UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Minnesota Department of Natural Resources, Commissioner Sarah Strommen, Deputy Commissioner Barb Naramore, DNR Section Manager Randall Doneen, Unnamed DNR Conservation Officers 1-10, Plaintiffs, v. The White Earth Band of Ojibwe and Hon. David A. DeGroat, in his official capacity as Judge of the White Earth Band of Ojibwe Tribal Court, Defendants	)	Case No. 21-3050 **DNR'S MOTION FOR A PRELIMINARY INJUNCTION AND EXPEDITED BRIEFING AND REVIEW**

This case arises from an extraordinary, unprecedented, and plainly prohibited attempt by the White Earth Band of Ojibwe ("the Band") to sue Minnesota Department of Natural Resources' officials ("DNR") in tribal court for an order requiring the officials to revoke a state-issued permit related to a pipeline replacement project – no part of which crosses the Band's reservation.

In response to the unprecedented tribal suit, DNR filed a motion to dismiss in tribal court for lack of subject matter jurisdiction. The tribal court denied the motion. DNR then filed a complaint and motion for a preliminary injunction in federal district court to enjoin further proceedings in tribal court. DNR named the Band and

Judge David A. DeGroat in his official capacity as defendants. Judge DeGroat is the Chief Judge of the tribal court and (at the time of the complaint) was the judge presiding over the case. The district court heard arguments on the DNR's motion for a preliminary injunction – but then *sua sponte* dismissed the federal action holding that both the Band and Judge DeGroat have sovereign immunity from suit in federal court.

While DNR agrees the Band has sovereign immunity, Judge DeGroat does not. *See*, *e.g.*, *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1139 (8th Cir. 2019). DNR appeals to this Court for reversal of the district court's dismissal of Judge DeGroat. It also files this motion for preliminary relief. The tribal court has scheduled a September 20 hearing on the Band's motion for a preliminary injunction in tribal court, so the need to protect DNR's rights is urgent. With this motion, DNR seeks three forms of expedited relief: (1) an injunction while this motion is resolved, (2) an injunction while the appeal proceeds; and (3) expedited handling of this appeal.

BACKGROUND

The Band has been litigating against agency issued permits and certifications for the Line 3 project in state and federal courts for years. *See In re Enbrdige Line 3 Replacement Project*, Case No. A20-1513, 2021 WL 3853422, *1 n.1 (Minn. Ct. App. Aug. 30, 2021); *Red Lake Band of Chippewa Indians v. U.S. Army Corps*

of Engineers, 338 F.R.D. 1 (Dist. D.C. Jan. 9, 2021). Doubtlessly unsatisfied with the result, the Band now pursues an action in tribal court.

On August 4th, Manoomin[1], the White Earth Band of Ojibwe, its tribal council, and a mix of individual band members and non-band members filed suit against the DNR and DNR officials in tribal court. (Dkt. 1-1, ¶¶ 20-40.)[2] The Band named DNR and DNR officials in their official and individual capacities as defendants. (Dkt. 1-1, ¶¶ 20-40.)

Much of the Band's tribal complaint concerns its argument that DNR violated the Treaty with the Chippewa, 1855 ("the 1855 Treaty") by issuing groundwater appropriation permits connected to construction of the Line 3 pipeline replacement project ("Line 3"). (*Id.* ¶¶ 1, 46-57.) No part of Line 3 crosses the Band's reservation. (Dkt. 7 ¶ 2.) All the relief the Band seeks is directed to DNR or its officials in their official capacities. (*Id.*) The Band seeks no relief that any official could offer in their individual capacity. (*Id.*)

In the thirty-seven day span between the filing of the tribal suit and the filing of this appeal, DNR faithfully but unsuccessfully: (1) moved the tribal court to dismiss the tribal suit for lack of subject matter jurisdiction; (2) moved the tribal

[1] Manoomin is wild rice, which in the Band's tribal court can bring suit. *See* White Earth Band of Ojibwe code available here: https://whiteearth.com/divisions/judicial/ forms

[2] "Dkt." references are to the district court docket entries.

court for a stay of proceedings until a final determination of the tribal court's subject matter jurisdiction could be determined; (3) moved the federal district court for a preliminary injunction against further proceedings in tribal court; and (4) moved the federal district court to reconsider its *sua sponte* dismissal. (Dkts. 1-2, 8 ¶ 3, 16, 16-1, 20, 25.)

On September 3, the federal district court dismissed *sua sponte*, holding that under *Fort Yates Pub. Sch. Dist. No. 4 v. Murphy*, 786 F.3d 662 (8th Cir. 2015) the Band and Judge DeGroat have sovereign immunity from suit. (Dkt. 20.) On September 5, DNR sought leave to file a motion to reconsider the dismissal of Judge DeGroat[3] – arguing that the issue of sovereign immunity had not been raised by Judge DeGroat, and the district court's *sua sponte* ruling was clearly erroneous. (Dkt. 21.) DNR explained that while suits directly naming a tribal court are not allowed, suits against tribal judges in their official capacity are allowed pursuant to *Ex Parte Young* – citing this Court's recent ruling on this exact issue in *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1139 (8th Cir. 2019). (Dkt. 21.) On September 10, the district court denied DNR's request for leave to file a motion to reconsider. (Dkt. 25.) DNR filed this appeal the same day.

[3] The Band has sovereign immunity, which it can waive. DNR does not contest the dismissal of the Band.

The tribal court has set an evidentiary hearing for September 20 on the Band's request for a preliminary injunction directed to DNR officials. (Dkt. 24.) Among the relief the Band appears to seek is an injunction requiring DNR to rescind all state-issued water appropriation permits related to Line 3. (Dkt. 1-1 at 46-47.) At minimum, this would bring the two sovereigns into serious conflict with one another.

ARGUMENT

At the heart of this motion are two simple propositions. First, no federal case has ever held that tribal courts have jurisdiction over state officials engaged in the administration of state regulatory programs, let alone for projects located off-reservation. Second, the express purpose of *Ex parte Young* is to allow suits for prospective injunctive relief against state or tribal officials sued in their official capacities in federal court where their conduct violates federal law. This includes suits to prevent tribal courts from exercising jurisdiction that they do not have. The principle is well-settled and was recently reaffirmed by this court in *Kodiak* – a case indistinguishable from this one.

The issue immediately before the Court on this motion is what relief should be afforded to DNR while this appeal is pending given the extraordinary nature of the tribal suit and the district court's clearly erroneous dismissal. DNR requests three concurrent forms of relief: (1) an injunction while this motion is resolved,

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.