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)

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

By: JIQ

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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

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[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