White Earth Band of Ojibwe
Tribal Court

Date: July 26, 2022
Regarding Case: Appeals
File No. AP21-0516

To:

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Enclosed Documents: **Order on Motion for Reconsideration dated July 26, 2022**

By: JEC

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WHITE EARTH BAND OF OJIBWE
COURT OF APPEALS

Minnesota Department of Natural Resources, et al.,

Appellants,

ORDER ON MOTION FOR RECONSIDERATION

v.

Manoomin, et al.,

File No. AP21-0516

Respondents,

This Court issued its Opinion dismissing Respondents' Complaint on March 10, 2022. On March 25, Respondents filed a Motion for Reconsideration under Rule 24 of the White Earth Band of Ojibwe Rules of Appellate Procedure. On March 29, the Court issued an order requesting the parties to address specific legal issues.[1] Respondents filed a Supplemental Brief on April 6, 2022. Appellants filed their Opposition to Motion for Reconsideration on April 20, 2022.

Rule 24 provides:

Reconsideration

(A) **Time:** Either party may file a motion for reconsideration of a final appellate court decision within fifteen (15) days of receipt of the final decision or twenty (20) days from publication, whichever time is lesser.

(B) **Criteria:** Reconsideration will only be granted under the circumstances where the moving party proves by a substantial weight of the evidence presented in the motion that there is new evidence in existence which was not considered by the appellate court and which is likely to have altered the final decision if this evidence had be [sic] introduced.

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[1] The Court requested the parties to brief the following questions:

- Is there legal authority in support of the conclusion that a Tribal Court should apply only Tribal law and should not apply federal law in determining subject matter jurisdiction over nonmembers (other than legal authorities cited by Respondents in their Motion)?
- Is there legal authority in support of the conclusion that a Tribal Court can have subject matter jurisdiction in a lawsuit against a nonmember under the *Montana* doctrine when the allegedly unlawful conduct of the nonmember occurs off the Reservation but results in an impact on the Reservation (other than legal authorities cited by Respondents in their Motion)?

(C) **Definition:** New evidence is defined as evidence of any sort which existed at the time of the final appellate court decision but which was unknown or unavailable to the parties despite a diligent search for it.

Respondents assert three grounds for reconsideration: (1) "[T]he Court erred by ignoring Tribal law conferring subject matter jurisdiction over a particular case of this type. In Tribal Court, the Band's Judicial Code is binding, and it is improper for the Court to predict how a federal court might resolve jurisdictional questions." (2) "[T]he Court failed to appropriately consider the on-Reservation impacts to Manoomin caused by DNR's activities and conduct. The Court's Order focused only on *off-reservation* impacts, rather than analyzing all alleged harm set forth in Respondents' Complaint." (3) "[T]here is new evidence relating to recently uncovered thermal imaging showing negative impacts caused by DNR's dewatering activities and aquifer breaches that is highly relevant to this case, and should be considered by the Tribal Trial Court in developing a full and complete factual record." Motion for Reconsideration, p. 1-2.

In their Supplemental Brief, Respondents offered a fourth ground for reconsideration: "[C]ongressional delegation of authority provides another basis for this Court to exercise Tribal jurisdiction in this case. The establishment of the White Earth Reservation, approval of the Minnesota Chippewa Tribe's governing documents, the powers expressed in the Tribe's Constitution, the fact that allotments at the White Earth Reservation did not extinguish the Band's treaty-protected usufructuary rights, and the scope of the regulation expressed in the Rights of Manoomin collectively constitute an express delegation of authority by Congress to the White Earth Band. . . . This delegation of authority confers Tribal jurisdiction over DNR's activities and conduct taking place within the boundaries of the White Earth Reservation as alleged by Respondents." Supplemental Brief, p. 3.

The Court will consider each of the Respondents' arguments.

I. APPLICATION OF FEDERAL LAW TO DETERMINE SUBJECT MATTER JURISDICTION

Respondents argue that "the Court erred by ignoring Tribal law conferring subject matter jurisdiction . . . . [T]he Band's Judicial Code is binding and it is improper for the Court to predict how a federal court might resolve jurisdictional questions. . . . The Court's starting point [finding that the Tribe's code authorized jurisdiction] should also have been the ending point of the Court's jurisdictional analysis." Motion for Reconsideration, pp. 1-2.

We agree with Respondents' contention that "tribal courts are best qualified to interpret and apply tribal law." *Iowa Mut. Ins. Co. v. La Plante*, 480 U.S. 9, 16 (1987). In this case, this Court did not ignore Tribal law. Our Opinion stated that "White Earth has authorized its courts to hear cases arising under tribal laws that seek to enforce treaty rights or to protect natural resources,

including resources outside the Reservation,"[2] citing White Earth Band Judicial Code, Title 1, Courts, Ch. II Jurisdiction, section 1(j). Opinion, p. 6.

We do not agree that the Court should ignore federal common law in determining the reach of Tribal Court jurisdiction. The application of federal law to this issue is well established in Tribal Courts throughout the United States.

As stated by the Crow Court of Appeals, Montana, "The first step in determining the Tribal Court's jurisdiction is to see whether it is granted by the Crow Tribal Code. . . . The second step in determining jurisdiction is to see whether it is limited by Federal law. . . . The limits of Tribal court jurisdiction are ultimately matters of federal law which the Tribal Courts are competent to apply and, by the same token, obliged to follow." *In re Custody of R.W.O.E.*, CIV. APP. DOCKET NO. 98-377, 2001 Mont. Crow Tribe LEXIS 12, **10,**12 (Crow Court of Appeals, Montana, May 25, 2001) (finding that the Tribal Court had jurisdiction under both *Montana* exceptions to adjudicate non-member's interest in custody of a child who is an enrolled member of the tribe). The Crow Court of Appeals has "consistently held that it is error for the Tribal Court not to analyze its jurisdiction under federal law in any case involving claims against a non-Tribal member." *Eggers v. Stiff*, CIV. APP. DOCKET NO. 00-06, 2001 Mont. Crow Tribe LEXIS 1, **12 (Crow Court of Appeals, Montana, Nov. 20, 2001) (quotation omitted) (holding that Tribal Court had jurisdiction under both *Montana* exceptions to enjoin defendant's conduct at the parties' place of work, a Tribal community college on Tribal land). Therefore, "even when the parties fail to raise it as an issue, the Tribal court is obliged to satisfy itself that it has subject matter jurisdiction as a matter of Federal law in every case involving a defendant or respondent who is not an enrolled member of the Crow Tribe." *Id.* at **12-**13.

Similarly, in cases involving a non-member defendant, the Navajo Nation Supreme Court has acknowledged "the need to establish bases for jurisdiction under both Navajo Nation and federal common law." *John Doe BF v. Diocese of Gallup*, No. SC-CV-06-10, 2011 Navajo Sup. LEXIS 16, *14 (Navajo Nation Supreme Court, Sept. 9, 2011) (remanding the case against non-members to the Tribal district court "for a full jurisdictional inquiry"). The Navajo Nation Supreme Court stated, "We must emphasize that establishment of jurisdiction under one set of laws should not end the inquiry where jurisdiction is disputed in a civil matter that concerns a non-member." *Id.* at *10. *See also Dale Nicholson Trust v. Chavez*, No. SC-CV-69-00, 2004 Navajo Sup. LEXIS 10 (Navaho Nation Supreme Court 2004) (threat by state officials to seize land within Navajo Nation may invoke Tribal Court jurisdiction under *Montana* exceptions).

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[2] In their Complaint, Respondents alleged jurisdiction and venue under, among other provisions, White Earth Band Judicial Code, Title 1, Courts, Ch. II Jurisdiction, section 1(j), which was adopted by Resolution No. 019-21-002. Complaint, pp. 24-26. In their Motion for Reconsideration, Respondents cite to section 1(b), which grants jurisdiction to actions arising under White Earth codes "provided that the action or violation occurs within the boundaries of the White Earth Reservation, including all lands, islands, waters or any interest therein hereafter added to the Reservation." Motion for Reconsideration, pp. 2-3.

Other Tribal Courts have applied the *Montana* doctrine to the issue of subject matter jurisdiction in Tribal Court. *See, e.g., Manygoats v. Atkinson Trading Co.*, No. SC-CV-62-2000, 2003 Navajo Sup. LEXIS 10 (Navajo Nation Supreme Court, Aug. 12, 2003) (applying *Montana* test to an employment dispute arising on non-Indian fee land within the exterior boundaries of the Navajo Nation, and finding the conduct within both exceptions); *Lilley v. Davis*, Appeal No. 293, 2000 Mont. Fort Peck Tribe LEXIS 19 (Fort Peck Tribal Court of Appeals, Montana, Feb. 14, 2000) (applying *Montana* test to allegedly tortious conduct that took place on non-Indian, alienated land, lying within the exterior boundaries of the reservation, and finding both exceptions applicable); *Bugenig v. Hoopa Valley Tribe*, No. A-95-020, 5 NICS App. 37 (Hoopa Valley Tribal Court of Appeals, April 23, 1998) (holding that Tribal Court had jurisdiction over non-Indian who cut timber on fee land on reservation per Congressional delegation of authority and under second *Montana* exception).

The practice of Tribal Courts applying the federal *Montana* doctrine to the question of subject matter jurisdiction is also referenced in federal cases cited by the parties and the Court. *See FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 920 (9th Cir. 2019) ("After years of litigation, the Tribal Court of Appeals held in 2014 that the Tribes have regulatory and adjudicatory jurisdiction over FMC under both *Montana* exceptions."); *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1090 (8th Cir. 1998) (noting that Rosebud Sioux Supreme Court held that "even if *Montana* were applicable to this case, the Breweries' conduct satisfied both of the *Montana* exceptions" and Tribal Court had subject matter jurisdiction); *Attorney's Process & Investigation Servs. v. Sac & Fox Tribe*, 609 F3d 927, 933 (8th Cir. 2010) (noting that the Appellate Court of the Sac and Fox Tribe of the Mississippi in Iowa "concluded that the tribal courts had jurisdiction over the Tribe's tort claims under *Montana v. United States*"); *Ute Indian Tribe of the Uintah & Ouray Rsrv. v. McKee*, 32 F.4th 1003, 1005-06 (10th Cir. 2022) (Tribal Court denied motion to dismiss on ground "that it had subject-matter jurisdiction because the Ute Tribe has sovereign authority to manage the use of its territory and natural resources by tribe members and nonmembers. The tribal court further held that it had subject-matter jurisdiction also under *Montana* . . . because the Tribe can regulate activities of all non-Indians who enter a consensual relationship with the Tribe or whose conduct imperils the Tribe's political integrity, economic security, or health and welfare.").

Respondents argue that this Court should decide only Tribal law issues and let federal courts decide the federal jurisdictional question ("it is uncertain why this Court would go ahead and issue a speculative decision interpreting federal law when it is aware of a pending Eighth Circuit appeal reviewing the same jurisdictional question," Respondents' Motion for Reconsideration, p. 5). But we agree with the Tribal Courts cited above that Tribal Courts must determine both whether their codes authorize jurisdiction over non-Indians and whether federal law permits jurisdiction. To allow this case to proceed – in the face of compelling jurisdictional defenses – may place a huge drain on the time and resources of the parties and the Tribal Court.

Respondents make one new argument in their Supplemental Brief – that the Tribe's inherent sovereign authority supports jurisdiction over Appellants' activities in this case, regardless of whether jurisdiction is based on *Montana*'s second exception. We agree that Tribes retain

inherent sovereign authority. *See United States v. Wheeler*, 435 U.S. 313, 323, 328 (1978) ("until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.") (Tribe had "power to punish offenses against tribal law committed by Tribe members"); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (Tribe's "power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management."). *Montana* acknowledged that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Montana v. United States*, 450 U.S. 544, 565 (1981).

Some courts have recognized that "a tribe's inherent authority over tribal land may provide for regulatory authority over non-Indians on that land without the need to consider *Montana*." *Grand Canyon Skywalk Dev., LLC v. 'SA' Nyu Wa Inc.*, 715 F.3d 1196, 1204 (9th Cir. 2013). In that case, the Ninth Circuit Court of Appeals applied the holding of *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011), that "where the non-Indian activity in question occurred on tribal land, the activity interfered directly with the tribe's inherent powers to exclude and manage its own lands, and there are no competing state interests at play, the tribe's status as landowner is enough to support regulatory jurisdiction without considering *Montana*, and unless a limitation applies, adjudicatory jurisdiction, as well." *Grand Canyon Skywalk*, 715 F.3d at 1204 (quotation omitted). But, in each of the cases cited by Respondents, the defendant's allegedly unlawful activity subject to Tribal Court jurisdiction occurred on reservation land. *See id.* (tribal court could conclude that it had jurisdiction over dispute involving Tribe's non-Indian partner in development of Grand Canyon Skywalk on tribal land)[3]; *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1419 (8th Cir. 1996) ("The exercise of tribal jurisdiction over activities of non-Indians is an important part of tribal sovereignty.") (Tribal court could find jurisdiction in dispute between Tribe and its gaming operation partner on tribal lands over application of arbitration clause); *Navajo Nation v. Intermountain Steel Bldgs., Inc.*, 42 F.Supp.2d 1222 (D.N.M. 1999) (federal court will defer to Tribal court in case involving Navajo plaintiffs and building located on Navajo land).

We conclude that the Tribe's inherent sovereign authority does not establish jurisdiction over Appellants' activities off Tribal land in this case. *See Merrion*, 455 U.S. at 142 ("We do not question that there is a significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe.").

We affirm that our application of federal law to the question of Tribal Court subject matter jurisdiction was proper.

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[3] The Court also found that "if *Montana* applied, either of its two recognized exceptions could also provide for tribal jurisdiction in this case." *Grand Canyon Skywalk*, 715 F.3d at 1205.

II. CONSIDERATION OF ON-RESERVATION IMPACTS IN DETERMINING JURISDICTION

Respondents argue that the Court "failed to consider whether Respondents' claims involving *on-reservation* impacts to the Manoomin where Appellants' conduct originates *off-reservation*. . . . [N]owhere in the Order did the Court consider the on-reservation impacts to Manoomin." Motion for Reconsideration, p. 6.

We find Respondents' assertions curious because the Court devoted several paragraphs to the issue of on-reservation versus off-reservation impacts of Appellants' activities. Opinion, pp. 8-9. We concluded that "Given Respondents' brief allegations as to on-reservation impact, we acknowledge that Respondents have pleaded such an on-reservation impact." Opinion, p. 9.

The Court considered Respondents' argument that "nonmember activities off reservation that threaten tribal interests on reservation are sufficient to invoke subject matter jurisdiction," but, in each of the cases cited by Respondents for that proposition, "the nonmember activity that was the basis for jurisdiction occurred on tribal land." Opinion, p. 9.

The one exception is *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001). Respondents do not present any new arguments to dissuade this Court from its conclusion "that *Wisconsin* does not support extending the tribal court's jurisdiction to nonmember activities off the reservation. We believe *Wisconsin* may be understood as a case in which Congress authorized the EPA to grant authority to Tribes to regulate water quality when local pollution sources threatened tribal waters." Opinion, p. 13.[4]

Respondents cite additional cases in support of their argument that a Tribe's inherent sovereign authority grants jurisdiction over off-reservation conduct that results in on-reservation impacts. But each of the cases cited involved on-reservation activity. *See Rincon Mushroom Corp. of Am. v. Mazzetti*, CASE NO. 09cv2330-WQH-POR, 2010 U.S. Dist. LEXIS 99926 (S.D. Ca. Sept. 21, 2010) (dismissing federal action due to "failure to exhaust tribal remedies" when Tribe enacted environmental code that applied to all land within reservation, including plaintiff's non-Indian

[4] Respondents cite *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996), another case involving Tribal enactment of clean water standards per EPA authorization under the Clean Water Act. The city argued that the Act "does not permit tribal standards to be enforced beyond tribal reservation boundaries." *Id.* at 421. The Court held that "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. . . . [T]he EPA has the authority to require upstream NPDES dischargers, such as Albuquerque, to comply with downstream tribal standards." *Id.* at 424. Respondents also provided the Court with an Order from the Western District of Washington in *The City of Seattle v. Sauk-Suiattle Tribal Court, et al.*, No. 2:22-cv-142, 2022 U.S. Dist. LEXIS 117811 (W.D. Wash. July 5, 2022). There, the District Court stayed the federal lawsuit pending Tribal Court proceedings (exhaustion) and noted that "nothing the Court has said about the plausibility of jurisdictional arguments should be considered as commentary on the relative merit of those arguments." *Id.* at *12.

fee land)[5]; *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1204 (9th Cir. 2001) (holding that Congress delegated authority to Tribe to regulate logging by a non-Indian on fee land within the reservation); *MacArthur v. San Juan County*, 497 F.3d 1057 (10th Cir. 2007) (holding that Tribal court did not have jurisdiction over employment-related claims against county entities, officials, and employees when allegedly unlawful activity occurred within Navajo Nation but did not meet second *Montana* exception).[6]

We decline to reconsider our Opinion based on Respondents' argument that alleged on-reservation impacts justify Tribal Court jurisdiction.

III. NEW EVIDENCE

Respondents contend that "[f]ollowing the Court's March 10, 2022 Order, new factual evidence has come to light regarding DNR's dewatering activities relevant to this case." Motion for Reconsideration, p. 9.[7] Respondents cite to two documents – Jeffrey Broberg's report dated March 25, 2022 and a press release from Minnesota DNR dated March 21, 2022. Neither document, nor Respondents' explanation in their Motion, provide any "new evidence" pertinent to reconsideration of the Court's opinion on subject matter jurisdiction.

Mr. Broberg's report refers to "newly acquired high-definition thermal imaging designed to identify hydrologic disturbances causing upwelling groundwater." Motion for Reconsideration, p. 12. He discusses "ruptured artesian aquifers in three locations" and "six other sites with upwelling groundwater." Broberg Report, p. 5.

The DNR press release discusses investigation and enforcement activities related to Line 3 aquifer breaches in Clearwater County, Hubbard County (LaSalle Creek), and St. Louis County. The press release summarizes ongoing breach-related activities, beginning in August 2021. It is not clear which of these activities, if any, constitutes "new evidence." And, as Appellants note, the aquifer breaches are not related to the dewatering permits which are the focus of Respondents' action: "the aquifer breaches were not allowed or allowable under any DNR

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[5] In *Rincon Mushroom Corp. of Am. v. Mazzetti*, 490 F. App'x 11 (9th Cir. 2012), the Ninth Circuit panel affirmed the District Court's ruling that Plaintiff must exhaust Tribal remedies before making federal claims, but held that the case should be stayed rather than dismissed. *See also Rincon Mushroom Corp. of Am. v. Mazzetti*, Case No.: 3:09-cv-02330-WQH-JLB, 2022 U.S. Dist. LEXIS 67044 (S.D. Cal. March 15, 2022) (Tribal Court had jurisdiction under second *Montana* exception to order compliance with Rincon Environmental Enforcement Ordinance on property within reservation).

[6] Respondents also cite to *Montana v. United States EPA*, 137 F.3d 1135 (9th Cir. 1998), in which the State of Montana challenged the EPA's decision to grant treatment-as-state status to the Confederated Salish and Kootenai Tribes to promulgate water quality standards "that apply to all sources of pollutant emissions within boundaries of the [Flathead Indian] Reservation, regardless of whether the sources are located on land owned by members or non-members of the Tribe." *Id.* at 1138. As noted in our Opinion, the focus in *Montana* remained on *on-reservation activities* – pollution "sources . . . located on land owned by members or non-members of the Tribe." Opinion, p. 12.

[7] We note that Rule 24 authorizes reconsideration only on the ground of "new evidence."

permit," and therefore "there is no DNR permit or conduct to challenge with respect to the aquifer breaches." Appellants' Opposition, p. 14. Finally, the Broberg report and DNR press release do not describe any allegedly unlawful activity on the Reservation.

Respondents do not explain how this alleged new evidence establishes grounds for subject matter jurisdiction under the *Montana* exceptions. Even if this Court concluded that off-reservation conduct by non-Indians that resulted in on-reservation impacts justified jurisdiction, Respondents have not tied the "new evidence" to any on-reservation impacts.

We conclude that reconsideration based on new evidence is not warranted.

IV. CONGRESSIONAL DELEGATION OF AUTHORITY

For the first time, in their Supplemental Brief, Respondents contend that "congressional delegation confers jurisdiction on the White Earth Band to regulate DNR's activities and conduct at issue in this case." Supplemental Brief at 23.[8] This argument is plainly new and is not what a motion for reconsideration is intended to address.

Respondents argue that the 1867 Treaty establishing the White Earth Reservation, other enactments and eminent domain proceedings, and the Secretary of the Interior's approval in 1964 of the Minnesota Chippewa Tribe's Constitution constitute express delegation by Congress for the Tribe to exercise jurisdiction in this case.

Respondents rely on *Bugenig v. Hoopa Valley Tribe*, No. A-95-020, 5 NICS App. 37 (Hoopa Valley Tribal Court of Appeals, April 23, 1998) and *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201 (9th Cir. 2001) as authority to support their Congressional delegation theory of jurisdiction. This case involved cutting by Bugenig (a non-Indian) of timber on her fee land near the Tribe's White Deerskin Dance Ground, in violation of the Tribe's "ten year forest management plan." The question was whether the Hoopa Valley Tribal Court had jurisdiction to enforce the timber regulation against Bugenig. The Tribal Court acknowledged that the Dance Ground was "very ancient" and "sacred." Fee land, including the land at issue, constituted only one percent of the land on the Reservation. The Hoopa Valley Tribal Court of Appeals sustained the Tribal Court's jurisdiction on two grounds:

> [S]upport for the Hoopa Valley Tribe's assertion of jurisdiction over the one percent fee land located on the Hoopa Valley Indian Reservation is found in the plain language of the Hoopa-Yurok Settlement Act of 1988 and its legislative history. . . .

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[8] In their Supplemental Brief, Respondents cite to a law review article, Kekek Jason Stark, *Bezhigwan Ji-Izhi-Ganawaabandiyang: The Rights of Nature and Its Jurisdictional Application for Anishinaabe Territories*, 83 MONT. L. REV. 79 (Winter, 2022). Proposed amicus Niibi Center also cites to the Stark article. We appreciate the contributions of Professor Stark to the issues of Rights of Nature and Tribal Court jurisdiction. As he notes, "Whether the tribal rights of nature laws apply to non-members within Indian country and within the Tribe's treaty territories is complex and constantly evolving." *Id.* at 95.

> We further affirm the lower court's ruling that the *Brendale* standard as applied to the second *Montana* exception supports the right of the Hoopa Valley Tribe to implement neutrally applied regulations to reasonably restrict encroachment upon what tribal member and trial witness Byron Nelson referred to as 'that sacred place 'among the oak tops' on Bald Hill, where, the legends say, the immortal watch the people of the valley dance with the precious white deerskins and the sacred obsidian blades.'

Bugenig, 5 NICS App. at p. 49.

Bugenig brought an action in federal court seeking "declaratory and injunctive relief against the Tribe's exercise of regulatory jurisdiction over her land use and the tribal courts' exercise of adjudicatory jurisdiction over her disputes with the Tribe." *Bugenig v. Hoopa Valley Tribe*, 229 F.3d 1210, 1214 (9th Cir. 2000) (panel opinion overruled by en banc opinion). The Ninth Circuit Court of Appeals held that "Congress expressly delegated" "authority [to the Tribe] to regulate logging by a non-Indian on fee land that she owns, located wholly within the borders of the Tribe's Reservation." *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1204 (9th Cir. 2001) (en banc opinion).[9]

The Ninth Circuit Court found significant that "less than one percent of the [Reservation's] approximately 90,000 acres is presently owned by non-Indians." *Id.* at 1206. The Tribe's 1972 Constitution provided that "The jurisdiction of the Hoopa Valley Tribe shall extend to all lands within the confines of the Hoopa Valley Reservation boundaries . . . and to such other lands as may hereafter be acquired by or for the Hoopa Valley Indians," *id.* at 1212 (emphasis omitted), and that one of the Council's enumerated powers is to "safeguard and promote the peace, safety, morals, and general welfare of the Hoopa Valley Indians by regulating the conduct of trade and the use and disposition of property upon the reservation, provided that any ordinance directly affecting non-members of the Hoopa Valley Tribe shall be subject to the approval of the Commissioner of Indian Affairs . . . ." *Id.* at 1208. The Court found that Congress "ratified and confirmed" the Tribe's governing documents (including the Constitution) in the 1988 Hoopa-Yurok Settlement Act. *Id.* at 1213. In 1995, pursuant to the Constitution, the Tribe enacted the timber-harvesting plan that proscribed Bugenig's cutting of timber. *Id.* at 1208. The Commissioner of Indian Affairs approved the Tribe's timber-harvesting plan. *Id.* at 1215.

The Court concluded that Congress had expressly delegated authority to the Hoopa Valley Tribe to regulate timber harvest on the reservation, including on Bugenig's fee land, reasoning as follows: Congress ratified the Tribe's Constitution that extended the Tribe's "jurisdiction . . . to all lands within the confines of the Hoopa Valley Reservation boundaries"; the Tribe enacted its timber-harvesting plan pursuant to the Constitution's grant of authority to regulate "the use and disposition of property upon the reservation"; and the timber-harvesting plan's application to non-members was approved by the Commissioner of Indian Affairs. Thus, the Court found,

[9] References to the *Bugenig* federal court opinion will be to the Ninth Circuit's en banc opinion.

Congress approved the authority of the Tribe to regulate timber harvest by non-Indians on the reservation. *Id.* at 1217-18.

While Congressional delegation of authority is a viable ground to sustain jurisdiction in Tribal courts,[10] we find that this case is significantly different than *Bugenig*, and we conclude that Congress has not granted authority to White Earth to regulate Appellants' allegedly unlawful activities off-reservation.

In our case, most significantly, unlike in *Bugenig*, the activity challenged by Respondents occurred off Tribal lands. Respondents have not pointed to any language in the Minnesota Chippewa Tribe Constitution that authorizes jurisdiction over non-Indians off-Reservation. And there is no evidence that the code cited by the Tribe – the Rights of Manoomin Ordinance – has been approved by the Commissioner. In this case, there is no evidence that Congress expressly delegated authority to White Earth to regulate DNR's off-reservation activities.

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For the reasons explained above, Respondents' Motion for Reconsideration is DENIED.[11]

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[10] *See Strate v. A-1 Contrs.*, 520 U.S. 438, 445 (1997) ("Our case law establishes that, absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances."); *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 558 (8th Cir. 1993) ("Congress delegated the tribe authority to regulate liquor traffic on fee lands owned by non-Indians in non-Indian communities within reservations.").

[11] The Court also declines Respondents' request for leave to amend. Respondents have not suggested any facts that would support subject matter jurisdiction as discussed in this Court's opinions.

Dated: July 26, 2022.

BY THE COURT:

George W. Soule

George W. Soule

Lenor Scheffler Blaeser

Lenor Scheffler Blaeser

David Harrington