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THE *MONTANA* "2.0" TEST FOR TRIBAL CIVIL ADJUDICATORY JURISDICTION: A GRAIN OF RIGHTS

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I. Introduction: Opposing Interests in Minnesota

Climate activists and advocates for tribal sovereignty suggest that litigants ground their efforts in the canons of Indian treaty construction. These canons of Indian treaty and statutory construction developed from the Federal Government's duty to protect Indian resources and cultures. The canons instruct that ambiguous provisions in treaties with tribes are construed in the tribes' favor and that courts rely on indigenous understandings of treaty language for interpretation. Suits grounded in treaty rights can facilitate expeditious enforcement of obligations owed to tribes. This is because relying on treaties to enforce the government's duties to tribes can avoid the murkiness of case law and jurisdictional issues.[1] Canon arguments have proven successful, and the canons remain important tools for protecting and strengthening tribal sovereignty. However, it is unclear whether the Supreme Court of the United States will continue to find canon arguments persuasive.[2] So, while federal courts undoubtedly hope to avoid tribal jurisdiction questions,[3] the continuous fight for tribal

1. *See, e.g.*, Elizabeth Ann Kronk Warner, *Everything Old Is New Again: Enforcing Tribal Treaty Provisions to Protect Climate Change-Threatened Resources*, 94 NEB. L. Rev. 916, 917 (2016) ("Today, an environmental challenge looms over Indian country—climate change—prompting one to wonder whether such tribally revered text, treaties, can be applied in new ways to provide a legal avenue with the potential to alleviate the impact of climate change.").

2. *See* Lauren King, Essay, *The Indian Treaty Canon and* McGirt v. Oklahoma: *Righting the Ship*, 56 Tulsa L. Rev. 401, 402-03 (2021).

3. *See, e.g.* , Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*,* 471 U.S. 845, 857, 105 S. Ct. 2447, 2454, 85 L. Ed. 2d 818 (1985) (*"*The risks of the kind of "procedural nightmare" that has allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made. Exhaustion of

sovereignty, the expansion of tribal court systems, and the uncertain future of the canons of construction push natural resources fights into tribal courts. Parties on all sides of natural resource issues need to know, when do tribal courts have jurisdiction over nonmembers?

This article analyzes *Minnesota Department of Natural Resources, et al. v. Manoomin, et al.,* No. AP21-0516 (White Earth Band of Ojibwe Ct. of Appeals March 10, 2022), the interlocutory appeal of a lawsuit filed by The White Earth Band, individual tribal citizens, and Manoomin.[4] The case considers how "Rights of Nature" arguments might affect tribal civil adjudicatory jurisdiction. The issue on appeal in *Minnesota v. Manoomin* is whether the tribal court has jurisdiction over a suit brought by tribal members against a nonmember about activities that did not happen within the Reservation. Generally, The Supreme Court of the United States has found that tribes have civil adjudicatory jurisdiction over nonmembers when nonmembers enter into contractual relationships with a tribe or its members. This tribal jurisdiction exists even if the activities between the member and nonmember happen on nonmember-owned fee land within the tribe's reservation. In *Manoomin*, the activities of Minnesota's Department of Natural Resources ("DNR"), considered a nonmember in the case, happened off of reservation land. The White Earth Band of Ojibwe Court of Appeals granted the DNR's motion to dismiss the issue for lack of subject matter jurisdiction. This paper suggests there is legal precedent to support a broader version of the narrow test the appellate court relied upon to determine whether *Manoomin* should be dismissed.[5]

A. The White Earth Nation and Manoomin

The White Earth Band of Ojibwe is part of a group of indigenous people called Anishinaabe, which means "the original people."[6] European settlement displaced the Anishinaabe people from the northeast United States and Canada to the Great Lakes Region. When they arrived at Gitchigami (Lake Superior), the Anishinaabe found Manoomin, just as a

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tribal court remedies . . . will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.").

4. *Manoomin* means "Wild Rice" in the Ojibwe Language, The Ojibwe People's Dictionary (Last Modified 2023), https://ojibwe.lib.umn.edu/main-entry/manoomin-ni).

5. The test is called the "second Montana exception." This test is discussed in the analysis section of the paper.

6. *About Us,* NIIBBI CENTER, https://niibicenter.org/about-us/ (last visited Sept. 9, 2023).

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prophecy foretold.[7] The protection of Manoomin and water are not simply "environmental causes" to Anishinaabe people. Water protection is "core to [Anishinaabe] identity as a people, and a sacred responsibility that [they] have inherited from [their] ancestors."[8] The Anishinaabe group includes the Ojibwe/Chippewa, Odawa, Potawatomi, Nipissing, Mississauga's, and Algonquin people.[9] The White Earth Band of the Minnesota Chippewa Tribe is the largest of six Minnesota Chippewa bands.[10] White Earth Reservation—one of seven Chippewa reservations in Minnesota—is located in north-central Minnesota.[11]

The White Earth Band participates in the harvest of Manoomin every fall.[12] Ojibwe go down to the lakes with canoes in teams of two.[13] The tradition is called "ricing."[14] One team member is the "poler." He or she stands in the back of the canoe with a long pole and propels the team slowly through the marsh.[15] The poler's job is to look for the best, fullest heads of grass.[16] The other team member, the "ricer," uses two wooden sticks to knock rice from the plant into the bottom of the canoe.[17]

Fred Ackley Junior is a member of the Sokaogon Chippewa Band. He has been a ricer since he was a young boy. Ackley describes the method of using the sticks to knock the rice into the canoe as "rhythm."[18] He always uses the sticks in beats of two succinct strokes: "Whack, whack."[19] He thanks the rice as it falls.[20] Harvesters collect about 700 pounds of

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7. *Id.*
8. *Id*.
9. Treaty with the Chippewa, U.S.-Tribal Nation, Feb. 22, 1855, 10 Stat. 1165, https://treaties.okstate.edu/treaties/treaty-with-the-chippewa-1855-0685.
10. White Earth History, WHITE EARTH NATION (Last Modified 2023), https://whiteearth.com/history.
11. Preference for the name Chippewa in the United States; White Earth History, WHITE EARTH NATION (Last Modified 2023), https://whiteearth.com/history.
12. Mary Annete Pember, *Manoomin Will Carry You Through*, Indian Country Today, Sept. 28, 2020, https://ictnews.org/news/manoomin-will-carry-you-through?redir=1.
13. *Id*.
14. *Id*.
15. *Id*.
16. *Id*.
17. *Id*.
18. Fred Ackley Jr., *Manoomin: Food that Grows on Water,* Essay and Video Story, The Ways, Dramatized Media: Stories on Culture & Language from Native Communities Around the Central Great Lakes, https://theways.org/story/manoomin.
19. *Id*.
20. *Id*.

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Manoomin each year.[21] Many harvesters keep the Manoomin for their own personal consumption; some sell it.[22] Ackley prepares the rice by using the process his grandma taught him. He roasts the rice to dehydrate it, beginning by laying the grains in the sun to bake.[23] After the rice has spent some hours exposed to the sun, Ackley stirs the Manoomin over a fire with a large wooden spoon. The dehydrated rice lasts throughout winter. Manoomin is more than a food to Ojibwe. It is also a medicine and a source of spiritual nourishment.[24]

B. The Line 3 Pipeline

Enbridge, a Canadian company, owns an oil pipeline called The Line 3 Pipeline ("the pipeline") which runs from Alberta, Canada to Superior, Wisconsin.[25] In 2014, Enbridge sought to construct new segments of the pipeline in order to keep up with increasing demand for crude oil.[26] To accommodate the increased demand, new 36-inch diameter pipeline segments replaced the existing 34-inch diameter pipeline.[27] The proposal showed that higher-volume pipeline would replace the entire section of the existing pipeline from Hardisty, Canada, to Superior, Wisconsin. Overall, the route of the pipeline remained identical to the original Line 3 route.[28] However, the proposal established a new route for the Minnesota segment, which would travel through historic treaty land over which the White Earth Band maintains reservation rights. The construction of this segment met serious opposition and delays,[29] but Enbridge eventually announced the

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21. Greg Seitz, *Aquatic Plant Provides Food- and Knowledge,* Science Museum of Minnesota (May 4, 2021), https://new.smm.org/learn/magic-of-manoomin.

22. *Id*.

23. *Id.*

24. *Id*.

25. ENBRIDGE, *Line 3 Replacement Project Summary*, pg. 3 (last updated July 31, 2023), https://www.enbridge.com//media/Enb/Documents/Factsheets/FS_EnergyInfrastructureProjects.pdf?rev=fe05610eed1648ec9ce1d1d8889cde7f&hash=4F1BF16ED6D12E9E8344153B3F35CDBD.

26. *Id.* ¶ 7.

27. *Id*. (The Proposal for the Pipeline explains by example that "in the first few months of 2015, Minnesota refineries' demand exceeded supply by 5.5 percent for light Canadian crude and 35 percent for heavy Canadian crude.").

28. *Id*.

29. *See* Sebastien Malo, *Minnesota Hit with Novel "Natural Right" Tribal Lawsuit over Line* 3, REUTERS; *see also* Complaint for Declaratory and Injunctive Relief at 1,

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completion of the Minnesota segment, which became operational on October 1, 2021.[30]

II. Before the Case: Laws and Practices of The White Earth Band

The 1855 Treaty with the Chippewa ceded large tracts of land to the United States.[31] Beneficiaries of the 1855 treaty were the East Lake, Leech Lake, Mille Lacs, Sandy Lake, and White Earth Bands of Ojibwe. Together, these Bands make up the 1855 Treaty Authority which enacted Resolution No. 2018-05. This resolution established the Rights of Manoomin.[32] The White Earth Band of Chippewa Indians also codified the Rights of Manoomin Ordinance in Resolution No. 001-19-009.[33] The White Earth Band recognized the Rights of Manoomin through Resolution No. 001-19-010 on December 31, 2018.[34] The language of the resolutions recognizes the inherent right of Manoomin to "exist, flourish, regenerate, and evolve, as well as inherent rights to restoration, recovery, and preservation."[35] The effect of the resolutions is to codify tribal members' rights to harvest, protect, and save Manoomin.[36] The laws also give the 1855 Treaty Authority and the White Earth Band of Ojibwe the right to enforce them.[37]

A. Rice Can Sue You - The Rights of Nature Movement

The Rights of Nature Movement acknowledges that nature in all its life forms has "the right to exist, the right to habitat (or a place to be), and the

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Manoomin v. Minn. Dep't of Nat. Res. (White Earth Band of Ojibwe Tribal Ct. Aug. 4, 2021) (No. GC21-0428); mn350.org; www.stopline3.org.

30. *Enbridge says line 3 replacement complete, opens Friday,* The Associated Press (Sept. 29. 2021), https://www.mprnews.org/story/2021/09/29/enbridge-says-line-3-replacement-complete-opens-friday.

31. Treaty with the Chippewa, U.S.-Tribal Nation, Feb. 22, 1855, 10 Stat. 1165. https://treaties.okstate.edu/treaties/treaty-with-the-chippewa-1855-0685.

32. *Id.*

33. 1855 Treaty Authority, Res. No. 2018-05.

34. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009, § 1(a) (Dec. 31, 2018); RESOLUTION ESTABLISHING RIGHTS OF MANOOMIN ORDINANCE, 1855 Treaty Authority, Res. No. 2018-05, § 1(a) (Dec. 5, 2018).

35. *Id.*

36. *Id.*

37. *Id.* § 3(d).

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right to participate in the evolution of the Earth community.[38] Rights of Nature efforts have become synonymous with environmental protection efforts. Recently, a number of tribes have embraced the Rights of Nature movement as a way to re-establish or strengthen tribal sovereignty.[39] After codifying the rights of Manoomin, The White Earth Band brought a claim on behalf of Manoomin in Tribal Court, arguing that, "by granting water-use permits to a company in conjunction with that company's operation of an oil pipeline in northern Minnesota, the DNR violated their Band Parties' rights."[40] The Manoomin-Plaintiff case uses the theory of environmental personhood which gives "standing for nature," allowing "such entities [as rice] to litigate on their own behalf." This theory recognizes natural entities as "legal persons, endowing them with corresponding rights and duties under the law."[41] The Manoomin-Plaintiff case is significant because it is the first case brought in a United States Tribal Court on behalf of the Rights of Nature.[42]

B. The Law on Tribal Civil Adjudicatory Jurisdiction

It is clear that where a suit arises between two tribal citizens on land that belongs to their tribe, the tribal courts of that nation have authority to adjudicate.[43] The issue on appeal in *Minnesota v. Manoomin* is whether the tribal court has jurisdiction over a suit brought by tribal members against a nonmember regarding activities that did not happen within the Reservation. Since early encounters between tribal nations and European colonists, the United States Government has maintained an attitude of apprehension toward tribal courts. The United States Government, in its self-appointed

38. Michelle Maloney, *Building an Alternative Jurisprudence for the Earth: The International Rights of Nature Tribunal*, 41 VT. L. Rev. 129, 133 (2016).

39. Rights of Nature, MOVEMENT RIGHTS (Last Modified 2022), https://www.movementrights.org/our-theory-of-change-work/.

40. Minn. Dep't of Nat. Res. v. White Earth Band of Ojibwe, No. 0:21-cv-03050, at 2.

41. Matthew Miller, Note, *Environmental Personhood and Standing for Nature*, 17 U.N.H. L. Rev. 355, 355 (2019).

42. Kirsti Marohn, *White Earth Argues DNR Water Permit for Line 3 Violates Wild Rice Rights,* Minnesota Public Radio News (Aug. 6, 2021), https://www.mprnews.org/story/2021/08/05/line-3-white-earth-argues-dnr-water-permit-violates-wild-rice-rights.

43. Williams v. Lee*,* 358 U.S. 217, 220–23 (1959) ("[A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them . . . the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe the right of the Indians to govern themselves.").

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role as the guardian and discovering sovereign, has had a consistent policy of limiting tribal civil adjudicatory jurisdiction over nonmembers.[44] This rule—that tribes do not have civil adjudicatory jurisdiction over nonmembers—is the default rule.[45] The exceptions to this general rule are laid out, in part, in *Montana v. United States*.[46]

In *Montana,* the Court established what is known as the *Montana Doctrine,* which is the test courts have applied for the last four decades to determine if a tribal court has authority over nonmembers. The *Montana* Court found that, even though tribal courts may not generally exercise authority over nonmembers, tribal courts may exercise authority over nonmembers in three instances: (1) "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;"[47] (2) "a tribe may also retain inherent power[48] to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe"[49]; (3) a tribe may exercise jurisdiction over nonmembers when Congress authorizes them to do so.[50]

III. The Trial Decision and the Appellate Decision

The claims brought forward on behalf of Manoomin find their legal basis in the laws of three sovereigns: The Tribe, the State, and the Federal Government. The trial court did not rule on the substantive law claims because the case never got past the procedural battle. Procedurally, the trial court held that the tribe had jurisdiction to hear the case, even though the disputed activities took place on nonmember-owned fee land. The appellate court reversed the lower court's decision and held that (1) the default rule is

44. *Id.*, *but see* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 76, § 7.02 (tribal jurisdiction may extend to nonmembers outside of Indian Country who have consented to tribal jurisdiction).

45. Montana v. United States, 450 U.S. at 564-65 (1981).

46. 450 U.S. 544, 565–66 (1981).

47. The "consensual relationship" exception is known as "The First Montana Exception."

48. Montana*,* 450 U.S. at 565–66.

49. The "threatened political integrity" exception is known as "The Second Montana Exception."

50. Montana*,* 450 U.S. at 565–66.

that tribes lack adjudicatory jurisdiction over nonmembers and (2) no exceptions to that default rule applied to the facts of this case.

A. The White Earth Band of the Ojibwe Tribal Court: Facts, Issues, and Decision

Manoomin et. al filed a complaint in tribal court against the Minnesota Department of Natural Resources ("DNR") on August 4, 2021. Generally, Plaintiffs argued that DNR's grant of a water permit to the Enbridge Line 3 pipeline infringed on treaty rights of Tribes to harvest Manoomin.[51] Plaintiffs found authority for the claim in the 1855 Treaty which they argued grants the Tribes usufructuary rights to harvest Manoomin on land ceded under the treaty. Plaintiffs claimed that the use of public water could damage Manoomin, interfering with rights reserved under the 1855 treaty.

In the complaint, Plaintiffs first asserted that the tribal court had jurisdiction to hear the case because (1) the Tribe was party to the treaty and (2) the rights of Manoomin were codified in the recent resolutions.[52] Plaintiffs sought declaratory relief and injunctive relief. They asked the court to declare rights of Manoomin (e.g., that Manoomin has an inherent right to exist and flourish) and other tribal rights (a-d), as well as to declare that DNR intentionally interfered with and deprived the Chippewas[53] and Manoomin of certain treaty rights (f-i). Plaintiffs asked the court for injunctive relief, enjoining DNR to rescind all water appropriation permits for Line 3 for commercial purposes, and to establish Joint Permitting Agreements with the Chippewas for the 1885 Treaty territory.[54]

Defendant DNR claimed that their sovereign immunity barred the lawsuit and that the Tribal Court had no adjudicatory jurisdiction. DNR moved to dismiss the case for lack of subject matter jurisdiction because (1) there were no acts on White Earth Reservation lands, (2) DNR is a nonmember, and (3) Line 3 does not cross any part of the White Earth

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51. Specifically, to the issuance of Amendment to Water Appropriation Permit 2018-3420 which increased the amount of public water Enbridge could use in building the pipeline. (Complaint, pg. 7).

52. Minnesota Dep't of Nat. Res., et al. v. Manoomin, et al*.*, No. AP21-0516 (White Earth Band of Ojibwe Ct. of Appeals March 10, 2022).

53. Language of plea - preferred name among many.

54. Manoomin, et al., No. AP21-0516 at 41–47.

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Reservation.[55] The White Earth Band Trial Court denied the motion to dismiss, for two reasons: first, the court held that The Second *Montana* Exception applied.[56] Second, the tribe's inherent authority to protect "necessary and vital resource[s]" gave it jurisdiction over activities which threaten Manoomin.[57] Furthermore, the court found that DNR's sovereign immunity as an agent of the State had to "give way to the Band's sovereign immunity."[58] After filing a claim in federal court that was dismissed,[59] DNR filed an interlocutory appeal asking the White Earth Band of Ojibwe Court of Appeals to review the Tribal Court's denial of Defendants' motion to dismiss for lack of jurisdiction.[60]

B. The White Earth Band of the Ojibwe Appellate Court: Review de Novo

The appellate Court of the White Earth Band found that the tribe's courts did not have subject matter jurisdiction (civil adjudicatory jurisdiction). Therefore, the appellate court determined it lacked the authority to decide possible defenses to the lawsuit, such as the defense of sovereign immunity.[61] The appellate court reversed the tribal court's order denying the motion and dismissed the Complaint. The appellate court reasoned that because the defendants were nonmembers, and the "second *Montana* exception to the general limitation on tribal regulation of nonmembers is inapplicable on non-Reservation land, including ceded territory," there was no "tribal legislative jurisdiction, and thus no tribal jurisdiction."[62]

55. Defendant's Memorandum, pg. 7, https://whiteearth.com/assets/files/programs/judicial/cases/Defendants%20Memorandum%20in%20Support%20of%20Motion%20to%20Dismiss.pdf.

56. The "threatened political integrity" exception: "a tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Montana v. United States, 450 U.S. 544, 565-66 (1981).

57. Manoomin, et al., No. AP21-0516 at 3.

58. *Id.*

59. *Id.* (Here, the federal court found that the tribe has sovereign immunity so a motion to dismiss filed in federal court could not be granted because the tribe could not be brought into court; the federal court sent the issue back to the tribe' sue to the exhaustion requirement).

60. *Id.* (DNR was dismissed in a clarification hearing and that Judge DeGroat recused himself and that judge BJ Jones was assigned the case).

61. *Id.* ¶ 5.

62. *Id.* ¶ 14.

IV. Decision of the Case

The appellate court first established that jurisdiction to hear the suit under tribal code. Judicial Code, Title 1, Courts, Ch. II Jurisdiction, section 1(j) allows White Earth Band Courts to hear cases "arising under tribal laws that seek to enforce treaty rights or to protect natural resources, including resources outside the Reservation."[63] Here, the Tribe sought to enforce treaty rights grounded in the 1855 Treaty. These rights allow White Earth Band to protect Manoomin and other natural resources. The appellate court found that this suit fell "squarely within this grant of jurisdiction."[64]

Next, the appellate court emphasized the fact that tribal courts are not courts of general jurisdiction. Therefore, even if a tribal court finds that it has adjudicatory jurisdiction under its own code, that finding must be supported by Supreme Court precedent.[65] From this position, the appellate court began its analysis of subject matter jurisdiction under federal case law using The Second *Montana* Exception since Respondents claimed The Second *Montana* Exception granted jurisdiction in this case.[66] There are three factors courts consider to determine whether The Second *Montana* Exception applies: (1) "whether the party allegedly subject to regulation is non-Indian, (2) whether the party's activity occurred on reservation land or on non-Indian fee land on the reservation, and (3) whether the effects of the activity "threaten the Tribe's political or economic security or health or welfare of the tribe."[67] DNR is a state agency and thus a nonmember. Therefore, in this case the first factor presumably reinforces the default rule against tribal jurisdiction over nonmembers. The appellate court accepted the third factor as true for the purposes of appeal, finding that the off-reservation activities of DNR threatened the health and welfare of the tribe.[68] The appellate court set aside the issue of whether the off-reservation activities had on-reservation impact because the answer to that question did not bear upon consideration of the second factor: whether the activities occurred off of reservation land. The second factor was the primary focus of the appellate court's analysis. Under this factor, the court analyzed

63. Judicial Code, Tit. 1, Ch. II, Sec 1(j).
64. Manoomin, et al., No. AP21-0516 at 6.
65. Boozer v. Wilder, 381 F.3d 931, 934 (9th Cir. 2004).
66. "The question of the regulatory and adjudicative authority of the tribes . . . is a matter of federal law." MacArthur v. San Juan County, 497 F.3d at 1066.
67. Montana, 450 U.S. at 565–66 (1981).
68. Manoomin, et al., No. AP21-0516 at 9.

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whether the Second *Montana* Exception can apply in situations where the nonmember's activity occurred off reservation land.

A. Did the Activities Happen on Reservation Land?

Respondents focused on two off-reservation activities which threatened the health and welfare of the tribe: (1) DNR's issuance of Amendment to Water Appropriation Permit 2018-3420, which increased the amount of public water it could use in building the pipeline to five billion gallons[69] and (2) the DNR's authorization of the extraction of clean ground water to avoid other dewatering and cross-contamination issues. Both the issuance of the permit and the water extraction happened off tribal land. Respondents relied on seven cases to support their proposition that The Second *Montana* Exception applies to these nonmember activities that occurred off of reservation land since those activities threatened the political integrity, economic security, or health and welfare of the tribe. The White Earth Band of the Ojibwe Appellate Court analyzed each of the seven cases in turn to establish whether the case governed the issue before it.[70] These cases did not persuade the appellate court that The Second *Montana* Exception applies to nonmember activities off of tribal land because, in almost every case, the activities at issue all happened *on tribal land.* The court quickly determined that most of the cases referenced by Respondents were inapplicable to the case at bar.

B. The 5 Billion Gallons of Water Taken by DNR Were Not Essential to the Tribe's Survival

The appellate court took more time analyzing *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001), and ultimately distinguished it from the present case. In *Wisconsin*, like in *Montana v. United States, EPA 137 F.3d 1135 (9th Cir. 1998),* tribes had authority over nonmembers in the regulation of water quality. *Montana* was about regulation of water on a reservation, while *Wisconsin* was about the regulation of water not on a reservation. In

69. Ten times the original amount.

70. Manoomin, et al., No. AP21-0516 at 9. (Respondents cite these seven cases: *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)).

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both cases, the tribes (the Confederated Salish and Kootenai Tribes and the Mole Lake Band, respectively) had TAS status.[71] The appellate court reasoned that *Wisconsin* did not expand the *Montana* exceptions to nonmembers beyond the geographical boundaries of a reservation. Instead, the only reason the tribe had authority over nonmembers in *Wisconsin* was because a federal statute sanctioned such jurisdiction through the tribe's TAS status. In essence, the tribe was not operating as a tribe, but as an arm of the federal government in its enforcement of environmental regulations. The court acknowledges that the *Montana* exceptions are never explicitly limited to on-reservation activities.[72] However, because there has never been a case with facts similar to the present case, where the harmful activities have been (1) a grant of a water use permit or (2) excessive use of water, the court refused to find the exception applied. On balance, the appellate court determined that The Second *Montana* Exception is narrow and limited to the geographic boundaries of the reservation. To the extent the exception applies to nonmembers beyond those boundaries, it is only where federal statute authorizes tribal jurisdiction. Furthermore, the court doubts that it has jurisdiction over water rights cases unless the case deals with contamination of tribal water sources essential to survival. In the present case, the nonmember activity happened off of reservation land; therefore, the only way the White Earth Band could regulate such activities was through federal statute or if The White Earth Band of Ojibwe Court of Appeals found that the water is essential to the tribe's survival. It did not.

V. Analysis

The appellate court's reasoning and decisions align with tribal adjudicatory jurisdiction jurisprudence. The appellate court reached the almost inevitable holding that tribal courts are forced to make when considering The Second *Montana* Exception: It does not apply. The appellate court concluded 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 of the reservation. However, I argue that the appellate court either (1) applied a narrower

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71. TAS defined: "Several federal environmental laws authorize EPA to treat eligible federally recognized Indian tribes as a state (TAS) for the purpose of implementing and managing certain environmental programs and functions, and for grant funding." https://www.epa.gov/tribal/tribes-approved-treatment-state-tas.

72. Manoomin, et al., No. AP21-0516 at 13.

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version of the Second *Montana* Exception than case law requires or, in the alternative, (2) relied on The Second *Montana* Exception where the court should have relied on the *Williams* test.

A. Montana *and* Williams *Are Tests That Draw a Line Between State and Tribal Authority*

Williams v. Lee is a Supreme Court case from 1959 that recognizes tribes' rights to self-determination and governance over their own historic lands. In that case, a Navajo couple failed to pay their bill for a store credit. The general store owner was a nonmember operating a store in Navajo territory. The store owner brought a suit in Arizona state court. The case went up on appeal and the Supreme Court heard the case to decide whether the state has civil adjudicatory jurisdiction to resolve this lawsuit by a non-Indian against an Indian that arises in Indian country. The Court held that the state did not have authority to exercise jurisdiction over a suit with an Indian in Indian Country absent a governing act of Congress. Without a governing act of Congress, the question becomes whether the State action infringes on the rights and sovereignty of the tribe. *Williams* establishes the test to determine the limits on state action in tribal matters. The test asks, "whether the state action infringe[s] on the right of reservation Indians to make their own laws and be ruled by them."[73] *Williams* and *Montana* are two ways that tribes can maintain and assert their sovereignty against the sovereignty of the states.

The three factors courts consider to determine whether the Second *Montana* exception applies are (1) whether the party allegedly subject to regulation is non-Indian, (2) whether the party's activity occurred on reservation land or on non-Indian fee land on the reservation, and (3) whether the effects of the activity "threaten the Tribe's political or economic security or health or welfare of the tribe."[74] The White Earth Band of Ojibwe Court of Appeals assumed that DNR qualifies as a non-Indian for purposes of The Second *Montana* Exception, and therefore, the *Montana* test was the right test for the facts of the case, but the court offered little analysis on the classification of a state agent as non-Indian for purposes of The Second *Montana* Exception. The appellate court assumed that state actors are non-Indians under this exception, and therefore that the *Montana* test of 1981 is the right test to use. However, I suggest that the

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73. Williams v. Lee, 358 U.S. 217, 220 (1959).
74. Montana, 450 U.S. at 565–66 (1981).

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court used the incorrect test to determine tribal jurisdiction over DNR. There are two possible tests the court could have used: (1) *Montana* + *Williams* or (2) *Williams.*

B. The Williams *Test and the* Montana *Test Merged to Create a Less Narrow Standard Than the Standard the Appellate Court Relied Upon*

Strate v. A-1 Contractors is a case from 1997 where two nonmembers got into a car accident on a public highway that ran through Fort Berthold Indian Reservation in North Dakota.[75] Here, the court held that the highway was the functional equivalent of non-Indian owned fee land.[76] Therefore, the *Montana* test governed. The tribe did not have jurisdiction because there was neither a consensual contractual relationship nor did the car accident affect the political integrity, economic interests, or health and welfare of the tribe.[77]

However, *Strate* does more than apply *Montana.* First*, Strate* makes it clear that *Montana* is the rule for questions involving both civil regulatory jurisdiction and questions involving civil adjudicatory jurisdiction.[78] Second, in applying *Montana* to issues of tribal civil adjudicatory jurisdiction, *Strate* collapses the *Williams* test into the *Montana* test.[79] The *Williams* Test begins where The Second *Montana* Exception ends. That is to say, *Montana* puts limits on how far the *tribe* can adjudicate and *Williams* puts limits on how far the *state* can adjudicate. *Strate* brings these tests together to answer one question: "Where is the line between tribal adjudicatory authority and state adjudicatory authority?"

The problem that *Strate* indirectly addresses is that the two tests articulate different standards/limits for drawing a line where the tribe's authority ends, and the states begins. *Strate* recognizes that when the tests are applied to the same set of facts, the line could be drawn in two different places. If the question is framed in terms of tribal reach over nonmembers, then the limit is this: Tribes may exercise jurisdiction over nonmembers only in those instances where the underlying conduct "threatens or has a

75. Strate v. A-1 Contractors, 520 U.S. 438, 442 (1997).

76. *Id.*

77. *Id.* ¶¶ 457–58.

78. *Id.* ¶ 452.

79. *Id.* ¶ 459. ("Neither regulatory nor adjudicatory authority over the state highway accident at issue is needed to preserve "the right of reservation Indians to make their own laws and be ruled by them." Williams*,* 358 U.S., at 220, 79 S.Ct., at 271. The Montana rule, therefore, and not its exceptions, applies to this case.).

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direct effect on the tribe's political integrity, economic security or health or welfare."[80] If the question is framed in terms of State authority, the limit is this: The State has civil adjudicatory jurisdiction unless the State's jurisdiction would "infringe on the tribe's ability to make its own laws and be ruled by them."

In the last three paragraphs of the *Strate* opinion, the Court uses the language of *Williams* to reinterpret The Second *Montana* Exception to mean the same as *Williams* from the opposite framework (either tribal authority framework or state authority framework). What *Slate* means is that *Williams* and The Second *Montana* Exception are essentially the same test, which can be understood by phrasing the limit as such: If a court finds that activities of nonmembers threaten the political integrity, economic security, and health and welfare of the tribe, or if a court finds that the activity interferes with the tribe's ability to make its own laws and be ruled by them, then the tribal court has jurisdiction over nonmembers. The *Strate* interpretation of the *Montana* test suggests that the tribal court does have adjudicatory jurisdiction over DNR.

C. The Williams *Test Applies: State Actors Are Distinct from Private Actors*

First, *Williams* is the test for limitations on state actors, not *Montana*. Out of all the Supreme Court cases that rely on *Montana,* the major case that excepted state-actors from tribal authority was *Nevada v. Hicks,* 533 U.S. 353, 355, 121 S. Ct. 2304, 2308, 150 L. Ed. 2d 398 (2001). In most other cases, "non-Indian" refers to private parties/non-member, American citizens.

Nevada v. Hicks established that tribal courts are not courts of general jurisdiction. Furthermore, the difference between that case and *Strate* is the nature of the tribal land at issue under the *Montana* test. Respondent Hicks, a tribal citizen, hunted animals outside of the Reservation land. The state police obtained a tribal search warrant and a state search warrant to investigate Respondent's house to verify the illegal hunting allegations. The house was located on tribal trust land for the Fallon Paiute–Shoshone Tribes of western Nevada. Respondent Hicks brought action against the state officers in tribal court.

> Hicks sued in tribal court "state officials who entered tribal land to execute a search warrant against a tribe member suspected of

80. Montana supra. note 15.

> 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.[81]

The holding of *Nevada v. Hicks* is limited by Justice Ginsberg's concurrence: "the holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law."[82] Therefore, *Hicks* does not apply to all state actors, all the time, on all classifications of land. Instead, it applies where state officers enforce already-existing, legislatively decided state law. It was under these circumstances and with a tribal search warrant that the officers were allowed to investigate trust land of a tribal citizen in *Hicks*. The Court's decision in *Nevada v. Hicks* explicitly leaves open the question of tribal court jurisdiction over nonmember Indians in general, including state officials engaged on tribal land on their own accord, or acting without authority of existing state law. To hold that state actors always classify as non-Indians under the *Montana* test ignores the state's role as a governing sovereign. As a rule, the state's exercise of jurisdiction on tribally owned land is contrary to the policy of self-determination. Therefore, state actors are bound by the *Williams* standard for state limitation and not the *Montana* test alone.

D. TAS Status Is Not the Source of a Tribe's Inherent Authority

The White Earth Band Appellate Court held that *Wisconsin* "does not support extending the tribal court's jurisdiction to nonmember activities off the reservation."[83] The appellate court maintained that *Wisconsin* should be understood as a case in which the tribe's power to regulate off-reservation activities came from Congress. Therefore, the *Montana* exceptions only apply to off-reservation activities *if Congress has granted the tribe TAS*

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81. Manoomin, et al., No. AP21-0516 at 6.
82. Nevada v. Hicks, 533 U.S. 353, 286 (2001) (Ginsberg, J., concurring).
83. Manoomin, No. AP21-0516 at 13.

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status for regulation of such activities.[84] The Court understood *Wisconsin's* rule to mean that, when local pollution sources threaten tribal waters, the tribe has authority to regulate water quality if and only if Congress authorized the EPA to grant the tribe TAS status.[85] This interpretation of *Wisconsin* misunderstands the tribe's source of regulatory authority. The tribe received authorization from Congress via TAS status to regulate nonmembers *because it already had* "'inherent authority to regulate water quality within the borders of the reservation,' a showing of which was required for the grant of TAS."[86] The Supreme Court found that a tribe has inherent authority over activities which have a serious effect on the health of the tribe.[87] The *Wisconsin* court applied the Supreme Court's reasoning and found that the tribe retains this inherent authority even if "it exerts some regulatory force on off-reservation activities."[88] The tribe's TAS status is a result of the tribe's inherent authority; not its source. Therefore, while the inherent authority to regulate water might be limited, that authority still precedes TAS status. So, the first question should not be whether a tribe has TAS status, but whether the tribe's inherent authority reaches the present issue. The White Earth Band of Ojibwe Court of Appeals should have remanded the case to the trial court for proceedings to determine whether DNR's actions threatened the tribe's survival due to the quantity of water removed.

In order for the *Montana* exceptions to apply to nonmembers, the tribe must show that the activities of the nonmembers have "serious and substantial" effects on the health and welfare of the reservation. In *Wisconsin*, activities occurred outside of the reservation, but the court found those activities and the resulting discharges often have serious and substantial effects on the health and welfare of the reservation."[89] The tribe showed that the activities had serious and substantial effects because it was able to show that its water resources are essential to its survival.[90] Because the tribe was able to demonstrate the activities serious and substantial

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84. *Id.* ¶ 12.
85. *Id.*
86. *Id*.
87. Wisconsin, 266 F.3d at 749–50; *See also* Montana (The authority is not just limited to the "health and wellbeing" of the tribe, but also includes the "political and economic integrity" of the tribe.).
88. *Id*.
89. *Id.*
90. *Id.*

effect, the tribe successfully established its inherent authority to regulate those activities. Furthermore, the court held that no case expressly "rejects an application of *Montana* to off-reservation activities that have significant effects within the reservation."[91]

Therefore, The White Earth Band Courts had civil regulatory jurisdiction over nonmembers under The Second *Montana* Exception because the grant of the permit to Enbridge and the removal of water had a serious and substantial effect on the tribe. Because the tribe is inextricably connected to Manoomin, activities that affect Manoomin are activities that affect the tribe. The Chippewa are connected to Manoomin through rights to protect and harvest, tribal ordinance, federal treaty, culture, and spirit. Therefore, DNR's activities had a serious and substantial effect on the tribe, so, under *Wisconsin,* The White Earth Band had jurisdiction under The Second *Montana* Exception.

VI. Conclusion

The White Earth Band of Ojibwe Court of Appeals correctly set aside the question of sovereign immunity to deal with the issue of jurisdiction. The appellate court's analysis of *Montana* reached the seemingly inevitable conclusion that the *Montana* exception did not apply here, and therefore, the tribal court had no jurisdiction over the DNR. However, the court should reassess two things.

First, the court should either combine the *Montana* test with the *Williams* test ("The *Montana* 2.0 Test") or simply use the *Williams* test because the DNR is a state actor who was not acting to enforce state law. The *Montana 2.0 test* comes out of *Strate* and combines the *Williams* test and The Second *Montana* Exception. The tests work together to answer the question "Where is the line between tribal adjudicatory authority and state adjudicatory authority?" The tests aim to uphold tribal self-determination while limiting sovereign overreach. Second, regardless of whether *Strate* combined the *Williams* and the *Montana* tests, state actors are bound by the language of *Williams* because state actors are sovereigns who must honor their regulatory authority. The interest of a sovereign is not the same as the interest of a private, nonmember citizen. Tribes are given limited

91. *Id. ("*. . . .and it would be . . . hard to say 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.").

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jurisdiction over nonmember citizens because there is an interest in protecting nonmembers' rights to local forum and authority. If The White Earth of Ojibwe Court of Appeals found it had jurisdiction under a different test, it should remand the case for discovery on the two issues it set aside: (1) whether DNR has sovereign immunity from tribal courts and (2) whether the off-reservation activities had on-reservation impacts.

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