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Sovereign States Pitted Against Sovereign Tribes in Recent Federal District Court Decision

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On September 3, 2021, in a potentially far-reaching decision, the U.S. District Court in Minnesota¹ decided that it could not intervene in a case brought by tribal members suing the State of Minnesota for a pipeline permit decision, leaving the sovereign state at the mercy of the tribal court. This case pits sovereign against sovereign, with the U.S. unwilling and unable to intervene.

Recent decisions by the White Earth Band of Ojibwe Tribal Court (Tribal Court) and the U.S. District Court in Minnesota have created new legal precedent permitting tribal courts to exercise jurisdiction over non-tribal members for actions occurring on non-tribal land. These decisions may have implications for state sovereign immunity and tribal challenges to state action.

Background

On August 5, 2021, the White Earth Band of Ojibwe Band (Band) sued the Minnesota Department of Natural Resources (MDNR) in the Tribal Court alleging that MDNR violated the Band's constitutional and treaty rights by granting water use permits for the \$2.9 billion Enbridge Line 3 pipeline expansion through Minnesota, although no part of Line 3 crosses any part of the White Earth Reservation. MDNR moved to dismiss the lawsuit, arguing that the Tribal Court lacked subject matter jurisdiction because (1) MDNR is not a tribal member; (2) MDNR is protected from suit under sovereign immunity; and (3) the contested action did not take place on reservation land. Honorable David A. DeGroat (Judge DeGroat), in his official capacity as Tribal Court judge, denied MDNR's motion to dismiss, finding that MDNR's arguments related to sovereign immunity and subject matter jurisdiction "must give way" to the Band's "vital" interest in protecting the Band's main treaty food, wild rice, which grows in water.

The U.S. District Court Decision

On August 19, 2021, MDNR sued the Band and Judge DeGroat in federal district court, seeking declaratory and injunctive relief to invalidate the Tribal Court's order and enjoin the Tribe's action against it. MDNR asserted the Tribal Court lacked subject matter jurisdiction and that sovereign immunity protected it from the Band's lawsuit. The district court denied MDNR's motion on September 3, 2021, finding that it lacked the authority to enjoin the Band and Judge DeGroat because of the Tribe's sovereign status.



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MDNR then requested permission to file a motion to reconsider arguing that (1) federal courts have jurisdiction to review tribal court jurisdiction and enjoin tribal court proceedings; (2) the Band and Judge DeGroat did not argue that the court lacked jurisdiction under the doctrine of sovereign immunity; (3) the district court did not take briefing specific to actions for injunctive and declaratory relief directed to tribal officials in their official capacities; and (4) tribal courts often waive immunity in federal suits challenging the jurisdiction of tribal courts because of their desire to participate directly.

The Court denied MDNR's request for permission to file a motion to reconsider on September 10, 2021. The Court found that MDNR's action against the Tribe and Judge DeGroat effectively sought an injunction preventing the Tribal Court from acting, rather than preventing Judge DeGroat from acting in his official capacity. The Court held that in MDNR's action, the Tribal Court was the real, substantial party in interest, and the suit was thus barred under the doctrine of sovereign immunity.

Take-away

The district court's September 10, 2021 refusal to reconsider the State's claims potentially leaves states at the mercy of tribal courts, creating a legal path for tribes to exercise jurisdiction over non-tribal members for actions occurring on non-tribal land. This result decidedly complicates state permitting decisions because any tribal member can potentially sue a state agency in tribal court over an undesirable permitting decision or other state action, alleging violations of treaty rights or tribal law. If other federal courts refuse to intervene, a state must rely on the tribal court to honor that state's sovereignty immunity.

The Court's decision is seemingly at odds with *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245 (1981), where the United States Supreme Court found that the exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and cannot survive without express congressional delegation. In *Montana*, the Supreme Court held that tribal regulation of non-member hunting and fishing on lands within the boundaries of a reservation, but no longer owned by that tribe did not bear a clear relationship to tribal self-government or internal relations. The Supreme Court also found that non-member hunters and fishermen on non-tribal fee land did not enter into any agreements or dealings with the tribe to subject themselves to tribal civil jurisdiction. And the Court found no evidence that non-tribal hunting and fishing threatened the tribe's political or economic security to justify tribal regulation. Subsequent federal decisions have applied *Montana* when determining whether a tribe has jurisdiction over non-member conduct on non-tribal land within the reservation.

On September 13, 2021, MNDR filed an appeal of the U.S. District Court decision in the Eighth Circuit Court of Appeals. MNDR simultaneously filed an appeal in the White Earth Band of Ojibwe Tribal Court of Appeals arguing that the Tribal Court erred in denying MDNR's motion to dismiss. Newly assigned Tribal Court Judge BJ Jones issued a stay of the Tribal

Court proceedings against MNDR officials pending the tribal appellate court review. As of this writing, there have been no further developments in the tribal or federal courts. With two appeals pending, it remains to be seen whether this district court decision will lead to more challenges by tribes against states and non-tribal members in tribal courts and whether state sovereign immunity may be eroded.

¹Minnesota Department of Natural Resources et al. v. The White Earth Band of Ojibwe et al., case number 0:21-cv-01869.

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