WHITE EARTH BAND OF OJIBWE
IN TRIBAL COURT

MANOOMIN, et al.

Plaintiffs,

vs.

MINNESOTA DEPARTMENT OF NATURAL RESOURCES, et al.

Defendants.

Court File No. GC21-0428
Hon. David DeGroat

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Tribal, state, and federal courts all recognize the principle of sovereign immunity, which prevents one sovereign from hailing another sovereign into its courts in the absence of a waiver or abrogation of that immunity. *See Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 289 (Minn. 1996). Tribal nations throughout Minnesota, including the White Earth Band of Ojibwe, rely on the principle of sovereign immunity when sued in state or federal courts. *See, e.g., id.*; *Harper v. White Earth Hum. Res.*, No. CV 16-1797 (JRT/LIB), 2017 WL 701354, at *1 (D. Minn. Feb. 22, 2017) (dismissing action on motion of the White Earth Band of Ojibwe asserting sovereign immunity). The State of Minnesota, and its agencies, are entitled to the same defense when sued in tribal courts. Here, the defendants have sovereign immunity, and this matter should be dismissed. Even in the absence of the defendants' sovereign immunity to suit, this Court would lack subject matter jurisdiction to hear the claims pled by the plaintiffs because the defendants are not members of the band and the acts challenged occurred off-reservation. Tribal courts have a limited jurisdiction that is delineated by federal law. The jurisdiction extended to tribal courts by

federal law does not allow them to exercise jurisdiction over non-members except in very limited circumstances not present here.

ALLEGATIONS OF THE COMPLAINT

The plaintiffs consist of Manoomin, the White Earth Band of Ojibwe, its tribal council, and a mix of individual band members and non-band members. (Compl. ¶¶ 20-40.) They sue the DNR, its Commissioner, two named DNR employees, and ten unnamed conservation officers. (*Id.* at 41-45.) The individual defendants are sued in their official and individual capacities. (*Id.*)

The plaintiffs plead seven counts. (*Id.* ¶¶ 58-85.) Counts I and II seek a declaration that application of state wild rice regulations to members of the White Earth Band of Ojibwe conflicts with usufructuary rights the plaintiffs claim were granted to band members under the Treaty with the Chippewa, 1855 (the "1855 Treaty"). Count III seeks a declaration that the State's failure to recognize certain usufructuary rights under the 1855 Treaty, while recognizing them under other treaties, violates equal protection principles. Count IV seeks a declaration that the DNR and named defendants violated the Fourth Amendment and the plaintiffs' due process rights by "seizing" 5 billion gallons of water when issuing the appropriation permit to Enbridge Energy, Limited Partnership for Line 3 dewatering activities. Count V seeks a declaration that tribal members' right to exercise certain usufructuary rights is guaranteed by the First Amendment and the American Indian Religious Freedom Act. Count VI seeks a declaration that DNR failed to adequately train staff on the plaintiffs' usufructuary rights under the 1855 Treaty. Count VII seeks a declaration that DNR and the named defendants violated the *Rights of Manoomin*, as set forth in tribal legal codes.

Much of the plaintiffs' factual allegations concern arguments that the defendants violated the 1855 Treaty by issuing a groundwater appropriation permit to Enbridge Energy, Limited Partnership for construction dewatering associated with the construction of the Line 3 pipeline

outside of the White Earth Reservation. (*Id.* ¶¶ 1, 46-57.) The plaintiffs also plead that they have been charged with trespass based on state law for actions taken to stop the construction of Line 3, though they plead no counts based on these allegations. (*E.g.* ¶ 28.)

All of the counts seek either declaratory or injunctive relief directed to the DNR, its Commissioner, or the two named DNR employees. (*Id.* ¶¶ 58-85, "Remedies".) All of the relief is directed to the defendants in their official capacities. (*Id.*) The plaintiffs seek no relief that any individual defendant could offer in their individual capacity. (*Id.*)

ARGUMENT

The plaintiffs' complaint should be dismissed for lack of subject matter jurisdiction on two bases. First, all of the defendants enjoy sovereign immunity with respect to all counts pled by the plaintiffs. Second, even in the absence of sovereign immunity this Court would lack subject matter jurisdiction to hear suits against the defendants, none of whom are tribal members, on the claims pled by the plaintiffs.

I. LEGAL STANDARD

Rule XVI(b)(1) of the White Earth Band of Ojibwe Rules of Civil Procedure allows a party to move to dismiss a complaint for lack of subject matter jurisdiction. In this regard, Rule XVI(b)(1) is the equivalent of Federal Rule of Civil Procedure 12(b)(1).

An attack on the Court's subject matter jurisdiction may be brought as a facial challenge, or as a factual challenge. *Branson Label, Inc. v. City of Branson, Mo.*, 793 F.3d 910, 914 (8th Cir. 2015). In a facial challenge, "the court merely [needs] to look and see if plaintiff has sufficiently alleged a basis of subject matter jurisdiction." *Id.* (citation omitted). Accordingly, "the court restricts itself to the face of the pleadings and the non-moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6)." *Id.* Conversely, in a factual challenge, "the existence of subject matter jurisdiction [is challenged] in fact, irrespective of the

pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." *Id.* (citation omitted). Thus, the nonmoving party would not enjoy the benefit of the allegations in its pleadings being accepted as true by the reviewing court. *Id.*

Here, the defendants bring two facial challenges to this Court's subject matter jurisdiction. First, the defendants assert they possess sovereign immunity from suit in this Court. Second, the defendants assert that this Court lacks subject matter jurisdiction to adjudicate claims such as the ones pled here because they are not members of the band and the conduct at issue occurred off-reservation.

II. THE DEFENDANTS HAVE SOVEREIGN IMMUNITY FROM SUIT.

States enjoy absolute sovereign immunity from suit in the courts of other states, or in tribal courts. *Franchise Tax Bd. of California v. Hyatt*, __ U.S. __,139 S. Ct. 1485, 1493, 203 L. Ed. 2d 768 (2019); *State of Montana v. Gilham*, 133 F.3d 1133, 1135 (9th Cir. 1998). This immunity originates in the inherent sovereign immunity afforded to all states, as confirmed by the Eleventh Amendment – which shields states from tribal suits even in federal court unless there is a waiver from the State, or an explicit abrogation of that sovereignty in federal law. *See*, *e.g.*, *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 53 (1996) (holding that in the absence of federal abrogation, inherent sovereign immunity of the states shields them from suits brought by tribes, even in federal courts); *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 782 (1991) (same); *Gilham*, 133 F.3d at 1137 (same). Notably, the reverse is also true – tribes retain sovereign immunity from suit in state or federal court, even on an action brought by a state, unless there has been a waiver or abrogation under federal law. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 791 (2014).

Federal law abrogates sovereign immunity and Eleventh Amendment immunity for some types of treaty claims – but in a limited fashion that allows for suit only in federal court, and only

against state officials in their official capacity under an *Ex Parte Young* analysis. *See* 28 U.S.C. §§ 1331, 1362; *see also*, *e.g.*, *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997) (holding tribes are subject to the Eleventh Amendment, and are therefore limited to bringing suits against states through official capacity suits for prospective injunctive relief under *Ex Parte Young*); *Mille Lacs Band of Chippewa Indians v. State of Minnesota*, 853 F. Supp. 1118, 1129 (D. Minn. 1994). Here, the plaintiffs are suing in tribal court, not federal district court. As a result, there is no applicable abrogation of Minnesota's sovereign immunity or Eleventh Amendment immunity, and it is immune from suit in this Court. *Id.*

The plaintiffs naming of individual defendants in their official or individual capacities changes nothing. Sovereign immunity extends to both state agencies and state officials acting in their official capacities, as well as defendants in their individual capacities if the suit challenges state policies or procedures. *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 269; *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1043 (8th Cir. 2000); *Weeks Constr., Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 668, 670 (8th Cir. 1986); *Harper v. White Earth Hum. Res.*, No. CV 16-1797 (JRT/LIB), 2017 WL 701354, at *1 (D. Minn. Feb. 22, 2017). Here, the plaintiffs challenge state policies and procedures. When "suit is commenced against state officials, even if they are named and served as individuals, the State itself will have a continuing interest in the litigation whenever state policies or procedures are at stake." *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 269. As a result, state agencies and state officials are immune when, as here, the suit challenges state policies or procedures irrespective of the label the plaintiff uses to describe the action. *Id.*

In addition to being plainly barred by well-established case law, a failure by this Court to recognize the defendants' sovereign immunity would also endanger the White Earth Band of

Ojibwe's own sovereign immunity to suit in other courts. One of the animating principles behind sovereign immunity is comity. *Franchise Tax Bd.*, __ U.S. at __, 139 S. Ct. 1485 at 1492. For a sovereign to assert immunity, it must in turn confer immunity on other sovereigns. *Id.* While the mutual immunities of tribes and states certainly produces challenges when there are disputes between them, that is not a basis to reject sovereign immunity. "The States and Indian tribes, as co-existing sovereigns with significant and complex commercial, governmental and property interrelationships, often require a mechanism to determine their respective rights and interests." *Gilham*, 133 F.3d at 1135. "Finding a forum to resolve disputes is problematic, for each sovereign naturally defends the jurisdictional reach of its own courts and resists being 'dragged before' the courts of the other." *Id.* The solution dictated by the constitution and federal law is to limit suits between a tribe and a state to federal court – with related limitations on subject matter, and through the vehicle of official capacity suits. *Id.* For these reasons, this case should be dismissed.

III. EVEN IN THE ABSENCE OF SOVEREIGN IMMUNITY, THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER THE CLAIMS PLED.

Tribal courts are courts of limited jurisdiction. *Plains Commerce Bank . Long Family Land and Cattle Co.*, 554 U.S. 316, 324 (2008); *Attorney's Process and Investigation Services, Inc. v. Sac & Fox Tribe of Mississippi in Iowa*, 609 F.3d 927, 934 (8th Cir. 2010). Whether "a tribal court has adjudicative authority over nonmembers is a federal question." *Id.* Here, none of the defendants are members of the White Earth Band of Ojibwe. As a general matter, tribal courts lack jurisdiction over non-members. *See, e.g. Nevada v. Hicks*, 533 U.S. 353, 358 (2001); *Montana v. U.S.*, 450 U.S. 544, 565 (1981). There are two narrow exceptions to this general rule, neither of which applies here.

First, tribal courts may exercise jurisdiction over non-members are where the non-member enters into a consensual relationship with the tribe though commercial dealings or a similar

arrangement. *Id.* Here, there are no commercial dealings or similar arrangements between the defendants and the White Earth Band of Ojibwe on the subject matters of this suit.

Second, tribal courts may exercise jurisdiction over non-members if their conduct occurs on tribal or trust lands within its reservation, or "on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566 (emphasis added). Here, the plaintiffs plead no acts on White Earth Reservation lands – tribal, trust or fee. Line 3 does not cross any part of the White Earth Reservation.[1] The permit the plaintiffs challenge was issued in St. Paul. The conduct at issue involves the administration of a State-law regulations to a State-issued permit, for conduct off the White Earth Reservation. An exercise of jurisdiction by this Court on these allegations would turn the *Montana* exception on its head – allowing the Court to threaten the political integrity of the State by subjecting State officials to tribal law and jurisdiction for activities taken on non-tribal lands outside of the White Earth Reservation. Simply put, the plaintiffs have not pled any acts on the reservation that would confer jurisdiction on this Court over the defendants. [2]

Montana and *Nevada* are particularly instructive. In *Montana*, the court considered whether a tribe could regulate hunting and fishing by non-members on fee lands within the reservation. *Montana*, 450 U.S. 557. The Supreme Court held the tribe could not – limiting the

[1] If Line 3 crossed the White Earth Reservation that might confer jurisdiction over Enbridge, but it would not confer jurisdiction over State agencies or their personnel for their conduct in administering State regulatory programs connected to Line 3. *Montana*, 450 U.S. 557.

[2] The plaintiffs' undeveloped allegations against the conservation officers also fail to establish any jurisdiction in this Court. In addition to not pleading any actual count against a conservation officer, the *de minimis* allegations against the unnamed officers concerning trespass citations do not plead that any of those citations occurred on any part of the White Earth Reservation (they did not).

legislative power of tribes over non-members to situations in which they act on tribal or trust land within the reservation. *Id.* *Montana* is dispositive of the plaintiffs' claims here. If tribes lack jurisdiction to regulate hunting and fishing of non-members even within some parts of the reservation, they clearly lack the authority to regulate the non-hunting and fishing related conduct of non-members off-reservation. *Id.* Here, that is what the plaintiffs are attempting to do – regulate the conduct of State officials acting off-reservation with respect to the State's regulation of an off-reservation project. And because the jurisdiction of tribal courts extends no further than the tribe's legislative authority, tribal courts have no jurisdiction over non-members for acts occurring off-reservation. *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997).

In *Nevada*, a game warden executed a search warrant inside a reservation at the home of a tribal member for an alleged crime occurring off-reservation. *Nevada*, 533 U.S. at 355-56. The member sued the officer in tribal court on a Section 1983 claim, alleging the officer violated his constitutional rights in conducting the search. *Id.* at 357.[3] The Supreme Court held that the tribal court lacked jurisdiction to hear the claims, and the plaintiff was instead required to bring such suits in federal court. *Id.*[4] Like *Montana*, *Nevada* is dispositive here. If tribal courts lack jurisdiction over claims for acts taken by state officials *on* the reservation by non-members, they clearly lack jurisdiction over claims for acts by state officials *off* the reservation.

Simply put, the plaintiffs seek an expansion of tribal court jurisdiction to the off-reservation acts of State officials, administering State laws, taken to regulate a project located off-reservation.

[3] Notably, the *Nevada* plaintiff also sued the State of Nevada and various defendants in their official capacities before voluntarily dismissing them – no doubt recognizing the tribal court had no subject matter jurisdiction over them. *Nevada*, 533 U.S. at 357.

[4] *Nevada*, holding tribal courts have no jurisdiction over Section 1983 claims, is dispositive of all of the plaintiffs' individual capacity claims.

The claims are plainly disallowed in this Court by *Montana* and *Nevada.* This Court should dismiss.

CONCLUSION

For the reasons set forth above, this case should be dismissed because the defendants are immune from suit and for lack of subject matter jurisdiction.

Dated: August 12, 2021

Respectfully submitted,

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