled.

The Defendants expressed concern at hearing and in their federal court lawsuit that this Court has allegedly found that state instrumentalities and their employees are not immune from suit in this Court and has thus improperly expanded this Court's jurisdiction and upended the general rule that sovereigns will not hail other sovereigns into their Courts. See Gavle v. Little Six, 534 NW2d 280 (Minn. 1995). They also contend that this Court is ignoring the 11th Amendment of the US Constitution and the United States Supreme Court's pronouncement that

[2] The standard procedure for parties seeking to enjoin tribal court proceedings against them is to join the parties suing them and the presiding Judge in a federal court proceeding under 28 USC §1331. This creases some ethical dilemmas for the Tribal Judge however as ethical rules prevent a Judge from presiding over a suit involving a party who is suing the Judge in another forum. It seems to this Court, however, that the Tribal Judge is being jointed purely in a pro forma status and that nothing prevents the tribal judge from continuing to preside

the Indian commerce clause does not override the 11th amendment rights of state governments and their entities. See Seminole Tribe of Florida v. Florida, 517 US 44 (1996). They also contend that the proper forum to resolve this dispute is the federal courts where there is an exception to sovereign immunity, frequently referred to as the Ex parte Young exception, which permits state officials to be sued for injunctive and declaratory relief for acting in derogation of federal law, including treaties. They contend that this doctrine does not apply in tribal courts which are courts of limited jurisdiction with no authority over state governments and officials.

This argument is incorrect. First it is unlikely that the 11th amendment applies in this Court in light of Talton v. Mayes, 163 US 376 (1896), holding that the United States Constitution does not apply in tribal courts. However, this Court has accepted the common law doctrine of sovereign immunity and readily acknowledges that it applies to the state or tribal sovereign. See White Earth Nation v. Lague, AP 16-1135 (May 1, 2017)(finding that the Band and its agencies are generally immune from suit, but that the Band's employment manual represented a limited waiver of immunity). This Court concedes that this general rule applies to both sovereigns- tribal and state.

However, the United States Supreme Court has recognized that the Ex Parte Young doctrine equally applies in tribal courts. In Michigan v. Bay Mills Indian Community, 134 S.Ct 670 (2013). Supreme Court in a 5-4 decision upheld the defense of sovereign immunity for an Indian tribe that was allegedly involved in Class III gaming off "Indian lands" in violation of the Indian Gaming Regulatory Act. The Court ruled that IGRA only permitted states to sue Indian Tribes for "Indian lands" gaming and thus the suit against the Tribe could not be countenanced. However, the Court discussed numerous other manners in which the State could have sued the Tribe including suits against tribal officials utilizing the Ex Parte Young exception.

> "As this Court has stated before, analogizing to Ex parte Young, 209 U. S. 123 (1908), tribal immunity does not bar such a suit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct. See Santa Clara Pueblo, 436 U. S., at 59."
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> Slip opinion at 13

Because Santa Clara Pueblo held that such suits against tribal officials cannot be brought in federal courts because the exclusive remedy in federal court for a violation of the Indian Civil Rights Act is habeas corpus under 25 U.S.C. §1303, the Bay Mills Court must be holding that these suits can be brought in tribal courts. It is true that the federal statute the Court was talking about, the Indian Civil Rights Act, 25 USC §1301 et seq, applies specifically to the Tribal government and this suit is commenced alleging violations of treaties and the United States Constitution, but the Ex Parte Young doctrine applies to state governmental officials acting in derogation of federal law, which would include treaty law. The question thus becomes whether a tribal court can exercise jurisdiction over a state official or employee under Ex Parte Young for violations of federal law other than the ICRA.

Many commentators believe that Nevada v. Hicks, 533 U.S. 353 (2001) laid this question to rest when the Supreme Court held that tribal courts cannot exercise jurisdiction under 42 USC §1983 over actions against state officials using the Ex Parte Young exception. Nevada v. Hicks, 533 U.S. 353 (2001). The opinion in that case is not clear on whether it created an exception to Montana, totally barring tribal court jurisdiction over states and their officials, or whether the Court merely engaged in statutory interpretation to hold that a tribal court could not exercise jurisdiction over a cause of action premised on 42 U.S.C. §1983 brought by a tribal member against a "state" employee- a game warden. The vast majority of cases, with one *major* exception, simply restate the Court's holding in Hicks as an example of when a tribal court lacks civil jurisdiction and therefore may not exercise jurisdiction over the claim.[3] However, as noted, there is one case which appears to interpret the *Hicks* decision as establishing that the *Montana*

[3] A tribal court may not exercise civil jurisdiction over state agents for on-reservation investigations stemming from off-reservation conduct

exceptions do not apply to state or government entities. See MacArthur v. San Juan County, 497 F.3d 1057, 1073 (10th Cir. 2007) (citing Montana, 450 U.S. 544). Specifically, the Tenth Circuit cites Justice O'Connor's concurrence in *Hicks* as establishing "a per se rule that consensual relationships entered into between state governments and tribes, 'such as contracts for services or shared authority over public resources,' could no longer give rise to tribal civil jurisdiction." *Id.* (citing Hicks, 533 U.S. at 393-94). In addition, the circuit court noted Justice Scalia's response that "[t]he [*Montana*] Court . . . obviously did not have in mind States or state officers acting in their governmental capacity; it was referring to private individuals who voluntarily submitted themselves to tribal regulatory jurisdiction by the arrangements that they (or their employers) entered into." San Juan County, 497 F.3d at 1073 (quoting *Hicks*, 533 U.S. at 372). When considering the language in *Hicks* that, at the very least, the first *Montana* exception cannot apply to States or state officers, Justice Scalia was surely implying that the exception could not pierce the sovereign immunity protection enjoyed by States and state officers.

However, what is confusing is that the second prong of Montana may remain as a viable alternative for the exercise of tribal court jurisdiction over state governmental employees and their entities despite the fact that they have some aspects of sovereignty. . In the two United States Court of Appeals decisions involving attempts by tribal courts to assert jurisdiction over state entities since Nevada v. Hicks, see Belcourt Public School District v. Davis, 786 F.3d 653 (8th Cir. 2015) and Fort Yates Public School District v. Murphy, 2015 WL 2330317, the United States Court of Appeals for the Eighth Circuit did not adopt a blanket rule that state political entities and their officials are beyond the purview of tribal court jurisdiction because of sovereign immunity. Instead, these Courts held that an agreement between a state entity and a Tribe could not form the basis for the assertion of tribal court jurisdiction under the first prong of

Montana, but that the second prong of Montana remains a viable alternative for the exercise of jurisdiction over a state entity and state actors. Of course, the standard adopted by the Court in Belcourt[4] for the exercise of that jurisdiction is almost impossible to meet, it has now been tempered by the United States Supreme Court decision in United States v. Cooley, 593 US _____, 2021 where the Court held that by declaring that an Indian Tribe has a inherent right, recognized in the second prong of Montana, to detain and search non-Indians committing criminal conduct in Indian country. The Defendants asserted at hearing that Cooley was a criminal case and has nothing to do with tribal court assertion over civil jurisdiction over non-Indians but it is clear from Cooley that the Court adopted the standard from the Montana test for the exercise of civil regulatory authority as the litmus test for tribal regulatory authority over non-Indian conduct that is criminal in nature. The Cooley analysis does not adopt the "catastrophic consequences" or imperil the subsistence of the Tribe" standard used by the Eighth Circuit in Belcourt Public School District calling into question where that standard is appropriate.

It is also telling that in both Belcourt Public Schools and Murphy the Court suggested that a treaty delegation could be the basis of the assertion of tribal court jurisdiction over state entities. In this case the Plaintiffs argue that the Defendants are violating a treaty between the Bands and the United States by removing sub-surface waters from the tribal lands, thus imperiling the existence of subsistence and treaty ricing rights. This Court has not had the

[4] The conduct must do more than injure the tribe, it must "*imperil the subsistence*" of the **tribal** community. [*Montana*, 450 U.S. at 566]. One commentator has noted that "th[e] elevated threshold for application of the second *Montana* exception suggests that **tribal** power must be *necessary to avert catastrophic consequences*." Cohen § 4.02[3][c], at 232, n.220.

opportunity to address this argument because of the preemptive motions filed by the Defendants.

Thus, the blanket rule suggested by the Defendants- that tribal courts can never exercise civil jurisdiction over state entities and employees in tribal court- seems to be an overreach. Also, the reciprocity argument proffered, that since Minnesota state courts do not assert jurisdiction over tribal entities and their employees tribal courts should return the favor, ignores the United States Supreme Court decision in, Lewis v. Clarke, 581 U.S. _____, 137 S.Ct 1285 (2017) where the Court held that state courts can exercise jurisdiction over lawsuits brought against tribal employees acting in excess of their authority or in violation of state law. In Lewis v. Clarke, a Mohegan Casino employee who was transporting gaming patrons to the Tribe's casino struck another car injuring the passengers therein. The accident occurred outside the reservation boundaries on a Connecticut highway. The employee invoked sovereign immunity and the Connecticut Supreme Court accepted that defense and held that the suit could not proceed in a Connecticut state court. The United States Supreme Court reversed and held that the employee was not immune from suit since the suit itself was against the employee and not the sovereign Mohegan Nation. [5]

The Court did not hold, however, that every suit against tribal officials or employees in their individual capacities falls outside the purview of the sovereign immunity defense, but only those suits that are designed to hold officials liable for their "personal actions." As the Court held in Lewis, the issue to be decided is whether the remedy sought by the Plaintiff is solely against the individual and in no way "would affect the Tribe's ability to govern itself independently."

[5] It should be noted that the Supreme Court noted that the employee attempted to raise other defenses, such as official or qualified immunity in the case before SCOTUS but the Court declined to address them since they were not raised below. In this case this Court notes that the named Defendants may have other defenses such as qualified immunity that would have to be addressed should the Court rule that they are not cloaked with sovereign immunity.

The Plaintiffs in this case contend that the individually named Defendants are acting in a manner inconsistent with their treaty rights and thus in derogation of their authority since treaties are superior to state law under the Supremacy clause of the US Constitution.. Whether they can prove that is another matter but using Lewis as an analogy it seems to this Court that they should be given a chance.

Lewis v. Clarke and Ex Parte Young, however, do not countenance a suit against the sovereign itself, but only against an official acting in excess of his authority. It is thus difficult to understand how Defendant Minnesota Department of Natural Resources, a state entity, can remain a viable Defendant in this case since the Plaintiffs have not demonstrated a waiver of sovereign immunity. The Court's inclination would be to dismiss it as a Defendant, but because the undersigned is bound by the law of the case doctrine it feels it must give the Plaintiffs a chance to demonstrate why the DNR should not be dismissed from this suit based on sovereign immunity.

The Defendants also contend that none of the actions they have taken or failed to take, as alleged in the complaint, took place on eh White Earth reservation and thus under the second prong of Montana jurisdiction is not possible over them. The Court finds that the complaint alleges that their actions or inactions have resulted in harm to the Plaintiffs' rights on the reservation, however, and this seems to be the standard under Cooley. The White Earth Tribal Code at Chapiter II, Section 1(b) does require Plaintiffs to show that the alleged actions or inactions taken by the Defendants "occurs within the boundaries of the White Earth reservation", but this may include actions taken off the reservation that impact on-reservation rights. This issue has not been fully briefed however so the Court is hesitant to make this finding at this point.

The Court thus reaffirms the prior ruling of Judge DeGroat dated August 18, 2021 except that the Court will give the Plaintiffs ten days to show cause why the complaint against the DNR should not be dismissed due to sovereign immunity.

MOTION FOR STAY OF PROCEEDINGS

The Defendants have moved this Court to stay these proceedings, due to the federal lawsuit being commenced and in anticipation of an appeal they intend to file. The Court denies this motion at this point until the Defendants have perfected an appeal with the White Earth Court of Appeals. Stays based upon anticipated, but not perfected appeals, are disfavored because the Court is being asked to rule based upon inchoate actions. Such is not an active controversy. Should an appeal be filed the Court will rule upon the motion for stay and as indicated at hearing this Court feels that rulings on motions to dismiss on sovereign immunity grounds are final orders because the purpose of the sovereign immunity defense is to avoid defending an action, not prevailing in the action.

The fact that the Defendants have commenced an action in federal court to enjoin the exercise of this Court's jurisdiction, however, is not a sufficient basis for a stay. Under the tribal court exhaustion rule the federal courts have to stay their jurisdictional hand in deference to the tribal court to allow the tribal court to develop the record and assess its jurisdiction. Although this Court acknowledges there are some exceptions to this, for example when tribal court jurisdiction is patently not available or when it is being invoked in bad faith, those exceptions do not appear to be the case in this matter. It would be strange for this Court to stay its hand to allow the federal court to take a stab at this case when it is required to stay its hand. This would result in an jurisdictional impasse.

ORDER

1. Plaintiff's motion for stay pending the proceedings in federal court is DENIED. Insofar as the motion alleges that an appeal is going to be filed, once it is filed the Court will address the stay request;
2. The Court clarifies its ruling dated August 18, 2021 as explained herein;
3. The Plaintiffs shall have ten days from the date of this order to show cause, if any they have, why the Defendant DNR should not be dismissed from this suit under the doctrine of sovereign immunity. The other Defendants may respond within 10 days of the Plaintiffs' response, if any;
4. Dependent upon whether an appeal is field and the ruling on the stay the Court will issue further orders regarding the manner of disposing of the pending motion for preliminary injunctive relief.

Date: 8/27/21 By: B.J. Jones

Associate Judge BJ Jones
White Earth Tribal Court