**WHITE EARTH BAND OF OJIBWE**
**COURT OF APPEALS**

Minnesota Department of Natural Resources, et al.,

Appellants,

v.

Manoomin, et al.,

Respondents.

**SUPPLEMENTAL BRIEF**

Case No. AP21-0516

## INTRODUCTION

Respondents Manoomin, the White Earth Band of Ojibwe, members of the White Earth Reservation Business Committee, tribal members, and non-Indians (collectively, "Respondents") respectfully submit this supplemental brief in response to the Court's Order regarding briefing for Respondents' Motion for Reconsideration.

At its core, this case implicates the White Earth Band's "sovereign interest in exercising governmental power over the natural resources within [its] Reservation." *DeSchutes River Alliance v. Portland Gen. Elec. Co.*, 323 F. Supp. 3d 1171, 1179 (D. Or. 2018). "Threats to tribal natural resources, including those that affect tribal cultural and religious interests, constitute threats to tribal self-governance, health and welfare." *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 935 (9th Cir. 2019) (citations omitted). As explained in Respondents' Motion for Reconsideration, this Court's Order did not consider the *on-Reservation impacts* to Manoomin caused by the Minnesota Department of Natural Resources' ("DNR") activities and conduct, and also declined to apply the White Earth Band's Tribal law conferring Tribal jurisdiction over this case. When considering the *on-Reservation* impacts of DNR's activities and conduct, and White Earth Tribal Law conferring jurisdiction over defendants in a case of this type, it is clear that the Tribal Court may properly exercise jurisdiction over this case.

Alternatively, the Tribal Court may properly exercise subject matter jurisdiction over this case under the second exception articulated in *Montana v. United States*, 450 U.S. 544, 566 (1981) ("*Montana*") based on the White Earth Band's *inherent sovereign authority* over activities and conduct having a serious effect on the health and welfare of the Band. *See, e.g.*, *Montana v. U.S. Envtl. Prot. Agency*, 137 F.3d 1135, 1141 (9th Cir. 1998) ("[T]hreats to water rights may invoke tribal authority over non-Indians."). A true application of the *Montana* framework takes a functional view of the location of non-Indians' activities and conduct. *See Sprint Commc'ns Co. v. Wynn*, 121 F. Supp. 3d 893, 899–900 (D.S.D. 2015) ("[P]hysical location, while relevant, is not dispositive[.]") (citing *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa*, 609 F.3d 927, 937 (8th Cir. 2010). "[N]o case … expressly rejects an application of *Montana* to off-reservation activities that have significant effects within the reservation." *Wisconsin v. Envtl. Prot. Agency*, 266 F.3d 741, 749 (7th Cir. 2001).

In its Order, the Court incorrectly stated that "*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." Order Dismissing Respondents' Complaint at 13. But, as discussed further below, this Court misconstrued *Wisconsin* by failing to consider the dispositive issue in the case of whether the tribe possessed the inherent sovereign authority to enforce water quality standards against nonmembers in the first place. *See Wisconsin*, 266 F.3d at 750 ("Because the Band has demonstrated that its water resources are essential to its survival, it was reasonable for the EPA, in line with the purposes of the Clean Water Act and the principles of *Montana*, to allow the tribe to regulate water quality on the reservation[.]"). Like any Indian tribe, the White Earth Band continues to exercise inherent sovereign authority, including exercising Tribal jurisdiction over non-Indians. White Earth's "inherent authority over activities

having a serious effect on the health of the tribe[] … is not defeated even if it exerts some regulatory force on off-reservation activities[.]" *Wisconsin,* 266 F.3d at 749. "Unless and 'until Congress acts, the tribes retain' their historic sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014). Nowhere in its Order did the Court point to any divesture of the White Earth Band's inherent sovereign authority to regulate within its Reservation the conduct at issue in this case involving alleged violations of the Rights of Manoomin.[1]

Additionally, congressional 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. *See Bugenig v. Hoopa Valley Tribe,* 5 NICS App. 37 (Hoopa Valley Tribal Ct. App. 1998). 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.

Respondents respectfully request the Court to reverse its Order dismissing the Complaint, and remand the case to the Tribal Trial Court for fact-finding and further proceedings. This case presents complex factual and legal questions about the interconnectedness of water systems and the nature and extent of Tribal jurisdiction. The current posture of this case is supplemental

[1] For a detailed discussion on the White Earth Band's enactment of the Rights of Manoomin as "codif[ying] their relationship with their territorial lands and natural resources into tribal law," "establish[ing] the beginnings of a tribal framework that can be utilized in the future as the tribal lead standard," and more, see Kekek Jason Stark, *Bezhigwan Ji-Izhi-Ganawaabandiyang: The Rights of Nature and Its Jurisdictional Application for Anishinaabe Territories,* 83 MONT. L. REV. 79 (Feb. 2022).

briefing on an interlocutory appeal following the denial of Appellants' Motion to Dismiss and the subsequent dismissal of Respondents' Complaint. No fact-finding has yet occurred in this case. "Questions of subject matter jurisdiction often require resolution of factual issues before the court may proceed, and that is particularly true of inquiries into tribal jurisdiction." *Attorney's Process & Investigation Servs.*, 609 F.3d at 937 (citation omitted). "It is therefore necessary and appropriate for the parties and the tribal court to ensure that 'a full record [is] developed in the Tribal Court.'" *Id.* (quoting *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985)). The development of a factual record by the Tribal Trial Court will serve the administration of justice and will help "clarify[] the factual and legal issues that are under dispute and relevant for any jurisdictional evaluation." *DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 882 (8th Cir. 2013) (citing *Nat'l Farmers Union*, 471 U.S. at 856–57). At a minimum, the White Earth Band's civil jurisdiction over DNR's activities and conduct is not plainly lacking, thereby requiring fact-finding and further proceedings in the Tribal Trial Court before the merits of Respondents' claims are even decided.[2]

## I. Tribal Law Confers Tribal Court Jurisdiction Over DNR Officials in this Case

Indian tribes are "separate sovereigns pre-existing the Constitution." *Bay Mills Indian Cmty.*, 572 U.S. at 788 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)). While Indian tribes have become "'domestic dependent nations,'" tribes continue to "exercise 'inherent sovereign authority.'" *Id.* (quoting *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991)). "Unless and 'until Congress acts, the tribes retain' their historic sovereign authority." *Id.*

[2] *See also Crow Creek Sioux Tribe v. Bureau of Indian Affairs*, 463 F. Supp. 2d 964, 967 (D.S.D. 2006) ("[C]ourts have also recognized that the jurisdictional issue and substantive issues can be so intertwined that a full trial on the merits may be necessary to resolve the issue.").

"Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1985); *see also United States v. Wheeler*, 435 U.S. 313, 332 (1978) (recognizing that "tribal courts are important mechanisms for protecting significant tribal interests"). A court is to "start with the premise that civil jurisdiction over the activities of non-Indians on reservation lands presumptively lies in tribal courts, unless affirmatively limited by a specific treaty provision or federal statute." *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412 (8th Cir. 1996); *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094, 1097 (8th Cir. 1989) ("[T]ribal courts are presumed to have civil jurisdiction over the actions of non-Indians on reservation lands absent the affirmative limitations of federal treaties and statutes.").

In addressing Tribal jurisdiction, it is a general principle of federal Indian law that matters of tribal law are properly interpreted and applied by tribal courts. *Iowa Mut. Ins. Co.*, 480 U.S. at 16 ("[T]ribal courts are best qualified to interpret and apply tribal law."); *see also City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 559 (8th Cir. 1993) (deferring to tribal court's decision that a tribal constitution gave the tribal court personal jurisdiction over non-Indians, and recognizing that federal courts "defer to the tribal courts' interpretation, even though non-Indians are involved").[3] In addition, the Eighth Circuit has also determined that "at least where non-members are concerned, tribal courts' adjudicative authority is limited (absent congressional

[3] *See also Navajo Nation v. Intermountain Steel Bldgs., Inc.*, 42 F. Supp. 2d 1222 (D.N.M. 1999) ("By permitting the Navajo Tribal Court to first determine its own subject matter jurisdiction, a federal court that may eventually be called upon to review this determination would have at its disposal a fully developed tribal court record from which to evaluate any challenges to tribal jurisdiction. Moreover, if the Navajo Tribal Court reached the merits of the action, a federal court would have the benefit of the Navajo Tribal Court's prior interpretation of Navajo law and customs that may apply to this case.").

authorization) to cases arising under tribal law." *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1135 (8th Cir. 2019).

A tribe has the inherent authority to apply its own laws to non-Indians' activities and conduct within its territorial boundaries. *See Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa*, 609 F.3d 927, 937 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 1003 (2011) ("Paramount among [sovereign] interests is the right of Indian tribes to 'make their own laws and be governed by them,' and in accordance with that right tribes 'may regulate nonmember behavior….'") (citations omitted). "[T]ribes retain considerable control over nonmember conduct on tribal land." *Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997); *Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1204 (9th Cir. 2013) ("[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*.").

The White Earth Band's ability to enforce the Rights of Manoomin over Appellants is derived, in part, from the inherent sovereign right to exclude nonmembers from its Reservation. "[T]ribes 'have inherent sovereignty independent of th[e] authority arising from their power to exclude,' and … *Montana*'s second exception recognizes that inherent authority." *United States v. Cooley*, 141 S. Ct. 1638, 1644 (2021). This power is derived from Indian tribes' "inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008)) (citing *Montana*, 450 U.S. at 564); *see also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982) (The power to exclude non-Indians from tribal lands "necessarily includes the lesser power to place conditions on entry on continued presence, or on reservation conduct[.]"); *Attorney's Process & Investigation Servs.*, 609 F.3d at 937 (8th Cir. 2010) (stating that a "tribe's traditional

and undisputed power to exclude persons[] from tribal land … gives it the power to set conditions on entry to that land.").

The Band's Judicial Code specifically confers jurisdiction over this case. The Code provides that "[t]he jurisdiction of the Tribal Court shall extend to … [a]ll actions arising under the Codes, Laws, and Ordinances of the White Earth Band of Chippewa, and to all persons alleged to have violated provisions of those Ordinances, provided that the action or violation occurs within the boundaries of the White Earth Reservation[.]" Judicial Code ch. 2 § 1(b). As explained by the Tribal Court below, the Judicial Code only "require[s] Plaintiffs to show that the alleged actions or inactions taken by the Defendants 'occurs within the boundaries of the White Earth reservation', but this may include actions taken off the reservation that impact on-reservation rights." Order Clarifying Aug. 18, 2021 Order Denying Motion to Dismiss at 8. Nowhere does the Judicial Code limit Tribal Court jurisdiction to activities and conduct taken solely within the White Earth Reservation.

The use of "shall" in the Judicial Code imposes an obligation on the Tribal Court to exercise jurisdiction over cases falling within the specific jurisdictional grant conferred by the Band. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (recognizing that "shall" is "mandatory" and "normally creates an obligation impervious to judicial discretion"); *Association of Civilian Technicians v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) ("The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive"); *Alabama v. Bozeman*, 533 U.S. 146, 153 (2001) ("The word 'shall' is ordinarily 'the language of command.'") (citations omitted). In other words, the Judicial Code does not authorize the Court to exercise discretion in deciding whether or not a particular case falls within the Code's grant of jurisdiction. But that is precisely what the Court did here.

*See* Order Dismissing Respondents' Complaint at 7 ("[W]hile White Earth grants jurisdiction in its Tribal Court for a case like this one, we must also determine whether federal law authorizes subject matter jurisdiction in this case.").

The question presented in this case is whether the Rights of Manoomin were violated within the boundaries of the White Earth Reservation by Appellants. The Rights of Manoomin establishes that any business, government, or other public or private entity that violates "any provision of this law" is guilty of an "offense." Rights of Manoomin § 3(b). In particular, the Rights of Manoomin provide that: "No government shall recognize as valid any permit … issued to any business entity … that would enable that entity to violate the rights or prohibitions of this law, regardless of whether the authorized activities occur within, or outside of, the White Earth Reservation." *Id.* § 2(b). By its terms, the Rights of Manoomin apply to lands within the exterior boundaries of the White Earth Reservation. *See id.* § 1(a) ("Manoomin, or wild rice, within the White Earth Reservation possesses inherent rights to exist, flourish, regenerate, and evolve, as well as inherent rights to restoration, recovery, and preservation.").

"[T]he complaint alleges that [Defendants'] actions or inactions have resulted in harm to the Plaintiffs' rights on the reservation[.]" Order Clarifying Aug. 18, 2021 Order Denying Motion to Dismiss at 8. This includes allegations that Appellants' activities and conduct has impacted the Band's resources, including Manoomin on Lower Rice Lake—located entirely within the White Earth Reservation. These impacts to Manoomin located on Lower Rice Lake within the boundaries of the White Earth Reservation were not sufficiently considered by the Court in its Order. The precise location and extent of both DNR's activities and the impacts of those activities involves a fact-intensive inquiry that is best suited for the Tribal Trial Court to resolve in the first instance.

The jurisdictional grant set forth in the Band's Judicial Code specifically confers Tribal Court jurisdiction over this case. The Court need not refer to any other source of law to resolve the jurisdictional question presented here to require fact-finding and further proceedings in this case.

## II. Under *Montana,* This Court May Exercise Civil Jurisdiction Over DNR Officials' Activities and Conduct Originating Off-Reservation When Those Activities and Conduct Are Directed Towards or Have Impacts on the White Earth Reservation

In its Order, the Court determined that there is no authority to support the exercise of tribal jurisdiction under the facts of this case "where the allegedly unlawful activity – grant of an amended water use permit and excessive use of waters – *occurred outside the boundaries of the reservation*." Order Dismissing Respondents' Complaint at 14 (emphasis added). But, as explained by the Tribal Trial Court below, "the complaint alleges that [Defendants'] actions or inactions have resulted in harm to the Plaintiffs' rights on the reservation[.]" Order Clarifying Aug. 18, 2021 Order Denying Motion to Dismiss at 8. This includes declaratory and injunctive relief for Appellants' violations of the Rights of Manoomin arising out of Appellant's activities and conduct. Compl. at 14, ¶¶ i, j. This Court's Order, however, failed to analyze whether Appellants' activities and conduct originating off-reservation and having significant impacts within the White Earth Reservation fall within the *Montana* framework. Taking these on-reservation impacts into account, the Tribal Court may properly exercise Tribal jurisdiction over Appellants based on the second *Montana* exception.

The second *Montana* exception provides that a "tribe may retain inherent power to exercise civil authority over the conduct of non-Indians … 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. When applying the *Montana* framework,

courts are to take a functional view of the location of nonmembers' activities and conduct. *See Attorney's Process & Investigation Servs.*, 609 F.3d at 937 ("[C]ourts applying *Montana* should not simply consider the abstract elements of the tribal claim at issue, but must focus on the specific nonmember conduct alleged, taking a functional view of the regulatory effect of the claim on the nonmember."). "[N]o case … expressly rejects an application of *Montana* to off-reservation activities that have significant effects within the reservation." *Wisconsin*, 266 F.3d at 749.

The Court's Order incorrectly stated that "*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." Order Dismissing Respondents' Complaint at 13. *Wisconsin* concerned the EPA's granting of treatment as state ("TAS") status under the Clean Water Act ("CWA"). 266 F.3d at 743. This Court misconstrued *Wisconsin* by failing to consider that the dispositive issue in the case was whether the tribe possessed the inherent sovereign authority to enforce water quality standards against nonmembers in the first place.[4] Accordingly, *Wisconsin* and other cases discussing tribes' inherent authority (whether in reference to the *Montana* framework or not) to regulate such non-Indian activities and conduct are relevant in the non-CWA context. *See, e.g.*, *FMC Corp.*, 942 F.3d at 935; *Bugenig v. Hoopa Valley Tribe*, 229 F.3d 1210, 1222 (9th Cir. 2000) ("[P]recedent 'recogniz[es] that threats to water rights may invoke inherent tribal authority over non-Indians' due to tangible and direct impact that such threats pose to tribal health and welfare."), *vacated on other grounds*, 266 F.3d 1201 (9th Cir. 2001) (en banc); *Rincon Mushroom Corp. of Am. v. Mazzetti*, No. 09cv2330-WQH-POR, 2010 WL 3768347, at *8 (S.D. Cal. Sept. 21, 2010) ("[T]he Ninth Circuit has held that 'threats to water rights may invoke inherent tribal authority over non-Indians' pursuant to *Montana*'s second exception."), *rev'd on*

[4] *Se Wisconsin*, 266 F.3d at 748–50; *see also U.S. EPA*, 137 at 1140–41.

*other grounds* 490 Fed. App'x 11 (9th Cir. 2012). These cases thus support the White Earth Band's exercise of its inherent sovereign authority for Appellants' activities and conduct originating off-reservation having direct on-reservation impacts.

For instance, *Montana v. U.S. EPA*, 137 F.3d 1135 (9th Cir. 1998), concerned the EPA's decision to grant the Confederated Salish and Kootenai Tribes ("CSKT") TAS status, allowing it to promulgate water quality standards "that apply to all sources of pollutant emissions within [the] boundaries of the Reservation, regardless of whether the sources are located on land owned by members or non-members of the Tribe." *Id.* at 1138. To receive TAS status, the "EPA require[d] a tribe to show that the regulated activities affect 'the political integrity, the economic security, or the health or welfare of the tribe.'" *Id.* at 1139 (citations omitted). Applying the *Montana* framework, the EPA approved CSKT's TAS status, finding "that the activities of the non-members posed such serious and substantial threats to Tribal health and welfare that Tribal regulation was essential." *Id.* at 1141.

Separately applying the *Montana* framework, *id.* at 1140 ("EPA's delineation of the scope of inherent tribal authority is not entitled to deference."), the Ninth Circuit upheld the EPA's decision, noting that it had "previously recognized that threats to water rights may invoke inherent tribal authority over non-Indians." *Id.* at 1141. The court observed:

> [*Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981)] also supports EPA's generalized finding that due to the mobile nature of pollutants in surface water it would in practice be very difficult to separate the effects of water quality impairment on non-Indian fee land from impairment on tribal portions of the reservation: "A water system is a unitary resource. The actions of one user have an immediate and direct effect on other users."

*Id.* (quoting *Colville*, 647 F.2d at 52). The court recognized "the threat inherent in impairment of the quality of the principle water source." *Id.* The Ninth Circuit concluded that CSKT's enforcement of their own water quality standards against non-Indians on non-Indian land within

the reservation was "valid as reflecting [the] appropriate delineation and application of inherent Tribal regulatory authority over non-consenting non-members." *Id.*

The Ninth Circuit's decision in *U.S. EPA* is consistent with decisions by the Seventh Circuit and Tenth Circuit affirming the EPA's granting TAS status to other Indian tribes, based on those tribes' inherent authority to enforce water quality standards against non-Indians. *See Wisconsin*, 266 F.3d at 750 ("Because the Band has demonstrated that its water resources are essential to its survival, it was reasonable for the EPA, in line with the purposes of the Clean Water Act and the principles of *Montana*, to allow the tribe to regulate water quality on the reservation[.]"). As the Tenth Circuit explained, the TAS program "does not prevent Indian tribes from exercising their inherent sovereign power to impose standards or limits that are more stringent than those imposed by the federal government. Indian tribes have residual sovereign powers that already guarantee the powers enumerated in [the TAS program]." *City of Albuquerque v. Browner*, 97 F.3d 415, 423 (10th Cir. 1996) (rejecting City of Albuquerque's argument that a tribe could not establish more stringent water quality standards and observing that the authority to establish such tribal standards "is in accord with powers inherent in Indian tribal sovereignty") (emphasis added); *see also MacArthur v. San Juan Cnty.*, 391 F. Supp. 2d 895, 938 (D. Utah 2005) (tribes "developing and enforcing their own tribal air and water quality standards, noting that "Tribal authority in these matters has consistently been confirmed by the federal courts").

*Wisconsin* concerned the EPA's decision granting TAS status to the Mole Lake Band of Lake Superior Chippewa Indians. 266 F.3d at 743. To be granted TAS status, the EPA required the Mole Lake Band to demonstrate under the *Montana* framework that it "already possessed inherent authority over the activities undoubtedly affected by [its] water regulations." *Id.* at 748. The Seventh Circuit separately applied the *Montana* framework to determine whether the EPA's

decision to grant the Mole Lake Band TAS status was lawful. *Id.* at 748–50. *Wisconsin* concerned the Mole Lake Band's authority to enforce its water quality standards against "upstream *off-reservation* dischargers[.]" *Id.* at 748 (emphasis added). The State of Wisconsin argued that the Mole Lake Band could not enforce its water quality standards against off-reservation polluters, as "[t]his is a classic extraterritorial effect, … and takes this case beyond the scope of *Montana*[.]" *Id.*

The Seventh Circuit acknowledged that the Mole Lake Band's TAS status meant that it could impose higher water quality standards against upstream, off-reservation polluters. *Id.* The court, however, did not view this as impermissible under the *Montana* framework.

> [A]ctivities located outside the regulating entity (here the reservation), and the resulting discharges to which those activities can lead, can and often will have "serious and substantial" effects on the health and welfare of the downstream state or reservation. There is no case that expressly rejects an application of *Montana* to off-reservation activities that have significant effects within the reservation.

*Id.* at 749. The Seventh Circuit concluded that the EPA's interpretation that, under the *Montana* framework, the Mole Lake Band's "inherent authority over activities having a serious effect on the health of the tribe[] … is not defeated even if it exerts some regulatory force on off-reservation activities" was reasonable. *Id.* "Because the Band has demonstrated that its water resources are essential to its survival, it was reasonable for the EPA, in line with the purposes of the Clean Water Act and the principles of *Montana*, to allow the tribe to regulate water quality on the reservation, even though the power entails some authority over off-reservation activities." *Id.* at 750.

In this case, in considering Respondents allegations that Appellants' off-reservation activities and conduct caused *on-reservation impacts* in violation of Tribal law—the Rights of Manoomin, and a tribe's inherent power to exercise civil authority over the conduct of nonmembers when that conduct threatens or has some direct effect on the tribe, the Seventh

Circuit's decision in *Wisconsin* is closely on point with this case. There is no case rejecting the application of the *Montana* framework to off-reservation activities impacting on-reservation tribal resources.

Furthermore, the Court's reliance on *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087 (8th Cir. 1998), for the proposition that a tribal court lacks subject matter jurisdiction when the "allegedly unlawful activities did not occur on the reservation," Order Dismissing Respondents' Complaint at 12, is misplaced. *Hornell* concerned the Rosebud Sioux Tribe suing a brewing company for using the Crazy Horse name in across "airwaves for national broadcasts over which the Tribe [could] claim no proprietary interest, and it cannot be said to constitute non-Indian use of Indian land." 133 F.3d at 1093. It was undisputed that the brewery did not manufacture, sell, or distribute Crazy Horse Malt Liquor on the reservation. *Id.* at 1091. The court explained that "[t]he mere fact that a member of a tribe or a tribe itself has a cultural interest in conduct occurring outside a reservation does not create jurisdiction of a tribe court under its powers of limited inherent sovereignty." *Id.* In determining the second *Montana* exception inapplicable to the facts of the case, the court stated that "[a]dvertising outside the Reservation and on the Internet does not fall within the rubric of directly affecting the health and welfare of the Tribe." *Id.* at 1093.

By sharp contrast, this case involves the nonmember activities on tribal lands, namely the granting of an amended dewatering permit and excessive use of waters *within the boundaries of the White Earth Reservation*, including Lower Rice Lake. *See* Compl. Ex. A (explaining that the dewatering permit granted by DNR has resulted in impacts "observable in the rice lakes and other waters and wetlands in the region. The water levels in the Lower Rice Lake on the White Earth Reservation are so low that it will be difficult if not impossible to harvest wild rice ….").

Moreover, unlike *Hornell*, which involved various tort claims,[5] this case concerns alleged violations of the Rights of Manoomin—a Tribal law protecting wild rice within the White Earth Reservation. Specifically, DNR's alleged "activity at issue here impacts the ecosystem of Manoomin in that it allows [DNR] to control the water quantity and quality on which the plant depends. Tribal Court Order Denying Motion to Dismiss at 3. "The possible impact of [DNR's] activities has a 'direct effect on the political integrity, political security or the health or welfare of the Tribe' as required by the second *Montana* exception. In addition, the activity threatens the cultural welfare and continuity of the Band due to the unique status of Manoomin." *Id.* It is also true that "[t]he White Earth Band of Chippewa Indians is entitled to hunt, fish, and gather wild rice on the White Earth Reservation without interference from or regulation by the State of Minnesota." *White Earth Band of Chippewa Indians v. Alexander*, 518 F. Supp. 527, 537–38 (D. Minn. 1981), *aff'd*, 683 F.2d 1129 (8th Cir. 1982). "The Band's right to hunt, fish and gather wild rice is an attribute of its inherent sovereignty." *Alexander*, 683 F.3d at 1137.

Based on Respondents' allegations of direct on-Reservation impacts of Manoomin caused by Appellants' activities and conduct, the Court should reverse its ruling that the Tribal Court lacks subject matter jurisdiction over this case. "Reducing the *Montana* jurisdictional analysis from a thorough investigation of the nonmember's course of conduct and contact with the reservation, to a mere determination of the nonmember's physical location is improper and would render *Montana*'s jurisdiction inquiry inapplicable …." *Payday Fin., LLC*, 935 F. Supp. 2d at 940. The Court previously noted that "whether granting the dewatering permit caused harm to tribal waters

[5] *F.T.C. v. Payday Fin., LLC*, 935 F. Supp. 2d 926 (D.S.D. 2013) ("In many cases, a nonmember defendant's lack of physical contact with the reservation, particularly in tort cases, is indicative that the nonmember's conduct did not occur within the reservation and did not have a discernable effect on the tribe.") (citing *Hornell*, 133 F.3d at 1093).

or Manoomin *on the Reservation*, the record is less clear." Order Dismissing Respondents' Complaint at 8 (emphasis in original). The Parties and the Court should be afforded an opportunity to develop a full factual record before the courtroom doors are shut on Respondents from bringing their claims in Tribal Court. *Attorney's Process & Investigation Servs.*, 609 F.3d at 937 ("Questions of subject matter jurisdiction often require resolution of factual issues before the court may proceed, and that is particularly true of inquiries into tribal jurisdiction. It is therefore both necessary and appropriate for the parties and the tribal court to ensure that 'a full record [is] developed in the Tribal Court.") (quoting *Nat'l Farmers Union*, 471 U.S. at 856); *see id.* (pointing out that "the parties were afforded discovery in the tribal trial court"); *see also Sprint Commc'ns Co.*, 121 F. Supp. 3d at 900 n.5 ("When a nonmember begins an activity outside the reservation, the effects of which are directed on to the reservation, it is not clear that such an activity occurred wholly outside the reservation. The precise location of the [nonmember's] activity or conduct should be evaluated by the tribal court when it applies *Montana* in the first instance.").

Finally, the Court's finding that "Respondents may enforce treaty rights in other forums," Order Dismissing Respondents' Complaint at 16, does not foreclose Respondents' claims based on the Rights of Manoomin brought in Tribal Court. *See FMC Corp.*, 942 F.3d at 935 ("Tribal jurisdiction under the second *Montana* exception may exist concurrently with federal regulatory authority."); *U.S. EPA*, 137 F.3d 1141 (stating that there is "no suggestion" in the *Montana* case law that "inherent [tribal] authority exists only when no other government can act"). "[T]ribal courts are best qualified to interpret and apply tribal law." *Iowa Mut. Ins. Co.*, 480 U.S. at 16. As such, this Court is the appropriate forum to hear Respondents' claims arising under the Rights of Manoomin.

## III. Congressional Delegation of Authority Confers Tribal Jurisdiction Over Appellants in this Case

A tribe may exercise jurisdiction over non-Indians when Congress authorizes them to do so. *See, e.g., FMC Corp.*, 942 F.3d at 932 ("[A] Tribe may regulate the conduct of nonmembers on non-Indian fee land when that regulation is expressly authorized by federal statute or treaty."). In *Bugenig v. Hoopa Valley Tribe*, 5 NICS App. 37 (Hoopa Valley Tribal Ct. App. 1998), the Hoopa Valley Tribal Court of Appeals addressed a matter involving a tribe's ability to regulate fee lands of a non-member within the boundaries of the Hoopa Valley Indian Reservation. *Id.* at 37. The tribal court held that the tribe retained regulatory authority over all land located within the exterior boundaries of the Hoopa Valley Indian Reservation. *Id.* at 49. The Ninth Circuit upheld Tribal jurisdiction, reasoning that Congress, in establishing the reservation and subsequently ratifying the Hoopa Valley Tribe's Constitution in the Hoopa-Yurok Settlement Act, effectively delegated federal authority to the tribe to regulate non-Indians within the Hoopa Valley Indian Reservation. *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1204 (9th Cir. 2001). As a result, the tribe retained the ability to prohibit logging within a one-half mile buffer zone adjoining the Hoopa Valley Tribe's sacred White Deerskin Dance Ground. *Bugenig*, 5 NICS App. at 44, 49.

In reaching its conclusion, the Hoopa Valley Tribal Court of Appeals utilized several historical factors. The first factor was the establishment of the reservation. The Hoopa Valley Indian Reservation was established by Executive Order in 1865. *Id.* at 41. The exterior boundaries were approved and declared by the President on June 23, 1876. *Id.* The reservation boundaries were later extended by Executive Order in 1891. *Id.* The reservation was later portioned "and returned to its original size pursuant to the Hoopa-Yurok Settlement Act of 1988." *Id.*

The second historical factor utilized in the tribal court's analysis was the establishment and approval of the Hoopa Valley Tribe's existing governing documents. The Hoopa Valley Tribe

was organized pursuant to the Indian Reorganization Act of 1934 under a "constitution and amendments approved by the Secretary of the Interior on November 20, 1933, September 4, 1952, August 9, 1963, and August 18, 1972." *Id.* at 42. The constitution was subsequently "ratified and confirmed" as part of the Hoopa-Yurok Settlement Act. *Id.* at 41–42.

The third historical factor utilized in the tribal court's analysis was the powers expressed in the tribe's constitution. *Id.* at 42. The tribe's constitution declared that the tribe possessed jurisdiction within the exterior boundaries of the reservation. *Id.* The constitution also declared the ability of the tribe "to provide assessments and license fees upon non-members" and "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 or disposition of property … affecting non-members …." *Id.*

The fourth historical factor utilized in the tribal court's analysis was the effects of allotment on the reservation. As the court explained: "The property involved in this dispute is located on the Hoopa Valley Indian Reservation in an area referred to as Bald Hill, and was originally allotted to members of the Hoopa Tribe under the General Allotment Act." *Id.* at 42–43.

The fifth historical factor utilized in the tribal court's analysis was the scope of the regulatory action. *Id.* at 43–45. *Bugenig* involved a dispute relating to the tribe's harvest management plan. *Id.* at 43. The plan established that one of its goals was to "protect cultural and religious resources." *Id.* The prohibition on logging within a one-half buffer zone adjoining the Hoopa Valley Tribe's sacred White Deerskin Dance Ground was established pursuant to the stated goal. *Id.* at 43–44. The court then proceeded to analyze the five historical factors pursuant to *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 494 U.S. 408, 441 (1989). The court explained:

> Our attention is drawn to the footnote accompanying the case law cited by the Supreme Court in support of the second *Montana* exception, wherein the Court stated: As a corollary, this Court has held that Indian tribes retain rights to river waters necessary to make their reservation livable. *Arizona v. California*, 373 U.S. 546, 599 (1963). Given that logic, it would seem to follow that a timber harvest regulation, neutrally applied the purpose and effect of which is to preserve the sanctity of the Hoopa Tribe's most sacred spiritual location for the present and future use of tribal members would be a right retained by the Hupa people to ensure that their reservation remained livable. Or as Justice White would have it, the Hoopa Valley Tribe has neither relinquished nor abrogated, in the fact of Appellant Bugenig's efforts to "bring a pig into the parlor" to the White Deerskin Dance Ground, its inherent sovereign authority "to ensure that this area maintains its unadulterated character."

*Bugenig*, 5 NICS App. at 48–49 (quoting *Brendale*, 492 U.S. at 441). Based upon the cultural and spiritual significance of the area, the court held:

> The *Brendale* standard … supports the right of the Hoopa Valley Tribe to implement neutral applied regulations to reasonably restrict encroachment upon … "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."

*Id.* at 46–49. In sum, the various above-described documents and actions all pointed toward Congress intending the Hoopa Valley Tribe to have retained its inherent sovereign authority to regulate logging in the area in question. As explained by the Ninth Circuit, "[b]ecause the Tribe possesses unique 'attributes of sovereignty,' and because the Tribe has at least some 'independent authority over the subject matter' at issue, we hold that the federal government could delegate to the Tribe its authority to protect cultural and historical resources of significance[.]" *Bugenig*, 266 F.3d at 1223.

Applying the five factors utilized in *Bugenig* to the White Earth Band and the Rights of Manoomin, a similar result is produced. The first factor involves the establishment of a reservation. The White Earth Reservation was established pursuant to the 1867 Treaty with the Chippewa. Treaty with the Chippewa Indians, Chippewa Indians–United States, Mar. 19, 1867,

16 Stat. 719. Article 2 of the 1867 Treaty expresses states that the "reservation shall include White Earth Lake and Rice Lake[.]" The White Earth Reservation was later amended by Congress pursuant to the Nelson Act. An Act for the Relief and Civilization of the Chippewa Indians in the State of Minnesota (Nelson Act), 25 Stat. 642 (Jan. 14, 1889). Additionally, Congress in 1926 enacted legislation creating a reserve referred to as the Wild Rice Lake Reserve on the White Earth Reservation. 44 Stat. 763 (1926) ("That there be, and is hereby, created within the limits of the White Earth Indian Reservation in the State of Minnesota a reserve to be known as Wild Rice Lake Reserve, for the exclusive use and benefit of the Chippewa Indians of Minnesota, which reserve shall include Rice Lake and the following described contiguous lands[.]"). In 1935, Congress amended the legislation in an act entitled "An Act setting aside Rice Lake and contiguous lands in Minnesota for the exclusive use and benefit of the Chippewa Indians of Minnesota," approved June 23, 1926. 49 Stat. 496 (1935). The federal government subsequently exercised eminent domain against the State of Minnesota to take back Rice Lake for the White Earth Band while surrounding Rice Lake with 4,450 acres of trust land. *See United States v. 4,450.72 Acres of Land, Clearwater Cnty., State of Minn.*, 27 F. Supp. 167 (D. Minn. 1939).

The second historical factor is the establishment and approval of the tribe's existing governing documents. The Minnesota Chippewa Tribe, which is composed of White Earth, Leech Lake, Mille Lacs, Fond du Lac, Bois Forte, and Grand Portage Bands, is organized pursuant to the Indian Reorganization Act of 1934 under a constitution and amendments approved by the Secretary of the Interior on March 3, 1964. The existing powers and authorities by the Secretary

were subsequently "ratified and confirmed" as a part of the White Earth Reservation Land Settlement Act of 1985.[6]

The third factor utilized in the court's analysis was the powers expressed in the tribe's constitution. Pursuant to Article I of the Minnesota Chippewa Tribe Constitution, the Tribe declared:

> Section 3. The purpose and function of this organization shall be to conserve and develop tribal resources and to promote the conservation and development of individual Indian trust property; to promote the general welfare of the members of the Tribe; to preserve and maintain justice for its members and otherwise exercise all powers granted and provided the Indians, and take advantage of the privileges afforded by the Act of June 18, 1934 (48 Stat. 984) and acts amendatory thereof or supplemental thereto, and all the purposes expressed in the preamble hereof.
>
> Section 4. The Tribe shall cooperate with the United States in its program of economic and social development of the Tribe or in any matters tending to promote the welfare of the Minnesota Chippewa Tribe of Indians.

Pursuant to Article V, Section 1:

> The Tribal Executive Committee shall, in accordance with applicable laws or regulations of the Department of the Interior, have the following powers:. . . (f) Except for those powers hereinafter granted to the Reservation Business Committees, the Tribal Executive Committee shall be authorized to manage, lease, permit, or otherwise deal with tribal lands, interests in lands or other tribal assets; to engage in any business that will further the economic well-being of members of the Tribe . . . subject only to the approval of the Secretary of the Interior or his authorized representative, when required by Federal law or regulations. (g) The Tribal Executive Committee may by ordinance, subject to the review of the Secretary of the Interior, levy licenses or fees on non-members or non-tribal organizations doing business on two or more Reservations.

[6] White Earth Reservation Land Settlement Act of 1985, Pub. L. 99-264, 100 Stat. 61 (1986), amended by Pub. L. 100-153, § 6(a), (b), 101 Stat. 887 (1987), amended by Pub. L. 100-212, § 4, 101 Stat. 1443 (1987), amended by Pub. L. 101-301, § 8, 104 Stat. 210 (1990), amended by Pub. L. 102-572, § 902(b)(2), 106 Stat. 4516 (1992), amended by Pub. L. 103-263, § 4, 108 Stat. 708 (1994) (Section 11 provides: "Nothing in this Act is intended to alter the jurisdiction currently possessed by the White Earth Band of Chippewa Indians, the State of Minnesota, or the United States over Indians or non-Indians within the exterior boundaries of the White Earth Reservation.").

The fourth factor entails the effects of allotment on the reservation. In *State v. Clark*, 282 N.W.2d 902 (Minn. 1979), the court held that the White Earth Reservation was not disestablished by the Nelson Act of 1889. The court further explained that the White Earth Band's aboriginal rights were recognized pursuant to the Treaty of 1867 and were never thereafter extinguished. *Id.*[7]

The fifth factor encompasses the scope of the regulatory action. In this instance, the dispute involves the Rights of Manoomin Ordinance. The Ordinance established that its primary goals is that "manoomin, or wild rice . . . possesses inherent rights to exist, flourish, regenerate, and evolve, aswell as inherent rights to restoration, recovery, and preservation." The prohibition on any business, government, or other public or private entity to "engage in activities" or permit activities that violate or would violate the provisions of this law are established in the furtherance of this stated goal.

Analyzing these five factors as the court did in *Bugenig*, it is clear that if any business, government, or other public or private entity "engage[s] in activities" or permits activities that violate or would likely violate the Rights of Manoomin Ordinance "in contravention of tribal law, threatening and physically disturbing the integrity and sacred status" of Manoomin, the activity would clearly threaten Anishinaabe "customs and traditions." Here, the White Earth Band "has the power and authority to define areas of sacred significance," and through establishment of the Rights of Manoomin Ordinance, "has exercised that power." The "areas of significance" are manidoo-gitigaan, the lakes and rivers that make up the wild rice beds. As a result, the Anishinaabe

[7] In 1939, the State of Minnesota enacted a statute (now repealed), recognizing the White Earth Band's exclusive authority to regulate Manoomin within the White Earth Reservation: "It is therefore declared the purpose of the [statutes], to meet this emergency and to discharge in part of a moral obligation to these Indians of Minnesota by strictly regulating the wild rice harvesting upon all public waters of the state and by granting to these Indians the exclusive right to harvest the wild rice crop upon all public waters within the original boundaries of the White Earth, Leech Lake, Nett Lake, Vermillion, Grand Portage, Fond du Lac, and Mille Lacs reservations."

expressly reserved all rights and powers associated with Manoomin, and Congress expressly authorized the existence of those rights and powers when it ratified the Anishinaabe treaties as the supreme law of the land.

Thus, the Rights of Manoomin Ordinance "neutrally applied," the purpose and effect of which is to preserve the continuing cultural importance of Manoomin as a sacred food that embodies the existence of the Anishinaabe Nation, is a right retained by the Anishinaabe people to ensure that the ecosystems that sustain Manoomin maintain their "unadulterated character." Based upon the cultural and spiritual significance of Manoomin, the *Brendale* standard supports the right of the Anishinaabe to enforce these "neutrally applied" regulations that "reasonably restrict" infringement of the Treaty with Manoomin. The combined effects of these five historical factors, as the Ninth Circuit held in *Bugenig v. Hoopa Valley Tribe*, constitute "an express delegation of authority to the Tribe." 266 F.3d at 1216. The Court should thus find that congressional delegation confers jurisdiction on the White Earth Band to regulate DNR's activities and conduct at issue in this case.

## CONCLUSION

The Court should reverse the dismissal of Respondents' Complaint, and remand this case to the Tribal Trial Court for further proceedings and fact-finding.

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Respectfully submitted,

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