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.

APPELLANTS' OPPOSITION TO MOTION FOR RECONSIDERATION

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INTRODUCTION

The respondents have moved for reconsideration of this Court's decision (the "Decision") holding that the White Earth Band of Ojibwe's tribal courts lack subject matter jurisdiction over the claims pled here against state officials for issuing permits for an off-reservation project. The respondents offer nothing that merits this Court reconsidering the Decision.

LEGAL STANDARD

Motions for reconsideration are disfavored. *Elder-Keep v. Aksamit*, 460 F.3d 979, 985 (8th Cir. 2006). A motion for reconsideration is not a vehicle to identify facts or legal arguments that could have been raised at the time the matter was first pending, but were not. *SPV-LS, LLC v. Transamerica Life Ins. Co.*, 912 F.3d 1106, 1111–12 (8th Cir. 2019); *Julianello v. K-V Pharm. Co.*, 791 F.3d 915, 923 (8th Cir. 2015).

ARGUMENT

The respondents filed two briefs in support of reconsideration, making essentially four arguments. First, the respondents argue this Court should ignore the *Montana* framework limiting when a tribal court may exercise jurisdiction over a nonmember, and instead decide the issue of tribal court jurisdiction based exclusively on a reading of the Tribal Code of Manoomin. Second, the respondents re-argue their position that the *Montana* framework allows tribal court jurisdiction over nonmembers for actions occurring off-reservation if there is an on-reservation impact. Third, the respondents newly argue that a congressional delegation of authority gives the Band's courts jurisdiction over DNR officials for any conduct that impacts Manoomin. Fourth, the respondents argue that newly

discovered evidence supports the Court reconsidering the Decision because the evidence shows additional potential harms to Manoomin.

There is nothing for this Court to revisit. The respondents have still not cited a single case in which a court has held that a tribal court can exercise jurisdiction over a nonmember for off-reservation conduct. The respondents instead continue to cite cases involving on-reservation conduct – often on tribal or trust lands where a different legal regime applies – to argue the Band's courts have off-reservation jurisdiction. The cases that *do* address off-reservation conduct plainly hold that tribal courts lack jurisdiction over nonmembers. The decision is correct, and the motion for reconsideration should be denied.

I. TRIBAL COURT JURISDICTION OVER NONMEMBERS IS LIMITED BY FEDERAL LAW.

The respondents argue the Band's courts have plenary power to exercise jurisdiction over nonmembers as a matter of inherent sovereignty. (Respondents Supplemental Br. at 4-9.) From this, they argue the Band's courts do not need to account for federal-law limitations on jurisdiction over nonmembers. This is plainly inconsistent with a long line of Supreme Court cases emanating from *Montana* that hold that tribes generally do *not* have inherent jurisdiction over nonmembers, and that federal law cabins tribal exercises of jurisdiction over nonmembers.

Federal law, not tribal law, establishes the outer limits of when a tribal court may exercise jurisdiction over a nonmember for conduct beyond tribal or trust lands. (Decision at 6.) This issue was considered and resolved by the time of the Supreme Court's decision in *National Farmers Union*, if not earlier. In *National Farmers Union*, the Supreme Court

held that tribal court jurisdiction over nonmembers is a matter of federal law, permitting federal courts to determine the jurisdiction of tribal courts over nonmembers. *Nat. Farmers Union v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985).

Subsequent decisions have reiterated the federal-law limitation on tribal court jurisdiction over nonmembers in unmistakable language: "whether a tribal court has adjudicative authority over nonmembers is a federal question." *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 324 (2008); *citing Nat'l Farmers*, 471 U.S. at 852*; see also Nevada v. Hicks*, 533 U.S. 353, 367 (2001) (holding the argument that tribal courts are courts of general jurisdiction is "quite wrong"); *Atty's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa*, 609 F.3d 927, 934 (8th Cir. 2010).

This is not a new issue in the case. The DNR explicitly briefed the issue – citing *Plains Commerce*, *Nat'l Farmers*, and *API* – and argued that the limits of tribal court jurisdiction over nonmembers is controlled by federal law. (*See* DNR Opening Brief on Appeal at 12.) This Court extensively analyzed the issue, reaching the same conclusion:

> That the Tribe has granted its courts authority to hear certain matters, however, does not end the courts' examination of subject matter jurisdiction. The United State Supreme Court has restricted the authority of tribal courts to hear certain cases against nonmembers, even if the Tribe would permit its courts to hear those cases.

(Decision at 6-7.)

In their supplemental briefing, the respondents now argue that tribal courts have inherent power to exercise jurisdiction over nonmembers for anything that impacts the

reservation. (Respondents' Supplemental Br. at 4-9.)[1] From this, they argue the Band's courts can ignore federal law restrictions on tribal court jurisdiction over nonmembers. This is incorrect.

Even on fee lands inside a reservation, tribes and tribal courts lack plenary authority over nonmembers, and must ground exercises of jurisdiction over nonmembers in a *Montana* exception. *See*, *e.g.*, *Plains Commerce*, 554 U.S. at 328. *Plains Commerce* affirmed this already well-established principle of law. There, the issue was whether a tribal court had jurisdiction to hear claims against a nonmember for discrimination and wrongful foreclosure of fee lands. *Id.* at 325-26. If the respondents were correct, and tribes have inherent authority over nonmembers, this would have been an easy decision in favor of the tribe. It was not – precisely because the Supreme Court has long held that tribes have no general jurisdiction over nonmembers, even for conduct on fee lands inside a reservation. *Id.* at 328 ("Our cases have made clear that once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it."). As a result, the *Plains Commerce* Court analyzed the case under the *Montana* exceptions and found no tribal court jurisdiction.[2]

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[1] The respondents offered no argument to the Court on this issue prior to the Decision, despite this Court's specific invitation for them to do so with its December 16, 2021 order inviting written argument on five discrete issues, including: "Does the Tribe's adoption of a Judicial Code provision granting the Tribal Court jurisdiction to hear actions based on alleged treaty violations override federal common law re Tribal Court jurisdiction under *Montana*?"

[2] In *Duro v. Reina*, the Supreme Court similarly considered the sovereign power of tribal courts in holding that tribal courts lack jurisdiction over nonmembers to try criminal matters. 495 U.S. 676, 681 (1990). The *Duro* court held that tribal sovereignty is limited,
(Footnote Continued on Next Page.)

As this Court observed in its order for supplemental reconsideration briefing, the respondents had not previously cited any cases holding that tribal courts can ignore federal law limits on their jurisdiction over nonmembers. With their supplemental briefing, the respondents have newly cited a set of related cases emanating from the following language from the Supreme Court in *Iowa Mutual*:[3] "Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." (Respondents Br. at 5.) From this, the respondents argue tribal sovereignty allows tribal courts to ignore federal law restrictions on jurisdiction. There are several problems with this argument.

First, all but one of the cases predate *Plains Commerce*. To the extent this line of cases ever held that tribal courts have inherent sovereign authority over nonmembers free of federal limits (a dubious reading of the cases),[4] that argument was expressly rejected in *Plains Commerce*. *Plains Commerce*, 554 U.S. at 328; *see also Duro*, 495 U.S. at 681. The one case cited by the respondents that post-dates *Plains Commerce* – *Grand Canyon* – involved conduct on trust lands and is therefore inapposite. 715 F.3d 1196 (9th Cir. 2013). The power of tribal courts to exercise jurisdiction over nonmembers for conduct on tribal or trust lands is greater than on fee lands and is of no relevance to this case involving off-reservation conduct. *Grand Canyon* discusses this very distinction in holding that the

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and tribal court jurisdiction extends only to its members in the absence of a federal grant of jurisdiction. *Id.* at 686.

[3] 480 U.S. 9, 11 (1985).

[4] The issue in *Iowa Mutual* was whether diversity jurisdiction allowed a nonmember to challenge tribal court jurisdiction in federal court before exhausting jurisdictional arguments in tribal court. 480 U.S. at 14. The Court did not resolve the question of whether the tribal court actually had jurisdiction, only whether it was sufficiently colorable to require exhaustion. *Id.* The subsequent cases cite *Iowa Mutual* only in passing.

Montana framework did not apply precisely because the conduct was on trust lands, not fee lands. *Grand Canyon*, 715 F.3d at 1205.

Second, even putting aside the trust lands/fee lands distinction, none of the new cases cited by respondents go that one step further and support authority for tribal court jurisdiction over off-reservation conduct free from federal limits. *Iowa Mut.*, 480 U.S. at 11 (auto accident inside a reservation); *Grand Canyon*, 715 F.3d at 1205 (development contract on tribal trust lands); *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1414 (8th Cir. 1996) (contract dispute for the construction and operation of a casino on trust lands); *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 556 (8th Cir. 1993) (regulation of liquor stores inside a reservation)[5]; *Blue Legs v. U.S. Bureau of Indian Affs.*, 867 F.2d 1094, 1095 (8th Cir. 1989) (illegal garbage dumps located inside a reservation); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 134 (1982) (oil and gas leases on trust lands inside a reservation). Each of these cases also expressly cabins its language as limited to on-reservation conduct. *See*, *e.g.*, *Iowa Mut.*, 480 U.S. at 18 ("Tribal authority over the activities of non-Indians *on reservation lands* is an important part of tribal sovereignty") (emphasis added).

In sum, no matter how far the newly cited cases might be stretched, they cannot be stretched to hold that tribal courts have jurisdiction over nonmembers for off-reservation conduct without regard to federal limitations. None of the cases hold that tribal courts can

[5] *City of Timber Lake* also involved a federal statute expressly giving tribes authority to regulate liquor stores located on fee lands within a reservation. 10 F.3d at 556, 18 U.S.C. 1161.

ignore the *Montana* framework when determining tribal court jurisdiction over nonmembers for conduct beyond tribal or trust lands. Nor could they. The whole point of *Montana* was that it established a background rule that tribes generally lack jurisdiction over nonmembers, from which an exception must be found. *Montana v. United States*, 450 U.S. 544, 565 (1981). This Court was correct to analyze whether federal law permits jurisdiction over DNR officials under the *Montana* framework, and it should not revisit the issue.

II. *MONTANA* DOES NOT CREATE A SOURCE OF TRIBAL COURT JURISDICTION FOR OFF-RESERVATION CONDUCT.

As a result of the respondents' motion for reconsideration, the parties again return to an issue already briefed and decided by this Court – does the second *Montana* exception allow for tribal court jurisdiction over nonmembers for their off-reservation conduct if a party can allege an on-reservation impact. (Respondents Supplemental Br. at 9-16.) The answer to this question is no, as the Court correctly determined after an extensive analysis. (Decision 7-14.)

In its order for supplemental briefing, the Court directed the respondents to focus their argument on new cases, rather than re-argue the same cases already considered. Respondents cite four new cases, none of which supports their position.

The respondents newly cite *Bugenig v. Hoopa Valley Tribe*, 229 F.3d 1210, 1223 (9th Cir. 2000) ("*Bugenig I*"). The first problem for the respondents on *Bugenig I* is that it goes the wrong way, with the Ninth Circuit ruling *against* tribal court jurisdiction on the

Montana issue. *Bugenig I*, 229 F.3d at 1223.[6] The second problem is that *Bugenig I* involved on-reservation conduct – logging activity on fee lands within the boundary of the reservation near a sacred tribal site. *Id.* 1219-20. The respondents are thus citing a case rejecting tribal court jurisdiction over on-reservation conduct to argue in favor of tribal court jurisdiction for off-reservation conduct. If anything, *Bugenig I* supports the DNR's position.

The respondents newly cite *Rincon Mushroom Corporation of America v. Mazzetti*, No. 09CV2330WQH-POR, 2010 WL 3768347 (S.D. Cal. Sept. 21, 2010), *rev'd sub nom. Rincon Mushroom Corp. v. Mazzetti*, 490 F. App'x 11 (9th Cir. 2012). In *Rincon*, the issue was whether a tribe could regulate the land uses of a parcel inside the reservation on fee lands adjacent to its casino. *Id.* at *2. As with every other case the respondents have cited, it involved the application of the second *Montana* exception to on-reservation conduct, not off-reservation conduct. *Id.*

The respondents newly cite *MacArthur v. San Juan Cnty.*, 391 F. Supp. 2d 895 (D. Utah 2007). It is another case involving on-reservation rather than off-reservation conduct. *Id.* at 918. Moreover, the respondents fail to disclose that the district court decision they cite was then *reversed*, with the Tenth Circuit holding the tribal court had no jurisdiction

[6] The Ninth's Circuit first decision in *Bugenig* was reversed after an on banc rehearing – but not on the *Montana* issue. *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1212 (9th Cir. 2001) ("*Bugenig II*"). *Bugenig II* held that there had been an express delegation of congressional authority to the tribe that conferred jurisdiction. *Id.* This issue is discussed in Section III below.

over *any* of the claims brought against nonmembers, on or off-reservation. *MacArthur v. San Juan Cnty.*, 497 F.3d 1057, 1077 (10th Cir. 2007).

Respondents newly cite *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996). Like the *Wisconsin v. EPA* case cited previously by respondents and extensively analyzed by this Court, *City of Albuquerque* involves a delegation of authority to a tribe under the Clean Water Act.[7] *Id.* at 423-24. As with *Wisconsin v. EPA*, the respondents again seek to spin *City of Albuquerque* as a *Montana* case. It is not. As the *City of Albuquerque* court explained:

> Under the statutory and regulatory scheme, tribes are not applying or enforcing their water quality standards beyond reservation boundaries. *Instead, it is the EPA which is exercising its own authority in issuing NPDES permits in compliance with downstream state and tribal water quality standards.* In regard to this question, therefore, the 1987 amendment to the Clean Water Act clearly and unambiguously provides tribes the authority to establish NPDES programs in conjunction with the EPA. . . . [T]he EPA has the authority to require upstream NPDES dischargers, such as Albuquerque, to comply with downstream tribal standards.

Id. at 425. *City of Albequerque* therefore undercuts the respondents' argument, and reinforces this Court's correct holding that Clean Water Act cases do not support an

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[7] The Clean Water Act authorizes the EPA to delegate its national pollutant discharge eliminations system (NPDES) permitting authority under the Clean Water Act to the individual states upon application, assurances that the state's program meets the minimum qualifications to manage the federal program, and EPA approval. 33 U.S.C. § 1342(b). The U.S. Code also authorizes the EPA to treat the tribes as states under the Clean Water Act and permits the EPA to delegate NPDES permitting authorities to the tribes provided the tribe applies and meets the applicable requirements. 33 U.S.C. § 1377(e). The EPA has not delegated it's NPDES authority to the White Earth Band. https://www.epa.gov/tribal/tribes-approved-treatment-state-tas

argument for off-reservation jurisdiction under *Montana*. These cases are instead properly read as an exercise of federal jurisdiction, not tribal jurisdiction.

Beyond these new cases, the respondents offer further argument on cases already analyzed by the Court – particularly *Wisconsin v. EPA*, *Montana v. EPA*, *FMC Corporation*, and *API* – but nothing new. None of these cases holds that tribes can exercise jurisdiction under *Montana* over off-reservation activities that have an on-reservation impact.

The DNR does not re-brief the issues here, relying on its prior briefing and three cases in particular – *Plains Commerce*, *Hornell Brewing* and *API*.[8] These cases contain clear and unambiguous holdings from the Supreme Court and Eighth Circuit that *Montana* and its progeny only permit tribal regulation of nonmember conduct *inside* the reservation, and then only if the other conditions of *Montana* are met. *Plains Commerce*, 554 U.S. at 338; *API*, 609 F.3d at 940; *Hornell Brewing Co. v. Rosebud Sioux Tribal Ct.*, 133 F.3d 1087, 1091 (8th Cir. 1998). This Court correctly decided this issue, and there is no reason to revisit it.

III. THE BAND DOES NOT HAVE A CONGRESSIONAL DELEGATION OF AUTHORITY OVER DNR.

In their supplemental briefing, the respondents advance an entirely new argument – that the Band has a congressional delegation of authority to regulate the conduct of DNR

[8] Because the respondents did not initially brief the *Montana* issue at all, the most relevant briefing is in the DNR's reply brief filed in the Eighth Circuit (where the tribal parties did brief the issue). The DNR submitted this brief to this Court with its December 20 supplemental submission in response to the Court's request for additional briefing on this issue. (*See* DNR Eighth Circuit Reply at 4-10.)

officials if that conduct might impact the reservation. (Respondents Supplemental Br. at 17-23.) For this proposition, the respondents rely on *Bugenig II* – where the Ninth Circuit held that a congressional act dividing an existing reservation among tribes, and ratifying one tribe's constitution and civil laws, gave that tribe the authority to regulate logging on the reservation. 266 F.3d at 1212. The respondents allege the Band has a similar delegation of congressional authority that permits civil jurisdiction over DNR officials for off reservation conduct that impacts the reservation. There are at least two fatal defects in this argument.

First, congress can only delegate jurisdiction to tribes over nonmembers for conduct within a reservation. As *Bugenig II*, itself holds:

> The Supreme Court has stated, repeatedly, that Congress can delegate authority to an Indian tribe to regulate the conduct of non-Indians on non-Indian land *that is within a reservation*.

Id. at 1210 (emphasis added). Here, the conduct at issue is not occurring on lands within the reservation, and no inquiry needs to be made into whether there is congressional delegation of authority over DNR officials because congress would have no authority to make such a delegation. *Id.*

Second, the Band has no delegation of congressional authority analogous to that of the Hoopa Valley Tribe in *Bugenig II*. In *Bugenig II*, the court considered the impact of a settlement act passed by Congress that dealt not just with allotment and compensation issues, but also partitioned a reservation which had originally been divided among four tribes with no grant of any particular jurisdiction to any particular tribe. *Id.* at 1206. Congress therefore acted to confirm the civil jurisdiction of the Hoopa Valley Tribe in

various ways to a portion of the reservation that had been allocated to it. *Id.* at 1212. Congress did so by explicitly affirming that the tribe's governing documents conferring civil jurisdiction inside the reservation were "ratified and confirmed." *Id.*

The respondents argue the same language appears in the White Earth Reservation Land Settlement Act of 1985 – giving the Band the same delegation. (Respondents Supplemental Br. at 20.) It does not, and the language of the two settlement acts is not analogous. The "ratified and confirmed" language of the White Earth Reservation Land Settlement Act concerns property ownership, not civil jurisdiction. The relevant language of the two settlement acts is as follows:

Language of the Hoopa-Yurok Settlement Act **Pub. Law 100-580, Sec. 8, 102 Stat. 2924** **(emphasis added)**
The existing governing documents of the Hoopa Valley Tribe and the governing body established and elected thereunder, as heretofore recognized by the Secretary, are hereby *ratified and confirmed.*
Language of the White Earth Reservation Settlement Act of 1985 **Pub. Law 99-264, Sec. 5 (c), (d), 100 Stat. 61** **(emphasis added)**
(c) As to any allotment which was granted to an allottee who had died prior to the selection date of the allotment, the granting of such allotment is hereby *ratified and confirmed*, and shall be of the same effect as if the allotment had been selected by the allottee before the allottee's death: Provided, That the White Earth Band of Chippewa Indians shall be compensated for such allotments in the manner provided in sections 6, 7, and 8. (d) As to any allotment that was made under the provisions of the Treaty of March 19, 1867 (16 Stat. 719), and which was reallotted under the provisions of the Act of January 14, 1889 (25 Stat. 642), such reallotment is hereby *ratified and confirmed*.

As a result, there is no congressional delegation of any civil jurisdiction to the Band over nonmembers in the 1985 settlement act, let alone civil jurisdiction over state officials for issuing off-reservation permits. Any such delegation would need to be express. *Bugenig II*, 266 F.3d at 1211. There is no express delegation here. The delegation would also need to be lawful, which it would not be if it conferred jurisdiction over nonmembers for off-reservation activities. *Id.* at 1210, 1211. Simply put, there is not and cannot be a

congressional delegation of civil jurisdiction to the Band for the off-reservation actions of state officials.

IV. THERE IS NO NEW EVIDENCE MERITING RECONSIDERATION

In their original brief in support of their motion for reconsideration, the respondents assert that new evidence merits reconsideration of the Decision. (Respondents Original Br. at 9-11.) The evidence concerns aquifer breaches associated with the construction of Line 3. This evidence does not establish a basis for reconsideration.

First, the aquifer breaches were not allowed or allowable under any DNR permit. The appropriation permit DNR issued for the Line 3 replacement project was for construction/trench dewatering.[9] It does not cover or allow breaches of aquifers, which is why DNR is now taking enforcement actions for the breaches.[10] Simply put, there is no DNR permit or conduct to challenge with respect to the aquifer breaches.

Second, as with everything else in this case, the new evidence concerns the off-reservation actions or inactions of DNR. The respondents' efforts to muster more evidence of things happening off-reservation doesn't strengthen their argument for tribal court jurisdiction because, as this Court correctly held, the Band's courts do not have jurisdiction over off-reservation conduct of nonmembers.

Relatedly, the respondents expend considerable effort in both reconsideration briefs arguing that this Court ignored their allegations of on-reservation impacts. (Respondents

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[9]https://files.dnr.state.mn.us/features/line3/decisions/04june2021-update-trench-watering-decisions.pdf.
[10]https://files.dnr.state.mn.us/features/line3/restoration-order-enbridge-energy-9-16-21.pdf

Opening Br. at 2, 6-9; Respondents Supplemental Br. at 1-2, 7-8, 13-14.) Neither the Court nor the DNR ignored these allegations. In truth, the respondents did not plead on-reservation impacts. As this Court recognized, the complaint instead pled impacts on the Mississippi watershed and wild rice beds in the ceded territories. (*See* Compl. ¶¶ 50-51; Decision at 8-9.) But for purposes of the appeal, the DNR did not argue the case should be dismissed because the respondents failed to plead on-reservation impacts. DNR argued that the case should be dismissed because the challenged conduct occurred off-reservation, and did not confer jurisdiction on the Band's courts even if there was an on-reservation impact. The Court clearly understood the issue in the same way, and referenced the respondents' submissions in their motion papers and appellate papers of on-reservation impacts (even if not technically supported by their complaint). (Decision at 8-9.) The Court then resolved the jurisdictional issue by holding that *Montana* requires on-reservation conduct, not just on-reservation impacts. (*Id.* at 14.) The new evidence does not change the pertinent facts of the case.

V. IF THE COURT REVERSES ITS DECISION ON THE *MONTANA* ISSUE, IT MUST THEN TAKE UP THE ISSUE OF SOVEREIGN IMMUNITY.

As the Court will recall, the DNR made an independent argument for dismissal of this matter based on sovereign immunity to suit in tribal courts. (Decision at 16.) Having decided that the Band's courts lacked jurisdiction under the *Montana* framework, the Court declined to decide this issue. (*Id.*) If the Court were to overturn its holding on *Montana*, it would then need to resolve the DNR's sovereign immunity challenge before it could remand. DNR relies on its prior briefing on this issue.

CONCLUSION

For the reasons stated above, this Court should deny respondents' motion for reconsideration.

Dated: April 20, 2022

Respectfully submitted,

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