WHITE EARTH BAND OF OJIBWE
COURT OF APPEALS

Minnesota Department of Natural Resources, et al.,

Appellants,

v. File No. AP21-0516

Manoomin, et al.,

Respondents.

OPINION

Judges Soule, Scheffler Blaeser and Harrington.

This appeal arises from a lawsuit by Manoomin (wild rice),[1] the White Earth Band of Ojibwe and elected members of its Reservation Business Committee, certain of the Band's members, members of other Tribes, and non-Indian citizens [Respondents] against the Minnesota Department of Natural Resources [DNR], its Commissioner, Deputy Commissioner, and Water Resources Section Manager, and unidentified DNR Conservation Officers [Appellants].

CASE BACKGROUND

Respondents' 47-page Complaint, filed on August 4, 2021, essentially claims that the White Earth Band (and other Ojibwe Tribes and/or members) retain usufructuary rights beyond the reservation, under the 1855 Treaty, to harvest Manoomin on land ceded under the treaty, and that the grant of a water permit by DNR officials to the Enbridge Line 3 pipeline project impairs or threatens the growth of Manoomin on those lands and therefore infringes on the treaty rights of Tribes and members to harvest Manoomin. Specifically, Respondents challenge the DNR's issuance of Amendment to Water Appropriation Permit 2018-3420, increasing the amount of public water it may use in building the pipeline.

> [T]he Minnesota Department of Natural Resources (DNR) has abruptly, unilaterally and without formal notice to tribal leaders (quasi-secretly), and without Chippewa consent, granted Enbridge Line 3 project an increase of approximately 5 billion gallons of public ground and surface water, for horizontal drilling under rivers and other waterways of the upper Mississippi watershed.

(Complaint, p. 7). One of Respondents' principal complaints is that Appellants did not confer with Respondents before issuance of the permit (p. 38):

[1] Respondents contend that Manoomin, a named party, "possesses inherent rights to exist, flourish, regenerate, and evolve, as well as inherent rights to restoration, recovery, and preservation." Complaint, p. 26; *see* White Earth Reservation Business Committee Resolution Nos. 001-19-009 and 001-19-010; The 1855 Treaty Authority's Resolution No. 2018-05 (resolutions regarding Rights of Manoomin).

> The DNR planned to avoid meaningful and timely consultation with the tribes waiting for five (5) months until May 27, and acted unilaterally on June 4, 2021, and issued the permit for 5 billion gallons, ten times the original permit. The tribes had no time to evaluate the impact of these withdrawals on the watersheds and wild rice. It also appears DNR was intentionally authorizing extraction of good, clean ground water to avoid other dewatering and cross-contamination issues. This is not meaningful and sufficient notification, especially when notification was avoided for months and not given directly to Tribal leaders.

Respondents claim that this use of public water may damage Manoomin and interfere with Respondents' usufructuary rights "in the 1855 ceded territory." The Complaint refers to Respondents' and others' activities, appeals, and protests in other forums – political, administrative agencies, courts – in opposition to the Enbridge pipeline project. *See, e.g.*, pp. 14-22.

Respondents allege that "[v]enue is proper" (p. 25), citing White Earth Band Judicial Code, Title 1, Courts, Ch. II Jurisdiction, section 1(j), which grants its Tribal Court jurisdiction under White Earth codes intended to protect treaty rights or protect tribal resources, including "off-reservation resources."

Respondents claim jurisdiction under several legal provisions (pp. 24-25): White Earth Resolution Nos. 057-10-008, 001-19-009[2], 001-19-010,[3] and 019-21-002;[4] the Chippewa's *Winter's Doctrine*; American Indian Religious Freedom Act, 42 U.S.C. § 1996; Public Law 83-280 (18 U.S.C. § 1162(b), 28 U.S.C. § 1360(b & c); 42 U.S.C. § 1983; and 42 U.S.C. § 1988; the First Amendment; Fourth Amendment; Fifth Amendment; Due Process Clause; and Equal Protection Clause of the Fourteenth Amendment.

Respondents allege substantive law claims against Appellants as follows: violations of "federal Treaty-recognized usufructuary property rights to hunt, fish and gather those wild plants and animals for their own subsistence" (Claim I, p. 39); claims by Appellants to "ownership of wild plants and animals" "are contrary to the federal 1855 Treaty-recognized usufructuary property rights to hunt, fish and gather" and "constitute a taking of federal treaty-recognized usufructuary property without Due Process or just compensation, in violation of the Fourteenth Amendment" (Claim II, p. 40); violation of Fourteenth Amendment Equal Protection for not treating individuals with 1855 Treaty rights with the same standard as individuals with 1837 or 1854 Treaty rights (Claim III, p. 41); seizure of five billion gallons of water without notice and opportunity to be heard violated Fourth Amendment and Due Process rights (Claim IV, pp. 41-42); infringement on usufructuary rights violated American Indian Religious Freedom Act and First Amendment (Claim V, pp. 42-43); failure to train DNR staff on Treaty rights (Claim VI, pp. 43-44); violations of rights of Manoomin contrary to Treaty rights (Claim VII, pp. 44-45).

Respondents seek declaratory relief, asking the Court to declare certain alleged rights of Manoomin and other tribal rights (*e.g.*, "*Manoomin*, or wild rice, within all the Chippewa ceded territories possesses inherent rights to exist, flourish, regenerate, and evolve, as well as inherent rights to restoration,

[2] Adopting Rights of Manoomin ordinance, 2018.

[3] Recognizing tribal members' usufructuary rights across the 1855 ceded territory, and providing "a legal basis to protect wild rice and fresh water resources as part of our primary treaty foods for future generations," through "a tribal law entitled 'The Rights of Manoomin,'" 2018.

[4] Granting jurisdiction in the White Earth Tribal Court to preserve rights negotiated for Chippewa people in treaties, including protection of resources "within or without the boundaries of the Reservation" (*see* White Earth Judicial Code, Chapter II, Section 1, paragraph (j)), and adopting "the 1855 Treaty Authority Resolution 2018-01 for the *Right to Travel, Use and Occupy Traditional Lands and Waters Code* and [the] 1855 Treaty Authority Resolution 2018-05 for the *Rights of Manoomin Code*."

recovery, and preservation. These rights include, but are not limited to, the right to pure water and freshwater habitat; the right to a healthy climate system and a natural environment free from human-caused global warming impacts and emissions." (p. 45)). Respondents also request injunctive relief (pp. 46-47) as follows:

a. Effectively and immediately rescind all the DNR water appropriation permits issued for Line 3 in this case, for commercial purposes, and in particular, Water Appropriation Permit No. 2018-3420 Enbridge Line 3 Replacement Project, dated June 4, 2021.

b. Establish Surface and Ground Water Property and Joint Permitting Agreements with the State of Minnesota for the 1855 Treaty Territory, to prevent any further unilateral, surface and ground water permitting by the state of Minnesota DNR.

On August 12, 2021, Appellants/Defendants made a motion to dismiss in the Tribal Court. Appellants claimed that the lawsuit was barred by their sovereign immunity and the Court "lack[ed] subject matter jurisdiction to hear the claims pled by the plaintiffs because the defendants are not members of the band and the acts challenged occurred off-reservation." Defendants' Memorandum in Support of Motion to Dismiss, p. 1. Appellants argued: "Here, the plaintiffs plead no acts on White Earth Reservation lands – tribal, trust or fee. Line 3 does not cross any part of the White Earth Reservation. The permit the plaintiffs challenge was issued in St. Paul. The conduct at issue involves the administration of a State-law regulations to a State-issued permit, for conduct off the White Earth Reservation." Defendants' Memorandum, p. 7.

Judge David DeGroat issued an order denying Appellants' motion to dismiss on August 18, 2021. The Court noted that Appellants argued that the Court lacked subject matter jurisdiction because Appellants were not tribal members and "none of the alleged acts occurred on tribal lands." Judge DeGroat denied the motion, concluding that treaties granted certain rights with respect to Manoomin, "[t]he activity at issue here impacts the ecosystem of Manoomin in that it allows [Appellants] to control the water quantity and quality on which the plant depends," and

> The possible impact of [Appellant'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.

The Court further found that, in adopting laws to protect Manoomin on and off the reservation, "the Band is exercising its inherent authority to protect a necessary and vital resource," an authority that "predates the U.S. Constitution and is reflected in the numerous treaties made between the United States and the Anishinaabeg peoples." "[T]he Band must . . . be able to exercise the jurisdiction to carry out that legislative purpose." The Court also concluded that the State's claim of sovereign immunity "must give way to the Band's inherent sovereignty."

On August 19, 2021, Appellants sued White Earth and Judge DeGroat in the United States District Court (Case No. 21-cv-1869) for the District of Minnesota, contending that the Tribal Court lacked subject matter jurisdiction and Respondents' claims were barred by the State's sovereign immunity, and seeking

an injunction against the proceedings in Tribal Court.[5] Judge DeGroat recused himself from further proceedings and Judge B.J. Jones was assigned to the case. Judge Jones held a status hearing on August 26, 2021, and on August 27, 2021 issued an order ("CLARIFICATION OF THE 8/18/21 ORDER DENYING MOTION TO DISMISS"). Much of the discussion in the August 27 Clarification is focused on Appellants' claim that sovereign immunity bars Respondents' lawsuit. The Court stated that it "accepted the common law doctrine of sovereign immunity and readily acknowledge[d] that it applies to the state or tribal sovereign, but concluded that the *Ex parte Young* doctrine applies in tribal court and permits a claim against state officials. The Court wrote that *Ex parte Young* does "not countenance a suit against the sovereign itself" and "[i]t is thus difficult to understand how Defendant Minnesota Department of Natural Resources, a state entity, can remain a viable Defendant in this case." The Court gave Respondents ten days to show cause why the State entity should not be dismissed. Respondents "indicated that they did not oppose dismissal of the Minnesota DNR on sovereign immunity grounds," and the Tribal Court dismissed the DNR by order dated September 14, 2021. The Court also stayed Tribal Court proceedings pending this appeal.[6]

With respect to subject matter jurisdiction, the Court noted that the U.S. Supreme Court decision in *United States v. Cooley*, 141 S. Ct. 1638 (2021), may lower the standard for proving the effects needed to justify jurisdiction under the second *Montana* exception. Finally, The Court wrote:

> The Defendants also contend that none of the actions they have taken or failed to take, as alleged in the complaint, took place on [the] White Earth reservation and thus under the second prong of *Montana* jurisdiction is not possible over them. The Court finds that the complaint alleges that their actions or inactions have resulted in harm to the Plaintiffs' rights on the reservation, however, and this seems to be the standard under *Cooley*. The White Earth Tribal Code at Chapter II, Section 1(b) does require 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. This issue has not been fully briefed however so the Court is hesitant to make this finding at this point.

On September 13, 2021, Appellants timely filed their Notice of Appeal from both Tribal Court orders. The parties filed briefs and informal memoranda in response to questions presented by the Court. The Court held a hearing on the appeal on December 21, 2021.

[5] The United States District Court denied the State's motion for a preliminary injunction against tribal court proceedings and dismissed the complaint without prejudice, on the ground that White Earth and Judge DeGroat were protected from suit by sovereign immunity. *See* Order Denying Plaintiffs' Motion for Preliminary Injunction and Dismissing Complaint Without Prejudice, September 3, 2021. The District Court order is on appeal to the Eighth Circuit Court of Appeals.

[6] Respondents filed a Request for Temporary Restraining Order in the Tribal Court. Before its hearing on the Request, the Tribal Court issued an order staying Tribal Court proceedings pending this appeal. Respondents filed a Motion for Injunction in this Court, requesting an "order appropriate to preserve the existing state of affairs because the DNR will not stop the unlawful uses of surface and ground and unlawful discharge of waters by Enbridge's Line 3 project." Respondents agreed to defer this request pending resolution of the federal court case between the parties in the Eighth Circuit Court of Appeals.

STANDARD OF REVIEW

Under our rules of appellate procedure, a non-final judgment or order "may be appealed via an interlocutory appeal to the [White Earth Court of Appeals] prior to a final judgment or order upon leave granted if the chief judge and/or associate justice(s) determine that an interlocutory appeal will:

(1) Materially advance the termination of the litigation or clarify further proceedings in the litigation;
(2) Protect the petitioner from substantial or irreparable injury; or
(3) Clarify an issue of general importance in the administration of justice."

White Earth Band of Ojibwe Court of Appeals Rules of Appellate Procedure, Rule 5 (B). The rules state that "[a]n interlocutory appeal is an appeal made regarding a single issue or decision reached by the original hearing body . . . prior to their final decision of the hearing. The purpose of an interlocutory appeal is to resolve a specific issue or question of law which is necessary prior to the adjudication of the merits of the case at the original hearing body." Rule 5 (B), n.2. Here, the Tribal Court denied Appellants' motion to dismiss for lack of subject matter jurisdiction, and found "the State's claim of sovereign immunity and eleventh amendment immunity must give way to the Band's inherent sovereignty." We grant leave under Rule 5 (B) to appeal this issue.[7] We review this decision de novo. *See Attorney's Process & Investigation Servs. v. Sac & Fox Tribe*, 609 F.3d 927, 934 (8th Cir. 2010) ("The extent of tribal court subject matter jurisdiction over claims against nonmembers of the Tribe is a question of federal law which we review de novo.").

SUBJECT MATTER JURISDICTION

We must first decide whether the Tribal Court has the authority to hear the Respondents' claims, *i.e.*, does the Court have subject matter jurisdiction. If the Court lacks subject matter jurisdiction, then the lawsuit must be dismissed. *See MacArthur v. San Juan County*, 497 F.3d 1057, 1063 (10th Cir. 2007) ("the adjudicative authority of tribal courts is a threshold question that must be answered before a court may consider the merits of the underlying action"). If this Court finds that the Tribal Court lacks subject matter jurisdiction, then the Court need not, and lacks the authority to, determine any possible defenses to the lawsuit, such as the defense of sovereign immunity.

We first look at the jurisdiction granted by the Tribe. The White Earth Band has enacted Code provisions that grant authority to its Tribal Court to hear an action such as this one. Broadly, the White Earth Band Judicial Code states:

> Section 1. White Earth Band Tribal Court Jurisdiction.
> The jurisdiction of the Tribal Court shall extend to: . . .
> (c) The White Earth Band of Chippewa Tribal Court shall have jurisdiction over all Band members, and over all persons whose actions involve or affect the White Earth Band of Chippewa or its members, ...

White Earth Band Judicial Code, Title 1, Courts, Ch. II Jurisdiction, section 1(c). More specifically, the Band, has granted its Courts authority:

[7] Respondents have not objected to this Court's consideration of these issues at this time.

> [T]o hear all actions arising under any code, resolution or ordinance enacted to protect, preserve, or regulate the rights reserved for Chippewa people in treaties negotiated with the United States government regarding off-reservation resources. The Court shall also have jurisdiction to hear all actions arising under any code, resolution or ordinance enacted to conserve, manage, or protect the resources utilized by the Chippewa people, regardless of whether such code, resolution or ordinance contemplates conservation, management or protection within or without the boundaries of the Reservation.

White Earth Band Judicial Code, Title 1, Courts, Ch. II Jurisdiction, section 1(j). Thus, 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. This case – in which the Tribe seeks to enforce treaty rights to protect Manoomin and other resources on 1855 Treaty ceded land – falls squarely within this grant of jurisdiction.

That the Tribe has granted its courts authority to hear certain matters, however, does not end the courts' examination of subject matter jurisdiction. The United States Supreme Court has restricted the authority of tribal courts to hear certain cases against nonmembers, even if the Tribe would permit its courts to hear those cases. "[W]hether a tribal court has adjudicative authority over nonmembers is a federal question." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008). "The question of the regulatory and adjudicative authority of the tribes . . . is a matter of federal law." *MacArthur*, 497 F.3d at 1066. "[F]ederal law defines the outer boundaries of an Indian tribe's power over non-Indians." *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985).

That federal law may supersede a Tribe's grant of authority to its Tribal Court to hear certain cases involving nonmembers is illustrated by *Nevada v. Hicks*, 533 U.S. 353 (2001). In that case, Hicks sued in tribal court "state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation." *Id.* at 355. Plaintiff argued that he was entitled to recovery under 42 U.S.C. § 1983 for violations of his civil rights. The tribal court held that it had jurisdiction over the claims. The state officials sued in federal court, seeking a declaratory judgment that the tribal court lacked jurisdiction.[8] The Supreme Court held that the tribal court lacked subject matter jurisdiction under Supreme Court precedent. The Court considered and rejected Hicks' argument that the tribal court was a "court of general jurisdiction" and therefore had authority to "entertain federal claims under § 1983," *id.* at 366, just as a state court may do.

> A state court's jurisdiction is general, in that it lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Tribal courts, it should be clear, cannot be courts of general jurisdiction in this sense, for a tribe's inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction. It is true that some statutes proclaim tribal-court jurisdiction over certain questions of federal law. See, *e.g.*, 25 U.S.C. § 1911(a) (authority to adjudicate child custody disputes under the Indian Child Welfare Act of 1978); 12 U.S.C. § 1715z-13(g)(5) (jurisdiction over mortgage foreclosure actions brought by the Secretary of Housing and Urban Development against reservation homeowners). But no provision in federal law provides for tribal-court jurisdiction over § 1983 actions.

[8] Many of the reported cases on challenges to tribal court jurisdiction occur when tribal court defendants sue the other parties and the tribal court and judge in federal court, seeking an injunction against further proceedings in the tribal court or against enforcement of a tribal court order or judgment.

Id. at 367-68 (quotation and citations omitted).

"Because federal law defines the outer boundaries of an Indian tribe's power over non-Indians, the question whether an Indian tribe retains the power to compel a non-Indian to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law . . . ." *Boozer v. Wilder*, 381 F.3d 931, 934 (9th Cir. 2004) (quotations omitted). Thus, while 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 *MONTANA* DOCTRINE

The case law prescribing when a tribal court has authority to deal with nonmembers is called the *Montana* doctrine, named after the U.S. Supreme Court case that clarified this rule of law, *Montana v. United States*, 450 U.S. 544 (1981).

The *Montana* Court acknowledged that, within a reservation, Tribes have "inherent sovereignty" to address "what is necessary to protect tribal self-government or to control international relations," and may "punish tribal offenders," "determine tribal membership, . . . regulate domestic relations among members, and . . . prescribe rules of inheritance for members." *Id.* at 564. The Court concluded, however, that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* The Court held that there were two situations in which a Tribe may exercise authority over a nonmember:

> To be sure, 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. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. [Citations omitted.] A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands 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.

Id. at 565-66. The "consensual relationship" situation, justifying tribal jurisdiction, is often referred to as the "first *Montana* exception," and the "threaten . . . the political integrity . . ." situation is referred to as the "second *Montana* exception." Looking at the second exception, the Court in *Montana* held that the Crow Tribe of Montana did not have the "authority to prohibit all hunting and fishing by nonmembers of the Tribe on non-Indian property within reservation boundaries," *id.* at 547, because that activity did not "so threaten the Tribe's political or economic security as to justify tribal regulation," *id.* at 566.

In the 40-plus years that have passed since the *Montana* decision, the courts have applied its ruling to decide in what circumstances Tribes had authority to regulate – and their tribal courts had authority to adjudicate – conduct of non-Indians and in what circumstances they did not.

SECOND *MONTANA* EXCEPTION: ACTIVITY ON RESERVATION LAND

Respondents contend that the Tribal Court has subject matter jurisdiction over this lawsuit under the second *Montana* exception. In applying the second *Montana* exception, the courts have focused on

three factors – was the party allegedly subject to regulation a non-Indian, did the party's activity occur on reservation land or on non-Indian fee land on the reservation, and did the effects of the activity "threaten the Tribe's political or economic security."[9]

Appellants' main argument is that the tribal court lacks subject matter jurisdiction under *Montana* because Appellants – non-Indians – did not engage in any allegedly unlawful activity on tribal land or on fee land within the Reservation's boundaries. Appellants point to the facts that Line 3 does not cross the Reservation and that the challenged permitting decisions were made in the city of St. Paul. Respondents allege that the permit wrongfully authorized excessive use of water, infringing on Respondents' treaty rights on ceded territory.[10] We consider both the issuance of the water permit in St. Paul and execution of the permit (use of water) that occurred to some extent on ceded territory.

Respondents argue that, even if Appellants' allegedly unlawful activities occurred off tribal land, the Tribal Court may invoke subject matter jurisdiction if the nonmember's activities threaten tribal interests on the reservation:

> First, the focus of the Montana analysis is on the nonmember's "conduct" or "activities," not the nonmember's physical location. Second, a nonmember's conduct or activities that imposes threats to or harms tribal natural resources may in fact invoke the second Montana exception.

Respondent's Letter Brief, December 9, 2021, p. 2.

The principal focus of Respondents' Complaint is on the threat the Enbridge project poses to waters and Manoomin on *off-Reservation* 1855 Treaty ceded territory. Complaint, p. 35-39. As to whether granting the dewatering permit caused harm to tribal waters or Manoomin *on the Reservation,* the record is less clear. On p. 14 of the Complaint, Respondents allege that "the DNR has intentionally and knowingly violated the Rights of Manoomin by unilaterally granting 5 billion gallons of water, without official notice to tribes, without Chippewa consent, *on and off White Earth Reservation* in the Chippewa treaty ceded territories," that an injunction to nullify the water permit is necessary "to prevent further, continued waste of fresh water resources both surface and groundwater, *on reservation* and across the ceded territories (emphasis added)." At the hearing on this appeal, Respondent's counsel argued that Enbridge's water use may have lowered the depth of Lower Rice Lake on the Reservation, impairing the growth of Manoomin. In their Response to Motion to Dismiss, Respondents argued:

> Today, the water levels on Rice Lake Refuge and many other harvesting waters on reservation and off are too low to access by canoe to harvest manoomin that might be available. The DNR has unjustly taken everyone's Nibi, everyone's water, and in doing so, water levels that support

[9] We note that the *Montana* analysis applies to nonmembers of the tribe. With regard to members, "[t]ribal court subject matter jurisdiction over actions arising outside Indian country extends to matters involving the exercise of off-reservation treaty rights." *Cohen's Handbook of Federal Indian Law* § 7.02[1][c] (2005 Ed.)); *see Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974) (describing the regulation of off-reservation treaty fishing as an "internal matter").

[10] The specific locations of dewatering activities authorized by the amended permit are listed in the Permit, Respondents' Motion for Injunction, Exhibit B. Respondents have focused their concerns on "[t]he upper Mississippi watershed . . ., from the Headwaters of the Mississippi River adjacent to White Earth Reservation through the various, original 1855 reservations and 1864 reservation ceded territories through Brainerd to St. Cloud." Plaintiffs' Response to Motion to Dismiss, p. 11.

> Monoomin on and off reservation are too low to harvest and support the aquatic ecosystem. Of course, the tribal court has jurisdiction over off-reservation waters, and because threats to manoomin have a direct effect on the economic security and health and welfare of the tribe, the tribal court possesses jurisdiction to protect manoomin on reservation lands and waters.

Respondents' Response, pp. 14-15.

The Complaint also details the cultural, spiritual, religious, and nutritional significance of Manoomin to the Anishinaabe. Complaint, pp. 1-3, 26-27. Given the importance of Manoomin to Respondents, a court may reasonably conclude that the Enbridge project "threaten[s] . . . the health and welfare of the tribe," under the second *Montana* exception, and for purposes of this appeal, we accept that allegation as true. Given Respondents' brief allegations as to on-reservation impact, we also acknowledge that Respondents have pleaded such an on-reservation impact.

Regardless of whether the effects of the nonmember activities threaten tribal resources on the reservation, this jurisdictional dispute focuses on whether the appellants'/defendants' allegedly unlawful activities must have occurred on tribal land (or fee land on the Reservation) for the Tribal Court to have subject matter jurisdiction under the second *Montana* exception.

Respondents cite several cases in support of their argument that nonmember activities off reservation that threaten tribal interests on reservation are sufficient to invoke subject matter jurisdiction under the second *Montana* exception: *Attorney's Process & Investigation Servs. v. Sac & Fox Tribe*, 609 F.3d 927 (8th Cir. 2010); *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (U.S. 2008); *Sprint Communs. Co. L.P. v. Wynne*, 121 F. Supp.3d 893 (D.S.D. 2015); *FTC v. Payday Fin., LLC*, 935 F. Supp.2d 926 (D.S.D. 2013); *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916 (9th Cir. 2019); *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001); *Montana v. United States EPA*, 137 F.3d 1135 (9th Cir. 1998). While the focus of these cases may have been on the nonmembers' activities or the effects of those activities on tribal land, in each case (except possibly for *Wisconsin*) the nonmember activity that was the basis for jurisdiction occurred on tribal land. We review each of the cases relied on by Respondents.

In *Attorney's Process & Investigation Servs. v. Sac & Fox Tribe*, 609 F.3d 927 (8th Cir. 2010), the Sac and Fox Tribe sued defendant API in tribal court, alleging that API had "committed torts while seizing control of tribal facilities on the Sac and Fox reservation." *Id.* at 930. Much of the discussion in *Attorney's Process* is focused on the defendant's activities and whether they threatened the "'political integrity, the economic security, [and] the health [and] welfare'" of the Tribe." *Id.* at 940 (quoting *Montana*, 450 U.S. at 566). But there was no doubt that such activities had occurred *on tribal land* ("The facilities API raided are on tribal trust land." *Id.* at 940.). The court upheld the Tribal Court's jurisdiction because the allegedly unlawful activities occurred on tribal land *and* threatened the tribe's interests under the second *Montana* exception. The court noted that "*Montana's* analytic framework now sets the outer limits of tribal civil jurisdiction – both regulatory and adjudicatory – over nonmember activities *on tribal and nonmember land*." *Id.* at 936 (emphasis added).

In *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (U.S. 2008), former Indian owners of fee land on the Cheyenne River Sioux Indian Reservation sued a bank located off the reservation in tribal court on the ground that the bank discriminated against plaintiffs in the sale of the land to non-Indian individuals. After the tribal court found in favor of the plaintiffs, the bank filed an action in federal court to invalidate the tribal court judgment on the ground that the tribal court lacked jurisdiction. The Supreme Court noted that Indian sovereignty "centers on the land held by the tribe and

on tribal members within the reservation." *Id.* at 327. "[T]ribes do not, as a general matter, possess authority over non-Indians who come within their borders." *Id.* at 328. *Montana* recognized two exceptions to this rule, "circumstances in which tribes may exercise 'civil jurisdiction over non-Indians on their reservations.'" *Id.* at 329, quoting *Montana*, 450 U.S. at 565. "*Montana* and its progeny permit tribal regulation of nonmember conduct inside the reservation that implicates the tribe's sovereign interests." *Id.* at 332. The Court held that the tribal court lacked jurisdiction to regulate sale of land by a non-Indian bank off the reservation to a non-Indian.

In *Sprint Communs. Co. L.P. v. Wynne*, 121 F. Supp.3d 893 (D.S.D. 2015), the Oglala Sioux Tribal Utilities Commission sued Sprint in Tribal Court, alleging that Sprint had refused to comply with the Commission's regulations. Sprint filed a complaint in federal court, seeking an injunction against the Tribal Court proceedings on the ground that it lacked subject matter jurisdiction. Sprint argued that, because it had no facilities or employees on the reservation, Sprint was not subject to jurisdiction. The court noted that "physical location [of facilities, equipment or employees], while relevant, is not dispositive because the focal point under *Montana* is the location of the nonmember's activities or conduct." *Id.* at 899. Sprint provided phone service to customers *on the reservation* using wires that entered the reservation. The federal court found that unresolved factual and legal issues prevented it from concluding "that the [tribal court] would plainly be without jurisdiction," *id.* at 901, and "the tribal court should have the first opportunity to balance the interests involved and determine its jurisdiction," *Id.*[11] The court denied Sprint's request for an injunction against tribal court proceedings and stayed the federal court action pending tribal court proceedings.

In *FTC v. Payday Fin., LLC*, 935 F. Supp.2d 926 (D.S.D. 2013), pay day loan companies on the Cheyenne River Sioux Tribe Reservation entered agreements with borrowers who resided off the reservation. The agreements provided that the Cheyenne River Tribal Court had exclusive jurisdiction over enforcement actions. The Federal Trade Commission brought an action in federal court to challenge the enforceability of the forum selection clause. The court found that the contract between lender and borrower was "formed on the Reservation," that the contract was a consensual relationship, and therefore the first *Montana* exception would authorize jurisdiction in the tribal court forum.

In *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916 (9th Cir. 2019), FMC negotiated an agreement with the Shoshone-Bannock Tribes to permit FMC to store hazardous waste on non-Indian-owned fee land on the reservation. FMC stopped paying the annual permit fee and the Tribes sued FMC in tribal court to recover payment. The tribal court held that it had jurisdiction under both *Montana* exceptions and found that FMC owed permit fees for the waste storage. FMC sued the Tribes in federal court, contesting the tribal court's jurisdiction. The district court agreed with the tribal court that it had jurisdiction and held that the tribal court judgment would be enforced in federal court under the doctrine of comity. The Ninth Circuit Court of Appeals concurred that the tribal court had jurisdiction over FMC under both *Montana* exceptions and that the judgment may be enforced in federal court. In finding jurisdiction under the second *Montana* exception, the court noted that "[t]hreats to tribal natural resources, including those that affect tribal cultural and religious interests, constitute threats to tribal self-governance, health and welfare," *id.* at 935, and concluded "that FMC's storage of millions of tons of hazardous waste on the Reservation 'threatens or has some direct effect on the political

[11] The Court noted "Given the long-held policy considerations in promoting tribal sovereignty, the doctrine of tribal exhaustion requires parties to challenge tribal jurisdiction in tribal court before seeking relief in a federal court." *Sprint*, 121 F. Supp.3d at 898.

integrity, the economic security, or the health and welfare' of the Tribes to the extent that it 'imperil[s] the subsistence or welfare' of the Tribes," *id.* (citing *Montana*, 450 U.S. at 566).

One of the leading cases on whether subject matter jurisdiction may be invoked when the nonmember's activities occurred off tribal land is *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087 (8th Cir. 1998). There, a descendant of Crazy Horse sued Hornell Brewing Co. in the Rosebud Sioux Tribal Court, asserting common law and statutory claims arising from Hornell's use of the Crazy Horse name in the sale of its malt liquor. The Tribal Court dismissed the action on the ground, inter alia, that the court lacked subject matter jurisdiction, but the Rosebud Sioux Supreme Court reversed, finding that the plaintiff had "established 'prima facie' subject-matter jurisdiction." *Id.* at 1088. The defendant sued in federal court to enjoin the tribal court proceedings, alleging that tribal court lacked subject matter jurisdiction. The Eighth Circuit Court of Appeals held that the tribal court did not have subject matter jurisdiction when Hornell's activities did not occur on the reservation[12]:

> We begin our discussion of subject matter jurisdiction by noting that, "absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances." *Strate v. A-1 Contractors,* __U.S.__, 117 S. Ct. 1404, 1409, 137 L. Ed. 2d 661 (1997) (*citing Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 55 L. Ed. 2d 209, 98 S. Ct. 1011 (1978) and *Montana v. United States*, 450 U.S. 544, 67 L. Ed. 2d 493, 101 S. Ct. 1245 (1981)). Indian tribes do, however, "retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians *on their reservations*." *Montana*, 450 U.S. at 565 (emphasis added). The operative phrase is "on their reservations." Neither *Montana* nor its progeny purports to allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring *outside their reservations*.
>
> The activities at issue in this case are the Breweries' manufacture, sale, and distribution of Crazy Horse Malt Liquor. It is undisputed that the Breweries do not conduct those activities on the Rosebud Sioux Reservation or within South Dakota. Thus, because the conduct and activities at issue here did not occur on the Rosebud Sioux Reservation, we do not believe *Montana*s discussion of activities of non-Indians on fee land within a reservation is relevant to the facts of this case. More importantly, the parties fail to cite a case in which the adjudicatory power of the tribal court vested over activity occurring outside the confines of a reservation.

Id. at 1091 (emphasis in original).

In summary, in *Attorney's Process & Investigation Servs.*, the defendant's alleged torts occurred "while seizing control of tribal facilities on the Sac and Fox reservation;" in *Sprint Communs. Co. L.P.*, Sprint provided phone service to customers *on the reservation* using wires that entered the reservation; in *Payday Fin., LLC*, the contract between lender and borrower was "formed on the Reservation;" in *Shoshone-Bannock Tribes*, the nonmember FMC stored hazardous waste on non-Indian-owned fee land on the reservation; and, in all these cases involving on reservation conduct, the courts sustained subject matter jurisdiction in tribal courts. In *Plains Commerce Bank*, a non-Indian bank off the reservation sold

[12] The Court rejected the argument that advertising of the malt beverage "had a direct effect upon tribal members." "Advertising outside the Reservation and on the Internet does not fall within the rubric of directly affecting the health and welfare of the Tribe. The Internet is analogous to the use of the airwaves for national broadcasts over which the Tribe can claim no proprietary interest, and it cannot be said to constitute non-Indian use of Indian land." 133 F.3d at 1093.

property to a non-Indian; in *Hornell Brewing Co.*, the brewer's allegedly unlawful activities did not occur on the reservation; and in these cases, the courts found that subject matter jurisdiction in tribal courts was lacking.

The most promising case for Respondents to argue that the Tribal Court may assert jurisdiction over non-reservation activity is *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001), quoted in Respondents' December 20 letter brief. A brief review of an earlier case – *Montana v. United States EPA*, 137 F.3d 1135 (9th Cir. 1998) – will help place the *Wisconsin* case in context.

In *Montana v. United States EPA*, 137 F.3d 1135 (9th Cir. 1998), the State of Montana challenged the EPA's decision to grant TAS (treatment-as-state) status to the Confederated Salish and Kootenai Tribes to promulgate water quality standards (WQS) "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. Montana argued that such TAS status permitted the Tribes "to exercise authority over non-members that is broader than the inherent tribal powers recognized as necessary to self-governance," *id.*, under the *Montana* case. Congress amended the Clean Water Act to authorize the EPA to grant TAS status to tribes to adopt WQS. The EPA policy "presume[d] that there has been an adequate showing of tribal jurisdiction over fee lands," *id.* at 1139, if tribal waters on the reservation are "subject to protection under CWA, and . . . impairment of waters would have a serious and substantial effect on the health and welfare of the tribe." *Id.* The Court found that "threats to water rights may invoke inherent tribal authority over non-Indians. 'A tribe retains the inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the health and welfare of the tribe. This includes conduct that involves the tribe's water rights.' *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52 (1981)." *Id.* at 1141. The Court thus "affirm[ed] the district court's decision that EPA's regulations pursuant to which the Tribe's TAS authority was granted are valid as reflecting appropriate delineation and application of inherent Tribal regulatory authority over non-consenting non-members." *Id.*

In *Montana v. United States EPA*, the focus remained on on-reservation activities – pollution "sources . . . located on land owned by members or non-members of the Tribe." In *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001), however, there is discussion of a tribe's regulation of emissions from off-reservation sources. In *Wisconsin*, the EPA, acting pursuant to authority of the Clean Water Act, granted the Sokaogon Chippewa Community (the Mole Lake Band) the TAS status "to establish water quality standards for bodies of water within its reservation and to require permits for any action that may create a discharge into those waters." *Id.* at 744. The State of Wisconsin sued the EPA, seeking revocation of the grant. The state challenged the tribe's "inherent authority to regulate water quality within the borders of the reservation," a showing of which was required for the grant of TAS. The EPA allowed "a tribe to establish this authority by showing that impairment of the reservation's waters would affect 'the political integrity, the economic security, or the health or welfare of the tribe.'" *Id.* at 748 (citing federal regulation). A tribe holding TAS status may "require upstream off-reservation dischargers . . . to make sure that their activities do not result in contamination of the downstream on-reservation waters. . . . This is a classic extraterritorial effect, which Wisconsin argues is impermissible and takes this case beyond the scope of *Montana [v. United States, 450 U.S. 544 (1981)],* which concerned only tribal authority over nonmember activities on reservation fee lands." *Id.* at 748. The TAS statute required "upstream and downstream users [such as Wisconsin and the Tribe] . . . [who] have different standards" for water quality to mediate such disputes. *Id.* at 749. The court upheld the EPA's grant of TAS status to the Tribe, reasoning as follows:

> [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, and it would be exceedingly hard to say that the EPA's interpretation is contrary to law in the face of the express recognition of this issue and the choice of a solution in the statute itself. It was reasonable for the EPA to determine that, since the Supreme Court has held that a tribe has inherent authority over activities having a serious effect on the health of the tribe, this authority is not defeated even if it exerts some regulatory force on off-reservation activities. * * *
>
> 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 that power entails some authority over off-reservation activities.

Id. at 749-50.

The Court also noted that "we think Wisconsin exaggerates the power of the tribe to veto upstream discharge activities. The tribe cannot impose any water quality standards or take any action that goes beyond the federal statute or the EPA's power." *Id.* at 749. In other words, the grant of TAS status did not result in purely tribal regulation.

We conclude 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. In allowing TAS designation, *Wisconsin* distinguished a prior case that found "the Chippewa Band was precluded from restricting hunting and fishing in the reservation waters," because "Most importantly, [the prior case] did not involve a particular statute under which Congress specified that tribes would be entitled to be treated as states under particular circumstances, and both Congress and the responsible agency outlined the regulatory authority tribes were to exercise. The legal structure governing [the prior case] involved only the treaty that created the reservation, and that treaty did not contain any language regarding the tribe's power to regulate reservation waters." *Id.* at 746-47 (citing *Wisconsin v. Baker,* 698 F.2d 1323, 1335 (7th Cir. 1983)).

In our case, there is no such congressional authorization of tribal regulatory authority or tribal court jurisdiction. Congress has authorized tribal court jurisdiction in other circumstances. *See Nevada v. Hicks*, 533 U.S. 353, 367-68 (2001) ("It is true that some statutes proclaim tribal-court jurisdiction over certain questions of federal law. *See, e.g.*, 25 U.S.C. § 1911(a) (authority to adjudicate child custody disputes under the Indian Child Welfare Act of 1978); 12 U.S.C. § 1715z-13(g)(5) (jurisdiction over mortgage foreclosure actions brought by the Secretary of Housing and Urban Development against reservation."); 25 U.S.C. § 1304 (granting tribes special domestic violence criminal jurisdiction over non-Indians who commit acts of domestic violence or dating violence in Indian country, when the alleged victim is an Indian and the defendant has sufficient ties to the prosecuting tribe).

While it was true in 2001 when the *Wisconsin* case was decided that "[t]here is no case that expressly rejects an application of *Montana* to off-reservation activities that have significant effects within the

reservation," *id.*, there are also no cases – to this day – that support 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. To the contrary, courts have suggested an underlying assumption that *Montana* applies to activities on the reservation: "tribal jurisdiction is, of course, cabined by geography: The jurisdiction of tribal courts does not extend beyond tribal boundaries*." Philip Morris United States v. King Mt. Tobacco Co.*, 569 F.3d 932, 938 (9th Cir. 2009) (trademark infringement case) (*citing Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001)). Since 2001, as we have explained, a number of cases have upheld subject-matter jurisdiction when activities occurred on reservation and denied jurisdiction when activities did not occur on reservation.

In its Clarification, the Tribal Court noted that the U.S. Supreme Court in *United States v. Cooley*, 141 S. Ct. 1638 (2021), may have lowered the standard for proving the effects needed to justify jurisdiction under the second *Montana* exception. In *Cooley*, the Court held that the Crow Police had "authority to detain temporarily and to search a non-Indian on a public right-of-way that runs through an Indian reservation. The search and detention . . . took place based on a potential violation of state or federal law prior to the suspect's transport to the proper nontribal authorities for prosecution." *Id.* at 1641. The Court found that "[t]he second [*Montana*] exception . . . fits the present case, almost like a glove." *Id.* at 1643. The non-Indian's activity subject to tribal regulation (by the stop and search) occurred on the reservation and threatened the "health or welfare of the tribe." *Id.* We do not see *Cooley* as expanding the second *Montana* exception, and this Supreme Court precedent does not support exercise of jurisdiction over Appellants in this case.

We conclude that, under the second *Montana* exception, a tribal court lacks subject matter jurisdiction to hear claims based on a nonmember's allegedly unlawful activities that occur off reservation.[13] We also find no support for the contention that a Tribe may exercise jurisdiction over a nonmember's activities on non-Reservation land on which the Tribe claims usufructuary rights. Because we find the second *Montana* exception to the general limitation on tribal regulation of nonmembers inapplicable on non-Reservation land, including ceded territory, we find no tribal legislative jurisdiction, and thus no tribal judicial jurisdiction.

TREATY RIGHTS CONFERRING JURISDICTION

In the Tribal Court's "Clarification," the Court wrote that "in both *Belcourt Public Schools* [*v. Davis*] and [*Fort Yates Public School District v.*] *Murphy* the [Eight Circuit Court of Appeals] suggested that a treaty delegation could be the basis of the assertion of tribal court jurisdiction over state entities."[14] Respondents argue that Treaties authorize the tribal court to hear this case: "Therefore, because the White Earth Band has formally adopted tribal laws to protect Manoomin, on and off reservations of the Chippewas of the Mississippi, the tribal court necessarily possesses reserved jurisdiction to protect manoomin on reservation and off reservation, as part of the usufructuary property rights jurisdiction

[13] *Accord Crow Tribe of Indians v. Gregori*, 1998 Mont. Crow Tribe LEXIS 1 (April 2, 1998, Crow Court of Appeals, Montana) ("The first step in analyzing the Crow Tribe's inherent sovereign authority in this case concerns whether the Coop's activities being regulated (and adjudicated) take place on land owned by the Tribe or its members, or on alienated, non-Indian fee lands or the equivalent.").

[14] The language in the cases is: "No federal statute or treaty specifically provides the Tribal Court with jurisdiction over the claims at issue in this case; therefore, the Tribal Court's jurisdiction must stem from its 'retained or inherent sovereignty.'" *Belcourt Pub. Sch. Dist. v. Herman*, 786 F.3d 653, 657 (8th Cir. 2015) and *Fort Yates Pub. Sch. Dist. #4 v. Murphy*, 786 F.3d 662, 666 (8th Cir. 2015) (citing *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001)).

expressly reserved in the 1825 and 1826 Treaties with the Chippewa." Plaintiffs' Response to Motion to Dismiss, p. 16-17. Federal law or treaty may grant subject matter jurisdiction, *see Strate v. A-1 Contrs*., 520 U.S. 438, 445 (recognizing that "express authorization by federal statute or treaty" may expand the limited tribal jurisdiction over the conduct of nonmembers). And while Respondents may claim usufructuary rights to fish, hunt and gather on 1855 Treaty ceded territory, Respondents have not cited any language from treaties that provide authority for the Tribe to regulate the activities of non-Indians on 1855 ceded territory or to confer tribal court jurisdiction.

REMAND FOR DISCOVERY

Respondents contend that this case should be remanded to the Tribal Court so Respondents may conduct discovery and obtain information to support subject matter jurisdiction under the second *Montana* exception. It is true that some subject matter jurisdiction challenges "require[] the Court to go beyond the pleadings to resolve a factual dispute necessary to determine whether the Court has jurisdiction." *Harper v. White Earth Human Res.*, No. 16-cv-1797 (JRT/LIB), 2016 U.S. Dist. LEXIS 184392 (D. Minn. Oct. 7, 2016) (citing *Osborn v. United States*, 918 F.2d 724 (8th Cir. 1990)). In this case, however, that the allegedly unlawful activity (grant of amended water permit, or use of additional water resources) occurred off the White Earth Reservation is not in dispute. While discovery may produce evidence of the impact of such conduct on the reservation, we have found that such evidence alone does not establish jurisdiction in tribal court. Thus, we conclude that it would be fruitless to remand this case to the Tribal Court for jurisdictional discovery.

DECLARATORY RELIEF

In addition to Respondents' request for injunctive relief against Appellants, Respondents seek declaratory relief as to rights of Manoomin, treaty rights, rights of Chippewa to harvest Manoomin, and rights of sovereignty. *See* Complaint, pp. 45-46. We have considered whether the Tribal Court may determine these requests even though it lacks jurisdiction to grant injunctive relief under the circumstances of this case. We conclude that without subject matter jurisdiction, the Tribal Court lacks jurisdiction to grant declaratory relief. *See Mack v. Wilcox Cnty. Bd. of Educ*., 218 So. 3d 774, 780 (Ala. 2016) ("In the absence of subject-matter jurisdiction, a court can take no valid action other than to dismiss the case."); *Loya Ins. Co. v. Loya-Gutierrez*, No. 1:20-cv-00433-JAP-GBW, 2021 U.S. Dist. LEXIS 758, *4 (D.N.M. Jan. 4, 2021) ("Where the record fails to show an independent jurisdictional basis, the district court lacks jurisdiction to grant relief in a declaratory judgment action.").[15]

[15] In *In Re: White Earth Reservation Business Committee v. Mason*, File No. GC19-0255 (August 30, 2019), the White Earth Band requested "that the Court declare certain conduct to be in violation of the Minnesota Chippewa Tribe Constitution and White Earth ordinances." The Tribal Court found that "there are no provisions of White Earth law that authorize the Court to make such 'declarations.' The authority for courts to grant declaratory judgments is provided by legislative enactments, e.g., Minn. Stat. § 555.01. But, unlike federal or Minnesota law, White Earth law does not include a declaratory judgment act or code." Because we conclude that Tribal Court lacks subject matter jurisdiction to hear Respondents' claims, we have not examined whether there may be a common law remedy of declaratory judgment or whether the Tribal Court may draw on federal or Minnesota law to make declaratory judgments. *See* White Earth Band of Chippewa Judicial Code, Chapter VII, Section 6(c).

SOVEREIGN IMMUNITY

Given our decision that the Tribal Court lacks subject matter jurisdiction in this case, it is not necessary or appropriate for us to decide whether Respondents' claims against Minnesota state officials are barred by sovereign immunity.

RESPONDENTS MAY ENFORCE TREATY RIGHTS IN OTHER FORUMS

While we conclude that Respondents may not pursue claims in Tribal Court against State officials based upon allegations that they unlawfully granted water permits to Enbridge, there are other avenues for the Tribe in which to seek enforcement of treaty rights.[16] The roadmap for enforcing treaty rights is set forth in federal cases in which Tribes have successfully sued State or local officials to enjoin Treaty violations. *See, e.g., Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (several Chippewa Bands won enforcement of 1837 Treaty rights to hunt, fish and gather on ceded territory; the U.S. Supreme Court ruled that "the Chippewa retain[ed] the usufructuary rights guaranteed to them under the 1837 Treaty.")[17]; *Fond du Lac Band of Chippewa Indians v. Carlson*, 68 F.3d 253, 255, 257 (8th Cir. 1995) (affirming district court order "that the Band may maintain a lawsuit against state officials seeking prospective injunctive relief against violations of their federal treaty rights" under *Ex parte Young* doctrine which recognizes "that suits may be brought in federal court against state officials in their official capacities for prospective injunctive relief to prevent future violations of federal law"); *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001, 1006 (D. Minn. 1971) ("Plaintiff Indians have the right to hunt and fish and gather wild rice on public lands and public waters of the Leech Lake Reservation free of Minnesota game and fish laws."). *See also United States v. Washington*, 827 F.3d 836 (9th Cir. 2016) (Ninth Circuit found that usufructuary rights include habitat protection, concluding "in building and maintaining barrier culverts" that hinder salmon swimming upstream to spawn, the state of Washington "has violated, and continues to violate, its obligation to the Tribes under the" usufructuary clauses of the applicable treaties, and "[t]he district court did not abuse its discretion in enjoining Washington to correct" the offending culverts) (affirmed without opinion by an equally divided U.S. Supreme Court in *Washington v. United States*, 138 S. Ct 1832 (2018)).

CONCLUSION

This Court is sympathetic to the White Earth Band's efforts to expand the jurisdiction of its Tribal Court, to enforce Treaty rights, and to protect natural resources important to the White Earth Band and others. But the Tribe and this Court are constrained by long-standing jurisdictional principles in federal case law. The efforts to expand jurisdiction by Band legislation and the use of Tribal Court to address matters such as raised in this case are commendable and should continue as an exercise of inherent tribal sovereignty. However, such actions are not exercised in a vacuum. Rather, such exercises of sovereignty

[16] There also may be other ways to challenge the granting of the water permit or the alleged exclusion of the Tribe's voice in the permitting process, but the parties have not commented on other such possible challenges and the Court has not examined those possibilities.

[17] The Treaty provided: "The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded is guarantied [*sic*] to the Indians, during the pleasure of the President of the United States." 526 U.S. at 177. The district court affirmed the 1837 Treaty rights. *Mille Lacs Band of Chippewa Indians v. Minnesota Dep't of Natural Resources*, 861 F. Supp. 784 (D. Minn. 1994), *aff'd*, *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904 (8th Cir. 1997).

must take into account the longstanding legal and judicial framework, unless the Band and other tribes pursue federal legislation to address such matters.

There may be cases in which Treaty rights may be enforced in Tribal Court, e.g., cases involving Tribal members or non-Indians who enter "consensual relationships" or involve activities on Tribal land. This case is not one of those.

We believe that federal case law requires dismissal of this case. If we were to allow the case to proceed on its merits in the Tribal Court, and the Court granted a remedy against Appellants, and this Court affirmed such remedy, we believe that a federal court would apply the same case laws we cite to enjoin the remedy and the Tribal Court from further proceedings.

We conclude that *Montana v. United States*, 450 U.S. 544 (1981), requires that a plaintiff show that the nonmember defendant engaged in *activities on the reservation* to invoke subject matter jurisdiction in tribal court under the second *Montana* exception. Because there is no allegation that the DNR officials engaged in allegedly unlawful activities on tribal land, the Tribal Court lacks subject matter jurisdiction over this lawsuit. Therefore, Plaintiffs' Complaint must be dismissed. The Tribal Court orders denying Appellants' motion to dismiss are reversed and the Complaint is dismissed.

Dated: March 10, 2022.

BY THE COURT:

George W. Soule

George W. Soule

Lenor Scheffler Blaeser

Lenor Scheffler Blaeser

David Harrington

David Harrington