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.

RESPONDENTS' RESPONSE BRIEF and EXHIBIT A

TO: Oliver J. Larson and Colin P. O'Donovan, Assistant Attorney Generals, 445 Minnesota Street, Suite 1400, St. Paul, Minnesota 55101-2131, and White Earth Tribal Appellate Court Administration.

Pursuant to the White Earth Appellate Court Rules of Procedure 17, Respondents filed for Preliminary Injunction September 24, 2021, *in response* to DNR's simultaneous notice of appeals filed in Federal Court 8th Circuit and White Earth Tribal Court of Appeals. Pursuant to the White Earth Appellate Court Rules of Procedure 14, Respondent's herein respond to DNR redundant arguments, relying on primarily on Kodiak Oil & Gas (USA) Inc. v. Burr, 932 F.3d 1125, 1132 (8th Cir. 2019) and Nevada v. Hicks, 533 U.S. 353 (2001). The DNR has made the same arguments in federal courts, which both the District and 8th Circuit have rejected DNR's attempts at preliminary injunction against White Earth Band of Ojibwe and the Honorable Judge DeGroat.

On September 8, 2021, Respondents herein filed a *response* to letter request by DNR for reconsideration to the Honorable Wilhelmina M. Wright, United States District Court for the District of Minnesota with regard to Minnesota Department of Natural Resources, et al. v. White Earth Band of Ojibwe, et al., Case No. 21-cv-1869-WMW-LIB. See Doc 23, WEBO response letter to DNR from Mr. Plumer's Office dated Sept. 8, 2021, attached as Exhibit A. It is readily apparent from DNR's statements, actions and briefs that DNR does not want to recognize the primary holdings in Kodiak, first "oil and gas companies' claims for declaratory and injunctive relief against tribal court officials were not barred by tribal sovereign immunity; [and second] ***oil and gas companies properly exhausted their tribal court remedies before filing suit in federal court***." (Emphasis added). Both Hicks and Kodiak involved tribal courts improperly reviewing federal causes of action. In Hicks it was a section 1983 claim and in Kodiak it was a federal land lease claim. Here, the White Earth Band of Ojibwe has enacted a *tribal law* governing manoomin (wild rice).

Here, DNR refuses to accept exhaustion of tribal remedies in tribal court first. Respondent's now provide Exhibit A dated Sept. 8, 2021 as our redundant response to DNR's redundant appeals, as additional brief response to Respondent's request for preliminary injunction Sept. 24th.

Conclusion

Wherefore, based on the files, records and other evidence, along with the reasons set forth above and in the original Request for Preliminary Injunction in Tribal Court dated August 23, 2021, and September 24, 2021, Respondents herein request the White Earth Appellate Tribal Court grant an *injunction* against the DNR from issuing or permitting any further water or dewatering allocations to the Enbridge Line 3 pipeline construction project until truly independent and reliable investigators verify all of the environmental damages along the pipeline construction corridor including artesian aquifer breaches and frac-outs and any other relief deemed fair, just and equitable.

Dated: October 6, 2021

____/s/ Frank Bibeau_____
Frank Bibeau, Tribal Attorney
Joe Plumer, Tribal Attorney
For the Manoomin, *et al*

Exhibit A

PLUMER LAW OFFICE

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September 8, 2021

Honorable Wilhelmina M. Wright
United States District Court for the District of Minnesota
316 N. Robert Street
St. Paul, MN 55101

Re: *Minnesota Department of Natural Resources, et al. v. White Earth Band of Ojibwe, et al.*, Case No. 21-cv-1869-WMW-LIB

Dear Judge Wright:

I represent Defendants the White Earth Band of Ojibwe and Hon. David A. DeGroat, Chief Judge of the White Earth Band of Ojibwe Tribal Court in the above-captioned case and write in response to Plaintiffs' request for leave to file a motion to reconsider the Court's September 3, 2021 Order (Doc. No. 20). For the reasons discussed below, the Order does not merit reconsideration.

First, contrary to Plaintiffs' assertion, tribal sovereign immunity is a "threshold jurisdictional matter" and a "jurisdictional prerequisite" that may be raised by a party at any time in the proceedings or "raised *sua sponte* by the court." *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 686 (8th Cir. 2011). As a threshold jurisdictional matter, the Court thus may properly dismiss Defendants from this case *sua sponte* on tribal sovereign immunity grounds. *See Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 434 (2007) ("[I]t is of course true that once a court determines that jurisdiction is lacking, it can proceed no further and must dismiss the case on that account.").

Second, Plaintiffs' contention that Judge DeGroat is a proper defendant and "does not enjoy sovereign immunity from DNR's claims, even when sued in his official capacity" is wrong. Tribal sovereign immunity "extends to tribal officials who act within the scope of the tribe's lawful authority." *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1131 (8th Cir. 2019). As a tribal official acting on behalf of the White Earth Band of Ojibwe, Judge DeGroat enjoys sovereign immunity from suit.

Third, Plaintiffs misunderstand the *Ex parte Young* exception to tribal sovereign immunity as applied to the facts of this case. Specifically, *Ex parte Young* holds that sovereign immunity "does not prevent federal courts from granting injunctive relief to prevent a continuing violation of federal law." *Green v. Mansour*, 474 U.S. 64, 68 (1985). The *Ex parte Young* exception only applies to an official acting contrary to applicable federal law. *Cory v. White*, 457 U.S. 85, 91

(1982); *see also N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 460 (8th Cir. 1983) ("*Ex parte Young* applies to the sovereign immunity of Indian tribes[.]"). Plaintiffs' Complaint does not contain any allegation that Judge DeGroat is acting contrary to federal law. This case is distinguishable from *Kodiak Oil & Gas*, where the plaintiffs' claims for relief were based on alleged violations of federal law. 932 F.3d at 1131–33. As such, the *Ex parte Young* exception is inapplicable to this case.

Fourth, because the *Ex parte Young* exception does not apply, Plaintiffs "bear the burden of proving that either Congress or [the White Earth Band of Ojibwe] has expressly and unequivocally waived tribal sovereign immunity." *Amerind*, 633 F.3d at 685–86. Plaintiffs allege no waiver. Plaintiffs' Complaint cites to no federal law that abrogates tribal sovereign immunity. As the Court found in its September 3, 2021 Order, lack of waiver is fatal to Plaintiffs' claims.

Finally, Plaintiffs' argument that federal courts have authority to "review tribal court jurisdiction and enjoin tribal court proceedings" is erroneous. The well-established tribal court exhaustion doctrine provides that a federal court should "stay . . . its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction." *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985). According to the Supreme Court, "[t]he federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts. At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts." *Id.* at 16–17.

The tribal court exhaustion doctrine is not optional. While the framework outlined by the Supreme Court in *Montana v. United States*, 450 U.S. 544 (1981), limits tribal court jurisdiction over nonmembers, tribal courts, including the White Earth Tribal Court, may properly exercise jurisdiction over certain cases involving nonmembers. As explained by the White Earth Tribal Court in its Order Clarifying the August 18, 2021 Order Denying the Motion to Dismiss, the Eighth Circuit has not "adopt[ed] a blanket rule that state political entities and their officials are beyond the purview of tribal court jurisdiction because of sovereign immunity." Doc. 16-1, at 5. Because the second *Montana* exception is particularly relevant to this case, the White Earth Tribal Court should have "the first opportunity to evaluate the factual and legal bases for the challenge[s]" to its jurisdiction. *Nat'l Farmers*, 471 U.S. at 856. The Court should reject Plaintiffs' attempt to bypass tribal court jurisdiction when tribal remedies have clearly not been exhausted.

Based on the foregoing, the Court should deny Plaintiffs' request to reconsider the Court's September 3, 2021 Order.

Sincerely,

/s/ Joseph Plumer
Joseph Plumer

Attorney for Defendants