

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.

DNR’S RESPONSE TO PLAINTIFFS’ MOTION FOR INJUNCTIVE RELIEF

Since the inception of this litigation, the Minnesota Department of Natural Resources and its officials (“DNR”) have engaged with the tribal court in good faith, briefed the merits of its sovereign immunity and jurisdictional defenses on an expedited manner, and tried to create an orderly and timely process for resolving the jurisdictional issues. Plaintiffs, in contrast, have pressed the tribal court for injunctive relief before the jurisdictional issues are resolved. The result has been parallel, expedited litigation in two forums – here and in federal court. This Court should not consider the motion for an injunction until the jurisdictional issues have been resolved.

As of September 24, the two cases were postured for timely and orderly resolution. DNR had filed a federal action, and then a related appeal. DNR sought a federal injunction and expedited resolution of the federal action to ensure that issues related to jurisdiction were resolved with finality before other issues were litigated. DNR then filed this appeal, to give this Court an

opportunity to weigh in on the jurisdictional questions while the federal suit was pending. When the tribal district court correctly stayed its proceedings, DNR notified the Eighth Circuit, and withdrew its request for federal preliminary injunctive relief. (See Ex. A, DNR letter to Eighth Circuit at 2.) DNR also filed its merits briefs in this Court and the Eighth Circuit well before their due dates to further expedite an orderly resolution of these matters.

Plaintiffs have now filed a motion in this Court that puts the parties back on the path to a disorderly resolution of the lawsuits. On September 24, the Band moved this Court for a preliminary injunction requiring DNR officials to revoke state-issued permits for an off-reservation project. The requested injunction is unprecedented in its scope and jurisdictional reach.¹

To allow for an orderly resolution and because the question of jurisdiction remains disputed, DNR requests that the Court summarily stay or deny the pending motion for injunctive relief. Both actions can then move forward. If DNR were forced to substantively litigate Plaintiffs' motion for injunctive relief, DNR would lose the benefit that sovereign immunity confers – the ability to avoid suit in a foreign court. *See, e.g., Parton v. Ashcroft*, 16 F.3d 226, 228 (8th Cir. 1994); *McSurely v. McClellan*, 697 F.2d 309, 317 (D.C. Cir. 1982); *Briggs v. Goodwin*, 569 F.2d 10, 60 (D.C. Cir. 1977).

In addition to this response, DNR also relies on its previously filed merits brief, which explains why the tribal court lacks subject matter jurisdiction to adjudicate claims against DNR officials for off-reservation conduct.

¹ Without addressing the merits of the Plaintiff's requested injunctive relief, DNR notes that the request is replete with gross mischaracterizations and falsehoods. For example, on page 4 of its memo Plaintiff's state: "DNR's failures resulted in *zero Enbridge compliance with any construction plans or contact protocols* right at the beginning of construction." (Emphasis added). This statement is at best an unsubstantiated, gross exaggeration and in fact is patently false.

CONCLUSION

For the reasons set forth above and in DNR's merits brief, this Court should summarily deny Plaintiffs' request for preliminary injunctive relief.

Dated: October 4, 2021

Respectfully submitted,

KEITH ELLISON
Attorney General
State of Minnesota

/s/ Oliver J. Larson

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ATTORNEYS FOR THE DEFENDANTS-
APPELLANTS

EXHIBIT A



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Minnesota Attorney General Keith Ellison
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September 15, 2021

Via ECF

Eighth Circuit Court of Appeals
Thomas F. Eagleton Courthouse
111 South 10th Street, Room 24.329
St. Louis, MO 63102

Re: *Minnesota Department of Natural Resources, et al., Appellants, v. Judge David DeGroat, in official capacity as Chief Judge of the White Earth Band of Ojibwe Tribal Court, Appellee*
Court File No. 21-3050

To the Court of Appeals for the Eighth Circuit:

I write to provide the Court with an update on this matter, which concerns a challenge to the jurisdiction of the White Earth Band of Ojibwe Tribal Courts to hear a claim brought by the White Earth Band of Ojibwe against Minnesota Department of Natural Resources officials (“DNR”) in tribal court.

In the tribal court matter, the Band is seeking (among other things) a preliminary injunction requiring that DNR officials revoke state-issued water appropriation permits for the Line 3 replacement project. No part of Line 3 is within the boundary of the White Earth Reservation.

DNR unsuccessfully moved the tribal court to dismiss based on its lack of jurisdiction and the state’s sovereign immunity. It then filed suit in federal court to obtain declaratory and injunctive relief preventing further tribal court proceedings.

The federal district court dismissed holding that the defendants (the Band and the Chief Judge of the tribal court) have sovereign immunity from suit in federal court. DNR filed this appeal on Friday, and Monday filed a motion for a preliminary injunction against further proceeding in the tribal district court and expedited treatment of this appeal.

The impending event that necessitated DNR’s motion for a preliminary injunction was that the tribal court had scheduled an evidentiary hearing for September 20 on the Band’s request for a preliminary injunction requiring DNR officials to rescind the State-issued permits.

Monday, DNR also filed a notice of interlocutory appeal and its principal brief in the White Earth Band of Ojibwe Court of Appeals – seeking review of the lower tribal court’s ruling that it had subject matter jurisdiction to hear claims against DNR officials.

Yesterday, the lower tribal court stayed proceedings until the tribal court of appeals resolves the appeal. A copy of the order is attached.

DNR is therefore modifying the relief requested in its September 13 motion to this Court. DNR withdraws its (motion) request for entry of a preliminary injunction, without prejudice to its right to re-file a motion seeking the same relief if proceedings in the lower tribal court resume.

DNR still seeks expedited briefing and resolution of this appeal for two reasons. First, it is not clear whether the tribal court of appeals will hear the interlocutory appeal – it may dismiss it. Second, the schedule for resolution of the tribal court appeal is relatively quick. DNR has further expedited that process by filing its merits brief with its tribal appeal. As a result, DNR anticipates that the tribal appeal could be resolved in as soon as 45-60 days. If the tribal court of appeals affirms the lower court's determination that it has subject matter jurisdiction, proceedings in the lower court would recommence and the parties in this federal action would be back litigating the necessity of a preliminary injunction from this Court.

By expediting the briefing and resolution of this appeal, the Court would substantially reduce the prospect of having to take up a preliminary injunction motion before it reaches the merits of the appeal. This appeal also presents pure questions of law that are ripe for decision, and matters of significant importance.

DNR will continue to challenge the district court's denial of its motion for preliminary injunction, and will ultimately seek a remand to the federal district court with an instruction to enter an injunction against further lower tribal court proceedings. Stated differently, DNR will continue to ask for a preliminary injunction at the end of this appeal while withdrawing for now its request for a preliminary injunction while the appeal proceeds.¹

With expedited briefing and resolution of this appeal, DNR is hopeful that the issues related to a preliminary injunction can be resolved with the merits of this appeal rather than through motion practice – a benefit to the Court and the parties.

Sincerely,

/s/ Oliver J. Larson

OLIVER J. LARSON

Assistant Attorney General

¹ Because DNR has not sued in this matter to block proceedings in the tribal court of appeals, those proceedings are not affected by this appeal.

Attachment 1

**White Earth Band of Ojibwe
Tribal Court
GC21-0428**

**Order Dismissing DNR and Staying
Further Proceedings Pending Appeal
(9/14/21)**

White Earth Band of Ojibwe
Tribal Court
Court Administrator Cover Sheet

Date: September 14, 2021
Regarding Case: General Civil
File No. GC21-0428

To: (list names and addresses)

Oliver Larson
Assistant Attorney General via E-mail

Colin O'Donovan
Assistant Attorney General via E-mail

Frank Bibeau
Attorney via E-mail

Joe Plumer
Attorney via E-mail

Lenny Fineday
Attorney via E-mail

Enclosed Documents: Order Dismissing DNR and Staying Further Proceedings Pending Appeal

By:  _____

Jodie Erb, Clerk of Court
White Earth Tribal Court
PO Box 289
White Earth, MN 56591
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WHITE EARTH BAND OF OJIBWE
TRIBAL COURT

MANOOMIN; THE WHITE EARTH BAND
OF OJIBWE,

Plaintiffs,

vs.

ORDER DISMISSING DNR AND STAYING
FURTHER PROCEEDINGS PENDING
APPEAL

MINNESOTA DEPARTMENT OF
NATURAL RESOURCES,

Defendants.

Court File No. GC21-0428

In this case the 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 allege causes of action based upon tribal codes, the 1855 Treaty with the Chippewa, (the “1855 Treaty”), and the U.S. Constitution. The Defendants moved this Court to dismiss the action, asserting that all Defendants are immune from suit and that this Court lacks subject matter jurisdiction over the causes of action alleged herein under Montana v. United States, 450 U.S. 544 (1981).

On August 18, 2021 this Court, per the Honorable Chief Judge David DeGroat, denied the motion to dismiss in a general order that did not differentiate between the two defenses invoked by the Defendants. Judge DeGroat then recused and the undersigned issued an order clarifying the order denying dismissal on August 27, 2021. In that order the Court indicated it would rule on the Defendants’ stay request once an appeal was filed and also gave the Plaintiffs time to show cause why Defendant DNR should not be dismissed as a party on sovereign immunity grounds.

The Plaintiffs then requested hearing on their motion for a preliminary injunction and also indicated that they did not oppose dismissal of the Minnesota DNR on sovereign immunity grounds. The Court scheduled hearing on the preliminary injunction for September 20, 2021 after failing to get a response from the Defendants on scheduling.

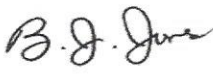
The Defendants have now filed an appeal dated September 13, 2021 from this Court’s

orders denying dismissal.¹

ORDER

1. Defendant Department of Natural Resources is DISMISSED as a party Defendant;
2. Further proceedings in this matter shall be STAYED pending appeal except insofar as necessary for this Court to protect its jurisdiction. The hearing set for September 20, 2021 is hereby cancelled.

Date: 9/14//21

By: 
Associate Judge BJ Jones
White Earth Tribal Court

¹ This Court will leave the issue of timeliness up to the Court of Appeals and the issue whether this appeal as a matter of right