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.

PRINCIPAL BRIEF OF APPELLANTS

KEITH ELLISON
Attorney General
State of Minnesota

COLIN P. O'DONOVAN, #0396349
OLIVER J. LARSON, #0392946
Assistant Attorneys General

445 Minnesota Street, Suite 1400
St. Paul, Minnesota 55101-2131
(651) 757-1026
(651) 297-4139 (Fax)
colin.odonovan@ag.state.mn.us
oliver.larson@ag.state.mn.us

ATTORNEYS FOR APPELLANTS

FRANK BIBEAU, #0306460
Tribal Attorney
51124 County Road 118
Deer River, MN 56636
frankbibeau@gmail.com

JOE PLUMER #0164859
Tribal Attorney
9352 North Grace Lake Road
Bemidji, MN 56601
jplummer@paulbunyan.net

ATTORNEYS FOR RESPONDENTS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Tribal Cases

Federal Statutes

State Rules

Tribal Rules

Other Authorities

STATEMENT OF THE ISSUES

I. Whether sovereign immunity bars this action from proceeding against the Minnesota Department of Natural Resources and its officers in Tribal Court.

Tribal Court Decision: The Tribal Court denied DNR's motion to dismiss and concluding that it had jurisdiction over a separate sovereign, the State of Minnesota, acting through its DNR and officers.

Most Apposite Authorities:
Sovereign Immunity – Common law and U.S. Const., amend. XI;
Idaho v. Coeur D'Alene Tribe of Idaho, 521 U.S. 261 (1997);
Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996);
Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991);
Michigan v. Bay Mills Indian Comm., 572 U.S. 782 (2014).

II. Whether the federal doctrine of *Ex Parte Young* which vests federal courts with federal jurisdiction abrogated state sovereign immunity to allow suits against state officials in Tribal Court.

Tribal Court Decision: The Tribal Court denied DNR's motion to dismiss and incorrectly concluded that *Ex Parte Young* abrogated state sovereign immunity and allows the Band to sue state officials in Tribal Court.

Most Apposite Authorities:
Sovereign Immunity – Common law and U.S. Const., amend. XI;
Idaho v. Coeur D'Alene Tribe of Idaho, 521 U.S. 261 (1997);
Kodiak Oil & Gas (USA) Inc. v. Burr, 932 F.3d 1125, 1132 (8th Cir. 2019).

III. Whether the White Earth Band of Ojibwe tribal court has subject matter jurisdiction over actions taken off-reservation by non-members, the Minnesota Department of Natural Resources and its officers, acting pursuant to state laws enacted by the Minnesota Legislature.

Tribal Court Decision: The Tribal Court denied DNR's motion to dismiss and incorrectly concluded that it had jurisdiction over actions by a non-member for a state law permit related to construction dewatering activities off-reservation issued pursuant to Minnesota law.

Most Apposite Authorities:
Sovereign Immunity – Common law and U.S. Const., amend. XI;
Montana v. U.S., 450 U.S. 544 (1981);
Nevada v. Hicks, 533 U.S. 353 (2001);
Strate v. A-1 Contractors, 520 U.S. 438 (1997).

STATEMENT OF THE CASE

This matter arises from a complaint filed by the White Earth Band of Ojibwe and associated parties ("Band") in the Band's tribal court (the "Tribal Court") seeking injunctive and declaratory relief against the State of Minnesota acting through its Minnesota Department of Natural Resources and DNR officials ("DNR").

The Band challenges action that occurred off-reservation by a separate sovereign, the State of Minnesota acting through DNR, and concern DNR's administration of State-law regulatory programs – most notably the DNR's issuance of a dewatering permit for construction activities associated with the Line 3 replacement project.

DNR moved to dismiss the case for lack of subject matter jurisdiction on the bases of sovereign immunity and that the Tribal Court lacks subject matter jurisdiction over the actions of non-members occurring off-reservation. On August 18, 2021, the Honorable Judge DeGroat denied DNR's motion to dismiss.

The DNR filed a motion to stay the Tribal Court proceedings, so that the DNR could file this appeal and allow the issue of subject matter jurisdiction to be litigated to a final resolution in the Band's Court of Appeals ("Tribal Appellate Court"). The Band moved for a temporary restraining order. Judge DeGroat recused himself from the matter in response to the DNR's related filing of a federal court action challenging the Tribal Court's jurisdiction. The case was reassigned to Judge BJ Jones. On August 30, Judge Jones *sua sponte* issued an amended ruling on the DNR's motion to dismiss, as well as DNR's motion for a stay. Judge Jones held that the Tribal Court has jurisdiction over DNR officials, but likely not the DNR itself. The Band subsequently agreed to dismiss the DNR. Judge Jones

denied a stay of further proceedings and no order has issued dismissing any party. Judge Jones set a hearing for the Band's preliminary injunction against on September 20, 2021.

STATEMENT OF FACTS

The plaintiffs in this lawsuit are the Band which 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 sued the DNR, which consist of its Commissioner, two named DNR employees, and ten unnamed conservation officers. (*Id.* ¶¶ 41-45.) The individual defendants are sued in their official and individual capacities. (*Id.*)

The Band pled 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 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 Band's usufructuary rights

under the 1855 Treaty. Count VII seeks a declaration that DNR violated the Rights of Manoomin, as set forth in tribal legal codes.

The Band's allegations focus on arguments that DNR 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 Band also pled that they have been charged with trespass based on state law for actions taken to stop the construction of Line 3, but the Band pled no counts based on these allegations. (*See*, *e.g.*, ¶ 28.) All of the counts seek either declaratory or injunctive relief directed to 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 Band seeks no relief that any individual defendant could offer in their individual capacity. (*Id.*)

The Tribal Suit does not contain any actions taken by DNR on the White Earth Reservation, and DNR and its officials are not members of the White Earth Band of Ojibwe. It is undisputed that no part of Line 3 crosses any part of the White Earth Reservation. It is similarly undisputed that all of the permitting decisions challenged by the White Earth Band of Ojibwe were made by State officials in St. Paul, applying State law to requests for State-issued permits.

The DNR sought dismissal of the Tribal Suit for lack of subject matter jurisdiction on two bases. First, the DNR has sovereign immunity from suit in Tribal Court. Second, DNR and the named defendants are not members of the White Earth Band of Ojibwe, and the White Earth Band of Ojibwe lacks jurisdiction over non-members for actions occurring

off the reservation. The DNR's motion was heard on August 16. On August 18, the Tribal Court issued an order denying the DNR's motion to dismiss. On August 30, the Tribal court issued an amended order appealed here.

STANDARD FOR GRANTING APPEALS

The denial of a motion to dismiss based on sovereign immunity is a final order and therefore subject to immediate appeal as a matter of right. *Puerto Rico Aqueduct & Sewer Authority*, 506 U.S. 139, 146 (1993); *see also In Re Chandler*, 251 B.R. 872, 874 n.2 (10th Cir. Bankr. Ct. 2000) ("It is well-established that an order denying a motion to dismiss on the grounds that a State is not entitled to its claim of sovereign immunity, such as the order appealed in this case, is "final.") (collecting cases); Band's R. App. Proc. 5(A) ("A final judgment or final order of any original hearing body…may be appealed to the WECA as a matter of right."). Judge Jones acknowledged the same in his amended order stating that "an order denying a motion to dismiss on sovereign immunity grounds is generally considered a 'final' order because the nature of the defense is one that is designed to avoid having the sovereign defend a suit." (Add. at 6 n.1.) The DNR's motion to dismiss was based on sovereign immunity and the Tribal Court's denial is a final order which is immediately appealable as a matter of right.

ARGUMENT

This Court should reverse the Tribal Court's order denying DNR's motion to dismiss for lack of subject matter jurisdiction for at least three reasons. First, DNR enjoys sovereign immunity with respect to all counts pled by the Band. Second, *Ex Parte Young* did not abrogate the state's sovereign immunity or vest this 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 DNR defendants are tribal members and the actions taken by DNR occurred off-reservation.

I. DNR HAS SOVEREIGN IMMUNITY FROM SUIT IN TRIBAL COURT.

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). States enjoy absolute sovereign immunity from suit in the courts of other states and in tribal courts. *Franchise Tax Bd. of California v. Hyatt*, --- U.S. ----, 139 S. Ct. 1485, 1493 (2019); *State of Montana v. Gilham*, 133 F.3d 1133, 1135 (9th Cir. 1998); *Principality of Monaco v. State of Miss*., 292 U.S. 313 (1934). 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.

The reverse is also true as tribes retain sovereign immunity from suit in state or federal court unless there has been a waiver or abrogation under federal law. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 791 (2014); *Gavle*, 555 N.W.2d at 289; *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).

Nor does upholding the State of Minnesota's sovereign immunity "reduce tribal sovereignty to a cynical legal fiction" as stated in Judge DeGroat's order or as an overreach as stated in Judge Jones's amended order. (Add. at 5, 12.) Quite the contrary. One of the animating principles behind sovereign immunity is comity. *Franchise Tax Bd.*, 139 S. Ct. 1485 at 1492; *see also* Minn. Gen. R. Prac. 10.03 (noting that a factor Minnesota state courts consider in determining whether to recognize a tribal court judgment is whether "the tribal court does not reciprocally recognize and enforce orders, judgments and decrees of the courts of this state"). For a sovereign to assert immunity, it must in turn confer immunity on other sovereigns. *Id.* A failure by this Court to recognize the defendants' sovereign immunity, therefore, would diminish and potentially endanger the White Earth Band of Ojibwe's *own* sovereign immunity to suit in other courts.

II. *EX PARTE YOUNG* DOES NOT ABROGATE SOVEREIGN IMMUNITY IN TRIBAL COURTS.

The majority of the amended order is spent arguing that *Ex Parte Young* abrogated state officials' sovereign immunity from suit in tribal court. This is incorrect as a matter of law.

Ex Parte Young is a federal doctrine that is a limited abrogation of sovereign immunity and Eleventh Amendment immunity that allows some types of treaty claims to proceed against state officials in their official capacity *in federal court*. *See* 28 U.S.C. §§ 1331, 1362; *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997)

(holding tribes are subject to the Eleventh Amendment and 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 Minn.*, 853 F. Supp. 1118, 1129 (D. Minn. 1994).

No federal court decision has ever interpreted *Ex Parte Young* to strip a state sovereign or its officials of immunity from suit in Tribal Court, and the amended order fails to identify a single case holding otherwise. This is not surprising as the Supreme Court has explained that the rationale for the *Ex Parte Young* doctrine "rests on the need to promote the vindication of federal rights" and to provide a neutral federal forum for their resolution. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105-06 (1984).

The Tribal Court curiously relies on *Michigan v. Bay Mills Indian Comm*., 572 U.S. 782 (2014) – a case which has no relevance here. In *Bay* Mills, the issue was whether tribes have sovereign immunity from suits brought by states in federal court. *Id.* at 787. The Supreme Court held that they do. *Id.* at 790. From this, the Tribal Court concluded that state officials are subject to suit in Tribal Court under an *Ex parte Young* analysis. This holding has no grounding in *Bay Mills.* The *Bay Mills* Court did not hold or in any way address the issue of whether states have sovereign immunity from suit in tribal courts, or whether *Ex Parte Young* suits would be allowed in tribal or state courts. *Id.* At best, the *Bay Mills* offered the unremarkable observation that tribal officials remained subject to suit in *federal* court on an *Ex parte Young* basis, as would state officials. *Bay Mills* nowhere suggest that it was radically altered a 100+ year plus federal doctrine to allow suit against state officials in tribal courts – as one would expect for such

an important issue of first impression – and the amended order fails to identify any case subsequent to *Bay Mills* that expressly held that either. (Add. at 9.) Simply put, a case holding that tribes are not subject to suit in federal court is not a case holding that state officials can be sued in tribal court.

Nor is there any need for a tribal court to exert authority over state officials in its courts as both state officials and tribal officials may sue each other in federal court under the limited abrogation recognized in the *Ex Parte Young* doctrine. *See Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1132 (8th Cir. 2019) (holding claims for injunctive relief against tribal court officials in federal court not barred by tribal sovereign immunity); *Fond du Lac Band of Chippewa Indians v. Carlson*, 68 F.3d 253, 256-57 (8th Cir. 1995) (holding claims for injunctive relief against state officials in federal court not barred by state sovereign immunity); *see also Bay Mills*, 572 U.S. at 809 (Sotomayor concurrence) ("As things stand, however, *Seminole Tribe* and its progeny remain the law. And so long as that is so, comity would be ill-served by unequal treatment of States and Tribes.") The converse is also true: Minnesota state officials may not sue tribal officials in Minnesota state courts under *Ex Parte Young*, and no Minnesota court decision has held otherwise. Similarly, tribal officials may not sue Minnesota state officials in Tribal Court under *Ex Parte Young*, and no tribal decision has held otherwise. That is what both sovereign immunity and comity require.

Here, the Band sued 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 DNR is immune from the Band's suit in in Tribal Court. *Coeur d'Alene*

Tribe of Idaho, 521 U.S. at 269. The Band's 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. *Id.*; *Hagen v. Sisseton-Wahpeton Comm. College*, 205 F.3d 1040, 1043 (8th Cir. 2000); *Weeks Constr., Inc. v. Oglala Sioux Housing Auth.*, 797 F.2d 668, 670 (8th Cir. 1986); *White Earth Hum. Res.*, 2017 WL 701354 at *1. 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; *see also* Band's R. Civ. Pro. IX Sect. 1 "Real Party in Interest." 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.*

Nor is there a "vital interest" exception to sovereign immunity as suggested by Judge DeGroat in his original order or an exception under *Montana* as suggested by Judge Jones in his amended order that allows such suits to proceed against state officials in Tribal Court. No federal case has rejected sovereign immunity on the basis that the suit concerned a matter of vital interest to the forum state. In fact, the exact opposite is true – cases analyzing sovereign immunity describe a state's interest in its own sovereign immunity as a "vital interest" that *requires* application of sovereign immunity in the absence of a specific waiver or abrogation. *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 274 (dismissing tribal claim against Idaho brought in federal court on the basis of sovereign immunity,

holding "it is acknowledged that States have real and vital interests in preferring their own forums in suits brought against them"). Similarly, no federal case has held that *Montana's* second exception allows suits against a state official in Tribal Court.

The amended order does suggest that the United State Supreme Court's recent decision in *Cooley* may call into question whether tribal courts can assert jurisdiction over non-members. (Add. at 11.) Quite the contrary, the *Cooley* opinion reiterated that while tribal police may have the power to detain individuals on the reservation engaged in criminal acts, the tribes must then turn the defendants over to state or federal law enforcement officers because the tribes cannot apply their laws to the defendants. *United States v. Cooley*, --- U.S. ----, 141 S. Ct. 1638, 1644-45 (2021). *Cooley* supports DNR's position.

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 law is clear that the solution is to proceed to the neutral forum of the federal courts as required by both the constitution and federal law. *Id.* This Court should therefore reverse the Tribal Court's order requiring the State of Minnesota and its officers proceed with this litigation in Tribal Court.

III. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER CLAIMS AGAINST THE STATE FOR ACTIONS TAKEN PURSUANT TO STATE LAW OCCURRING OFF-RESERVATION.

Tribal courts are courts of limited jurisdiction. *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 324 (2008); *Atty's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. 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); *Duro v. Reina*, 495 U.S. 676, 679 (1990). There are two narrow exceptions to this general rule, neither of which applies here.

First, tribal courts may exercise jurisdiction over non-members where the non-member enters into a consensual relationship with the tribe though commercial dealings or a similar arrangement. *Montana*, 450 U.S. at 565. Here, there are no commercial dealings or similar arrangements between DNR and the White Earth Band of Ojibwe on the subject matters of this suit. The Band has not argued that there are, and the Tribal Court did not rule that there are. The first exception does not apply.

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). The Band pleads no acts on lands in the White Earth Reservation –

tribal, trust or fee. Nor could it. Line 3 does not cross any part of the White Earth Reservation. Moreover it is undisputed that the DNR is headquartered in St. Paul and issued its dewatering permits off-reservation. Simply put, the DNR conduct alleged by the Band involves the administration of a State-law regulations to a State-issued permit, for conduct off the White Earth Reservation.

The two seminal cases on tribal jurisdiction over nonmembers, *Montana* and *Nevada,* are particularly instructive. In *Montana*, the Supreme 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 and limited the 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 Tribal Court's jurisdiction over the Band's claims. 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 conduct of non-members, particularly State officials, off-reservation. *Id.* Here, that is what the Band is attempting to do, namely regulate the conduct of State officials acting off-reservation with respect to the State's regulation of an off-reservation project. And because the tribal courts adjudicatory authority 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).

Significantly, the Supreme Court just months ago reaffirmed the fundamental tenet that the *Montana* exception only applies to action taken *within the reservation*. *Cooley*,

141 S. Ct. at 1645 ("We have subsequently repeated *Montana's* proposition and exceptions in several cases involving a tribe's jurisdiction over the activities of non-Indians within the reservation.") (string citing cases).

In *Nevada*, the Supreme Court further limited the jurisdiction of tribal courts for suits against State officials. That case involved a state game warden who 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. The Supreme Court held that the tribal court lacked jurisdiction to hear the claims, and the plaintiff was instead required to bring his suit in federal court. *Id.* 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.

Rather than dismiss as required under this clear precedent, the Tribal Court in its original order held that it had jurisdiction under *Montana* on the basis that the Band had a vital interest in protecting waters and wild rice. (Add. at 5.) The Tribal Court, however, ignored the fundamental limiting principle of *Montana* – it applies only to on-reservation conduct. The Tribal Court in its amended order then backed away from that firm assertion that *Montana* absolutely vested tribal courts with jurisdiction but held that the second Montana exception "*may* remain as a viable alternative for the exercise of tribal court jurisdiction over state governmental employees." (Add. at 10.) The *Montana* exception cited by the Tribal Court for acts that threaten "the health or welfare of the tribe" is

expressly limited to conduct that *within the reservation*. *Montana*, 450 U.S. at 566 (emphasis added); *Cooley*, 141 S. Ct. at 1645. None of the conduct the Band challenges occurred within the boundaries of the White Earth Reservation, none of the cases cited in the original order or amended order stand for the proposition that tribal court authority extends to actions beyond the boundaries of the Reservation, and the Tribal Court therefore lacks jurisdiction over the matter.

The limits of the *Montana* exception (to on-reservation conduct) is also recognized by other tribal court decisions – including the one tribal decision cited by the Tribal Court here, *Dale Nicholson Tr. v. Chavez*, 5 Am. Tribal Law 365, 2004 WL 5658105 (Navajo Jan. 6, 2004). (*See* Add. at 2 n.1.) *Nicholson* involved a suit brought in Navajo tribal court against New Mexico tax officials who were seeking to enforce a state tax lien against the property of a tribal member. *Id.* At 368. The state officials did not appear, and the trial court dismissed *sua sponte*, finding it had no subject matter jurisdiction. *Id.* On an unopposed appeal, the Navajo Supreme Court remanded for further proceedings, holding that the tribal member might be able to make out a factual showing of sufficient contact with the reservation to establish jurisdiction under the *Montana* exceptions. *Id.* At 374. However, the *Nicholson* court expressly recognized that for the *Montana* exceptions to apply, the conduct at issue must have occurred within the reservation. *Id.* If the Tribal Court here had actually followed *Nicholson*, it should have dismissed the Band's suit.

Finally, the Tribal Court's holding is also precluded by *Duro*. The Band's claims, and the Tribal Court's ruling, are grounded in arguments that the Band has inherent authority independent of any grant of authority from the federal government. The problem

is that while tribes do retain some inherent authority arising out of their "retained sovereignty," that authority extends only to the tribe's own members. *Duro*, 495 U.S. at 679 (holding that the "retained sovereignty" of a tribe does not extend "outside its own membership"). The issue in *Duro* was whether a tribe could exercise criminal jurisdiction over an Indian nonmember for conduct on the reservation. *Id.* The tribe argued it had "retained sovereignty" to adjudicate such matters. *Id.* The Supreme Court held it did not, because retained sovereignty could confer jurisdiction only over the tribe's own members. *Id.* Congress fixed this issue (in the appropriately named *Duro* fix) by passing a federal statute extending tribal jurisdiction over criminal matters occurring on reservation to all Indians, irrespective of tribal membership. *See* 25 U.S.C. § 1301(2); *United States v. Lara*, 541 U.S. 193, 200 (2004). The principle in *Duro* remains good law – tribes have no inherent authority over nonmembers – and the Supreme Court reaffirmed that principle in *Cooley* just this session. *Cooley*, 141 S. Ct. at 1644 (affirming detention of a nonmember until appropriate authorities can arrive because such actions "do not subsequently subject [nonmember] to tribal law."). The Band and the Tribal Court have no "inherent" authority to exercise jurisdiction over the State, DNR, or its officials or to subject them to tribal law in tribal courts. And there is no *Duro* fix to apply in this civil matter. This Court must therefore reverse the Tribal Court's order because it lacks subject matter jurisdiction.

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: September 13, 2021.

Respectfully submitted,

KEITH ELLISON
Attorney General
State of Minnesota

/s/ **Colin P. O'Donovan**
OLIVER J. LARSON (No. 0392946)
COLIN P. O'DONOVAN (No. 0396349)
Assistants Attorney General

445 Minnesota Street, Suite 1400
St. Paul, Minnesota 55101-2131
(651) 757-1026 (Voice)
(651) 297-4139 (Fax)
oliver.larson@ag.state.mn.us
colin.odonovan@ag.state.mn.us

ATTORNEYS FOR THE DEFENDANTS-APPELLANTS