UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Mille Lacs Band of Ojibwe, a federally recognized Indian tribe; Sara Rice, in her official capacity as the Mille Lacs Band Chief of Police; and Derrick Naumann, in his official capacity as Sergeant of the Mille Lacs Band Police Department,

Plaintiffs,

vs.

County of Mille Lacs, Minnesota; Joseph Walsh, individually and in his official capacity as County Attorney for Mille Lacs County; Brent Lindgren, individually and in his official capacity as Sheriff of Mille Lacs County,

Defendants,

and

County of Mille Lacs, Minnesota,

Counterclaim Plaintiff,

vs.

Mille Lacs Band of Ojibwe, a federally recognized Indian tribe; Sara Rice, individually and in her official capacity as the Mille Lacs Band Chief of Police; Derrick Naumann, individually and in his Official capacity as Sergeant of the Mille Lacs Band Police Department; Melanie Benjamin, individually and in her official capacity as Chief Executive of the Mille Lacs Band of Ojibwe Tribal

Case No. 17-cv-05155-SRN-LIB

MEMORANDUM OF LAW OF MILLE LACS COUNTY IN OPPOSITION TO THE MOTION TO DISMISS OR STRIKE COUNTERCLAIM UNDER RULES 12(b)(1), 12(b)(6) AND 12(f)

Council; Carolyn Shaw-Beaulieu, individually and in her official capacity as Secretary/Treasurer of the Mille Lacs Band of Ojibwe Tribal Council; Sandra L. Blake, individually and in her official capacity as District I Representative of the Mille Lacs Band of Ojibwe Tribal Council; David Aubid, individually and in his official capacity as District II Representative of the Mille Lacs Band of Ojibwe Tribal Council; and Harry Davis, individually and in his official capacity as District III Representative of the Mille Lacs Band of Ojibwe Tribal Council,

Counterclaim Defendants.

INTRODUCTION

The Counterclaim Defendants (generally referred to as "the Band" below) have moved to dismiss or strike the Counterclaim filed by Mille Lacs County ("County"). That motion should be denied in its entirety. First, the Counterclaim should not be dismissed under Rule 12(b)(1) for want of standing, because the County has adequately alleged that the Band's actions have caused an injury in fact and threaten an imminent injury in fact. The Band's actions have infringed on the County's regulatory and civil jurisdiction—this interference with a legal right is a cognizable injury. The Band's actions also threaten further imminent injury to this legal right. Additionally, the County pleaded other cognizable injuries, such as a loss in tax revenue. The Band's argument on standing is largely based on its assertion that the County cannot prove these injuries, but

here, at the pleading stage before discovery has begun, the Band's arguments are misplaced. Second, the County sufficiently pleaded facts stating a claim for declaratory and injunctive relief. A declaratory judgment action is proper because the conflict over the Band's boundary is an immediate, real, and substantial controversy involving the parties' adverse legal interests. Third, the Band's motion to strike the Counterclaim fails because the Counterclaim is redundant of neither the Complaint nor the County's Answer. Essentially, the Counterclaim ensures that the precise issue of the reservation's boundary is decided *in this lawsuit*; without the Counterclaim, the Complaint's claims and the affirmative defenses may be resolved without actually resolving the boundary issue. Accordingly, each of the Counterclaim Defendants' arguments fails and the Court should deny the Motion to Dismiss.

FACTS

The allegations in a complaint or counterclaim, together with any reasonable inferences from those factual pleadings, must be taken as true for a motion to dismiss. *Tension Envelope Corp. v. JBM Envelope Co.*, 876 F.3d 1112, 1116 (8th Cir. 2017). The Band purports to "summarize" the Counterclaim in an effort to recast the pleading in a manner that changes its character and factual allegations.

The Band claims that "the only allegations [the Counterclaim] makes against the Band are that it has *lawfully* expressed its views regarding the Reservation and sought the continued support of the Federal Government for those views." Countercl. Defs.' Mem. Supp. Mtn. Dismiss 9, Feb. 2, 2018, ECF No. 27 (emphasis added). This grossly mischaracterizes the pleadings.

A fair summary of the Counterclaim is as follows: The Mille Lacs Reservation, consisting of 61,000 acres, was established by the 1855 Treaty with the Chippewa (10 Stat. 1166). Countercl. ¶¶3, 13, Dec. 21, 2017, ECF No. 17. Eight years later, the Reservation was disestablished by the 1863 Treaty with the Chippewa (12 Stat. 1249) and the nearly identical 1864 Treaty (13 Stat. 693), in which all of the 1855 Reservation[1] was ceded to the United States for consideration that was promised and paid. Countercl. ¶¶3, 18. Article 12 of the 1863-64 Treaties granted to the Band a conditional privilege of occupancy, such that they "not be compelled to remove" from the ceded 1855 Reservation as long as they did not "interfere with or in any manner molest the persons or property of the whites." Countercl. ¶19. The Band claimed that this conditional privilege of occupancy preserved the 1855 Reservation in its entirety.

[1] The term "1855 Reservation" herein refers to the former Reservation that was established by the 1855 Treaty with the Chippewa.

To resolve the conflict between the Band's claim of an occupancy right within the former Reservation and the opening of the Reservation for sale and preemption under the General Land laws, in 1889, Congress passed the Nelson Act (25 Stat. 642). Countercl. ¶20. Under the Nelson Act Agreement negotiated with the Mille Lacs Band, the Band formally agreed to forever relinquish the conditional privilege of occupancy in the 1855 Reservation to the United States. Countercl. ¶20. The Nelson Act was approved and accepted by the President on March 4, 1890. The Nelson Act provided that the United States would sell the remaining lands in the 1855 Reservation. The United States Supreme Court found that there had been an express relinquishment and cession of the 1855 Reservation, including the right of occupancy. *United States v. Mille Lacs Band of Chippewa Indians*, 229 U.S. 498, 504-05 (1913); Countercl. ¶21.

Twenty years after the Nelson Act, the Band sued the United States, maintaining it was entitled to additional compensation for the surrender of their Article 12 conditional privilege of occupancy pursuant to the 1889 Nelson Act. Countercl. ¶22. The Supreme Court held that the Band was entitled to additional compensation for the relinquishment of that conditional privilege. *Mille Lacs Band*, 229 U.S. at 507. The Court also recognized that the 1889 Agreement contained an "express" relinquishment of the 1855 Reservation, quoting the Agreement where the Band did "forever relinquish to the United States the right

of occupancy on the Mille Lacs Reservation." *Id.* at 504-05 (citing Act of January 14, 1889, 25 Stat. 642); Countercl. ¶¶23-24.

For a century, no one, including the Mille Lacs Band, suggested that the claim of reservation status should apply to the 1855 Reservation. During litigation over claims by the Mille Lacs Band, including claims made to the Indian Claims Commission, the Mille Lacs Band and/or the Minnesota Chippewa Tribe have received payments for the entire 1855 Reservation. Countercl. ¶¶26, 28.

Several generations have relied upon the understanding that the 1855 Reservation was relinquished based on the United States Supreme Court's 1913 decision and claims made in subsequent litigation regarding the extinguishment or relinquishment of the Reservation. Countercl. ¶¶27-28. For nearly a century no one, including the Band, asserted that Indian country (18 U.S.C. § 1151(a)) included all lands within the original boundaries of the 1855 Reservation. Beginning in the late 1980s or early 1990s, the Band quietly began a campaign to influence state and federal agencies that the 1855 Reservation was never diminished or disestablished. Countercl. ¶42. The Band "simultaneously and *impermissibly* petition[ed] federal agencies, in violation of the Indian Claims Commission Act of 1946, 60 Stat. 1049, § 12, to recognize the existence of the 1855 Mille Lacs Reservation." Def.'s Answer ¶12; Countercl. ¶1 (emphasis added).

The Indian Claims Commission Act, 60 Stat. 1049, § 12, is more than a statute of limitations. The Act specifically prohibits tribes from bringing claims that were in existence on August 13, 1946 to any court or federal agency: "[N]o claim existing before such date [Aug. 13, 1946] but not presented within such period [five years] may thereafter be submitted to any court or administrative agency for consideration. . ." 60 Stat. 1049 § 12. The time for the Band to have brought its claim regarding the 1855 Reservation ended in 1951.

While the Band claims that the County merely alleges that the Band is "lawfully" expressing its views and seeking the support of federal agencies, in fact, the County alleges that the Band is "impermissibly" petitioning federal agencies for claims that are barred by the Indian Claims Commission Act. Furthermore, the County alleges that these actions by the Band violate not only Supreme Court precedent, which holds that the 1855 Reservation was relinquished, but is contrary to the position taken by the Mille Lacs Band and the Minnesota Chippewa Tribe in litigation in which the Band itself sought compensation for the entire Reservation *on the basis* that it had been "relinquished," "extinguished," "taken," "lost," "finally extinguished," and "legally extinguished." Countercl. ¶68. In 1913, the Band stated to the United States Supreme Court that "such reservation was extinguished as an Indian Reservation." Countercl. ¶69.

Actual, Imminent, and Threatened Injuries

The Band's Motion to Dismiss attempts to turn the clock back to 2002, claiming that nothing new has happened since this Court dismissed the County's Complaint seeking determination of the Reservation boundary issues in *County of Mille Lacs v. Benjamin*, 262 F.Supp.2d 990 (D. Minn. 2003); *aff'd in part, rev'd in part,* 361 F.3d 460 (8th Cir. 2004). Setting aside the fact that the decision in *Benjamin* involved a motion for summary judgment, rather than a motion to dismiss in which the Counterclaim's allegations must be taken as true, there are numerous and fundamental differences from 2002.

First and foremost of those differences is that the Band has sued Mille Lacs County seeking a determination of the reservation boundary issues, subsumed in its request to the Court to determine the scope of the Band's law enforcement authority. *See* Countercl. Defs.' Mem. 3.

The Band's brief does *not* claim that the issues are not ripe for adjudication, and to the contrary, the Band's Complaint alleges that the issues *are* ripe for adjudication. Compl. ¶5V, Nov. 17, 2017, ECF No. 1. While this Court in *Benjamin* was unable to find that "a controversy of constitutional dimension exists," here the Court is called upon by Plaintiffs to determine that a controversy exists. This Court is already tasked with determining some of the issues encompassed within the County's Counterclaim, and therefore the Court's analysis must, of necessity,

proceed from a different perspective: "It is clear that potential liability stemming from a filed complaint can be sufficient to create standing." *Benjamin*, 262 F. Supp. 2d at 997 (citing *Va. Sur. Co. v. Northrop Grumman Co.*, 144 F.3d 1243, 1246 (9th Cir. 1998)). The Complaint seeks to limit the County's civil regulatory authority over three of its townships, Isle, Kathio and South Harbour, and to expand the power and jurisdiction of tribal government over individuals and fee lands in those same townships, including tribal inherent criminal investigatory authority for non-member activities on their fee-owned lands. The fact that the "filed Complaint" is in the same action in which the Counterclaim occurs does not change the impact of this Court's holding in *Benjamin*.

In *Benjamin*, this Court noted that the tribal defendants "have *not* sought" a finding that the 1855 Reservation was a legally valid entity. 262 F. Supp. 2d at 999. The opposite is true here.

The Counterclaim alleges several actual, concrete, or imminent actions that have been taken by the Mille Lacs Band since 2002, which cause injury to the County:

- In 2013, the Band petitioned the Department of Justice for the Assumption of Concurrent Federal Criminal Jurisdiction over the lands encompassed in the 1855 Reservation.[2] Countercl. ¶46.
- In December 2016, the Band entered into a Deputation Agreement with the Bureau of Indian Affairs whereby the Band *sought and obtained* authority to exercise federal law enforcement powers throughout the original boundaries of the 1855 Reservation. Countercl. ¶48.
- On November 8, 2017, immediately prior to filing this suit, the Band *sought and obtained* a letter from the Solicitor's office addressed to County Attorney Joseph Walsh claiming that there was no "basis in law" to

[2] In its brief, the Band incorrectly asserts that it was the County that caused the Solicitor to issue its 2015 Opinion (the "M Opinion"). Countercl. Defs.' Mem. 17 n.4. This is not accurate because it was the Band's application for concurrent criminal jurisdiction that ultimately caused the Solicitor to issue the Opinion. The Band's application sought concurrent federal jurisdiction throughout the entire 1855 reservation, including the disputed 58,000 acres of land. Faced with this threatened interference with its jurisdiction, the County submitted comments to the Band's application, arguing that the 1855 Reservation had been disestablished or diminished. The Band submitted a voluminous reply to the County's comment to the Solicitor. The Solicitor then issued the M Opinion. Regardless, at this pleading stage, these factual arguments are irrelevant, as the Court should accept the facts as pleaded by County. The Band's inclusion of the M Opinion in its Motion is improper because the Band makes no argument that its Motion should be treated as one for summary judgment. The County therefore objects to inclusion of materials outside of the pleadings as part of the Band's Motion.

dispute the Band's exercise of criminal jurisdiction throughout the original boundaries of the 1855 Reservation. Countercl. ¶49.

- The Band has *participated and cooperated* with the EPA in asserting jurisdiction over lands outside of trust lands within the 1855 Reservation, and specifically on lands where the Band operates one or more businesses on fee lands within the original 1855 Reservation boundaries that have underground storage tanks. Underground storage tanks are permitted and regulated by the Minnesota Pollution Control Agency, under an agreement with the EPA. That jurisdiction changes only for "Indian country," over which the EPA maintains regulatory authority.[3]

[3] Although it is Minnesota, not the County, that has authority to regulate underground storage tanks, the Band's present actions regarding such tanks are illustrative of the steps it has taken since 2002. In 2002, the Band and its members were obtaining County building permits, albeit under protest. Today, the Band's affirmative actions, in concert with the EPA, to regulate underground tanks on the disputed 58,000 acres is therefore a marked change from acquiescing to the County's authority in 2002. This change supports the County's assertions that the Band's actions represent an imminent and actual threat to the County's jurisdiction over the disputed land. Further, the issue is an example of the Catch-22 the Band's actions create for the County. If the County raises the issue, the Band, as it has here, asserts that the regulation of the tanks is the state's issue, not the County's, and it is the EPA, not the Band, that is infringing on the regulatory authority. But if the County does not raise the issue, the Band would almost certainly cite the EPA's unchallenged exercise of regulation over underground tanks as evidence that the disputed land is Indian country.

In addition to these actions by the Band, the County asks that the Court take notice that, in November 2016, the County served the Department of Justice ("DOJ") and the Department of Interior ("DOI") with Freedom of Information Act ("FOIA") requests seeking records related to tribal law enforcement activities under 25 U.S.C. §§ 2801-2815, the assumption of concurrent federal criminal jurisdiction, and communications regarding these matters with the Band. In October 2017, approximately one month before this lawsuit was commenced by the Band, the County filed suit against the DOJ and DOI under FOIA in an effort to obtain that information. That suit is currently pending. *County of Mille Lacs v. United States Dep't of Justice and Dep't of Interior*, No. 17-cv-04863 (D. Minn. filed Oct. 26, 2017). A recently-filed Pretrial Statement shows that the United States Attorney has agreed to make an initial disclosure of the FOIA documents and exemption claims on March 23, 2018, sixteen months after the County's FOIA requests were served.

Claims Against the Individual Plaintiffs and Counterclaim Defendants

The Band claims in its brief that "after naming and describing the individual Counterclaim Defendants, the Counterclaim *never again mentions them*; makes no allegation that any individual Counterclaim Defendant has taken or failed to take any particular action." Countercl. Defs.' Mem. 5-6.

The individual Counterclaim Defendants who are not Plaintiffs are the Chief Executive Melanie Benjamin, the Secretary/Treasurer Carolyn Shaw-Beaulieu, and the three District Representatives who are on the Mille Lacs Band Tribal Council. These individuals are named to ensure that the Court would have jurisdiction over the Counterclaim allegations that would otherwise lie against the Band under *Ex parte Young*, 209 U.S. 123 (1908). The elected governing officials of the Band named as Counterclaim Defendants were joined to ensure that the Court had jurisdiction over the claims for declaratory and injunctive relief against the Band in the event that the Band asserts sovereign immunity.

Sara Rice, the Mille Lacs Band Chief of Police, and Derrick Naumann, Sergeant of the Mille Lacs Band Police Department, are the other individual Defendants who are the subject of the Counterclaim. Count II of the Counterclaim, Countercl. ¶64, alleges that the Court "should enjoin the Plaintiffs and Counterclaim Defendants, from exercising tribal inherent criminal authority or federal criminal authority outside of Indian country in Mille Lacs County," which is limited to lands held in trust. Given that Sara Rice, the Band's Chief of Police, and Derrick Naumann, the Sergeant who holds a Special Law Enforcement Commission ("SLEC")[4], are seeking declaratory and injunctive relief against the County, the County has properly counterclaimed to enjoin these

[4] Complaint, ¶5K; Answer ¶5K.

individuals from exercising tribal or federal police authority outside of Indian country in Mille Lacs County, i.e. outside of the trust lands. To claim that the "Counterclaim never again mentions them" is simply hyperbole and a misreading of the Counterclaim. In addition to ¶64, Count III, ¶66 and ¶67, additionally address claims as to the individual Counterclaim Defendants. Finally, the Counterclaim Defendants are specifically mentioned in the Prayer for Relief in both the introductory paragraph applicable to all of the Plaintiffs and Counterclaim Defendants and in ¶¶3 and 4 of the Prayer for Relief.

While the Band argues that there is no allegation that the individual Counterclaim Defendants have taken or failed to take any action, the Counterclaim makes clear that individual tribal officers, including Derrick Naumann, have applied for and obtained SLECs. Countercl. ¶48. Furthermore, the Counterclaim alleges that the Band asserts the right to exercise inherent criminal jurisdiction, including criminal investigatory authority over non-members on public highways and on fee lands, including fee lands owned by non-members, outside of trust lands, but within the original boundaries of the 1855 Reservation. *See* Countercl. ¶48. This authority is, of course, exercised through individual police officers such as Plaintiffs Chief of Police Sara Rice and Sergeant Derrick Naumann. The Counterclaim asserts that the Band cannot exercise any inherent tribal criminal jurisdiction and federal criminal jurisdiction

outside of Indian country and that tribal police officers should be enjoined from attempting to exercise those powers outside of trust lands.

The Counterclaim Sufficiently Alleges That The Band and Band Officials Have Injured The County

The Counterclaim, after detailing the actual, concrete, and imminent actions of the Band to attempt to create a basis to support the claim that the 1855 Reservation was never disestablished, alleges those actions have ". . . injured the County in the exercise of its criminal and civil regulatory authority outside of trust lands." Countercl. ¶¶54-55.

These controversies further undermine property tax values for residents on fee lands within the original boundaries of the 1855 Reservation, and reduce the tax base and income for the County accordingly. Countercl. ¶55. Additionally, the actions set forth involve the exercise of federal and tribal inherent criminal and regulatory authority outside of trust lands that undermine and displace the State and local law enforcement authority exercised by the County. These matters are ripe for adjudication. Countercl. ¶55.

The Counterclaim sufficiently alleges that the County's rights and interests as a local unit of government with governmental power and authority that are exercised over the territorial boundaries encompassed within the County, are both injured and threatened with injury. Countercl. ¶¶9, 13. This controversy is actual, it exists, it is imminent, and it is threatened just by Plaintiffs' Complaint

alone. The County has been seeking a determination of these issues for itself and its citizens since it filed suit in the *Benjamin* case in 2002. The issue of the existence of the 1855 Reservation is ripe for adjudication, as the Band's own Complaint alleges. Compl. ¶5V.

The Band wants it both ways, however, alleging that it can proceed with its action for injunctive and declaratory relief against the County, but then claiming that the County both lacks standing and has asserted identical claims. If the claims are identical, then clearly the County has standing to bring those claims. If the claims overlap, as the County has alleged, but are not identical, the Court nevertheless has standing on the claims that overlap. The best policy for the Court and all parties is to allow the Counterclaim to proceed so that there is an adjudication of a longstanding dispute, so that the ultimate resolution of the dispute is not delayed. *See infra*, Part III.B.

ARGUMENT

I. The Court Should Deny the Motion to Dismiss Because the County Has Standing for its Counterclaim.

To have standing, a plaintiff must show (1) injury in fact, (2) a causal connection between that injury and the challenged conduct, and (3) the likelihood that a favorable decision by the court will redress the alleged injury. *Huyer v. Van de Voorde*, 847 F.3d 983, 985-86 (8th Cir. 2017) (citing *Iowa League of Cities v. EPA*, 711 F.3d 844, 869 (8th Cir. 2013)). Here, the Band only argues that

the County has failed to allege an injury in fact. An "injury in fact" is "an invasion of a legally protected interest" which must be "concrete and particularized" and "actual or imminent." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The injury from the invasion of a legal right is enough to create standing. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982) (citation and quotations omitted).

When determining standing on a motion to dismiss, "the standing inquiry must . . . be done in light of the factual allegations of the pleadings." *Demarais v. Gurstel Chargo, P.A.*, 869 F.3d 685, 690–91 (8th Cir. 2017) (internal citations omitted). At the pleading stage, "general factual allegations of injury . . . may suffice." *Murphy by Murphy v. Minnesota Dep't of Human Servs.*, 260 F. Supp. 3d 1084, 1100 (D. Minn. 2017) (citing *Lujan*, 504 U.S. at 561). When ruling on a motion to dismiss due to standing, the trial court must accept as true all material allegations of the complaint, and must construe the claim in favor of the complainant. *Warth v. Seldin*, 422 U.S. 490, 501–02 (1975).

A. The Counterclaim appropriately alleges an injury in fact.

The County has adequately pleaded an injury in fact. The Counterclaim alleges that the parties' conflict regarding jurisdiction over the lands within the former 1855 Reservation, including the SLECs issued to tribal police officers for federal law enforcement authority throughout the 1855 Reservation boundaries,

has infringed on the County's exercise of its criminal and civil regulatory authority on these disputed lands. Countercl. ¶ 55. In arguing that the County neglected to allege any unlawful activity by the Band in its Counterclaim, the Band fails to construe the Counterclaim in favor of the County. An invasion of a legal right *is* an injury in fact. *See Spokeo*, 136 S. Ct. at 1548. And an infringement on the exercise of jurisdictional authority is "an actual injury in fact." *Virginia v. Hicks*, 539 U.S. 113, 121 (2003). In *Virginia*, the Commonwealth of Virginia's inability to prosecute a citizen for trespass was held to be "sufficiently 'distinct and palpable' to confer standing under Article III." *Id*. (quoting *Warth*, 422 U.S. at 501). Here, the County is injured by the Band's claims of law enforcement authority on lands solely under County jurisdictional and regulatory authority. This injury in fact was pleaded adequately in the County's Counterclaim.

B. **The Band's actions since 2002 have injured the County.**

In its brief, the Band makes much of the similarities between the circumstances surrounding the parties' 2002 litigation (the "*Benjamin* litigation") and today. The Band then asserts that the outcome in the present litigation should be the same as in the *Benjamin* litigation, in that the County lacks standing for its Counterclaim. But the Band fails to mention the myriad actions it has taken since 2002 to assert jurisdiction over the disputed lands.

1. The Band initiated this lawsuit, which implicates the Reservation boundary issue.

In its brief, the Band does not mention the greatest single difference between the *Benjamin* case and today: here, *the Band initiated suit against the County* to assert its claims of authority over all lands in the 1855 Reservation boundaries. In its Complaint, the Band alleges that "All lands within the Reservation as established in 1855 are Indian country within the meaning of 18 U.S.C. § 1151." Compl. ¶VC. The Band also seeks a declaratory judgment that the Band's law enforcement authority pertains to all lands within the 1855 Reservation boundaries, even though the majority of that land is fee land, owned and occupied by non-members. Compl., Demand for Relief, ¶1A. Further, the Band argues that it has law enforcement authority on Band-owned fee lands, simply because those lands are within the boundaries of the 1855 Reservation. Countercl. Defs.' Mem. 6.

These claims to and threats of conflicting law enforcement authority have injured the County, because they invade and threaten the County's jurisdictional authority. As the Supreme Court has explained, "one does not have to await the consummation of threatened injury to obtain relief. If the injury is certainly impending, that is enough." *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979). An Indian tribe does not have jurisdiction over activity that occurs entirely outside of reservation boundaries, or, put another way, outside of

Indian country. *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1092 (8th Cir. 1998) ("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*") (emphasis in original). Thus, the assertion by the Band that it possesses law enforcement authority on non-trust lands, merely because those lands lie within the former Reservation boundaries, is a threat to the County's jurisdiction and regulatory authority. Indeed, the very act of suing the Sheriff and the County Attorney, the senior officials in charge of public safety and law enforcement within the County, necessarily injures the County's legal interests. *See Virginia*, 539 U.S. at 121 (inability to prosecute injured Commonwealth's authority). The County need not wait any longer for the injury to worsen before bringing its claim for declaratory relief.

2. The Band petitioned the Department of Justice for United States Assumption of Concurrent Federal Criminal Jurisdiction over the disputed lands.

In 2013, the Band petitioned the Department of Justice for United States Assumption of Concurrent Federal Criminal Jurisdiction, over lands encompassed in the 1855 Reservation. In its petition, the Band claimed to have authority over the lands within the 1855 Reservation, as though it were never disestablished or diminished. The County opposed the Band's request. On January 20, 2016, the Office of Tribal Justice granted the Band's request for the

Assumption of Concurrent Federal Criminal Jurisdiction. By receiving this authority from the Office of Tribal Justice, the Band is asserting criminal jurisdiction over lands that are not Indian country. This is an unlawful exercise of jurisdiction and is an injury in fact to the County. The County adequately pleaded this injury in its Counterclaim.

After the Band's petition was granted, individual Band officers applied for SLECs, granting them the power of federal BIA officers throughout the original boundaries of the 1855 Reservation. This was not the federal government acting alone. Rather, this was the Band entering into an agreement with the BIA, and Band officers obtaining SLECs—the very Commissions used by Plaintiff Derrick Naumann as the basis for his allegation that the County, County Attorney, and Sheriff are interfering with his right to exercise that federal BIA authority throughout the original 1855 Reservation. Accordingly, both the actions of the Band and Naumann, as well as the Band's Chief of Police who supervises her subordinates who have obtained SLECs, constitute concrete and actual actions to obtain federal law enforcement authority throughout the 1855 Reservation boundaries. The exercise is so imminent that Plaintiffs themselves seek the Court's injunctive authority to exercise those powers. The County adequately pleaded this injury in its Counterclaim.

Further, the Band is not subject to Data Practices Act or Freedom of Information Act requests that would allow the County to determine what activities are actually being carried out by Band police officers. Discovery on standing issues may well determine that Band officers have been exercising both inherent tribal and federal law enforcement authority outside of trust lands since December 2016. The parties have already held an early 26(f) Conference to allow for the early commencement of discovery. Accordingly, the Court should deny this Motion and allow the parties to proceed to discovery on these issues. *See* 5B Charles Alan Wright, et al., Federal Practice and Procedure § 1350 (3d ed. 2004).

3. The Band sought and received an Opinion from the Office of the Solicitor that the Mille Lacs Reservation had not been diminished or disestablished.

In 2015, the Office of the Solicitor issued Opinion M-37032, which states that the Mille Lacs Reservation had not been diminished or disestablished. The Band and federal authorities withheld the Opinion from the County for several months after its issuance. This "M Opinion" was issued after the Band lobbied the Office of the Solicitor to adopt this position on the 1855 Reservation boundaries. The County is injured by the Band's exercise over and claim to lands that are not "Indian country." The County adequately pleaded this injury in its Counterclaim.

4. The Band entered into a Deputation Agreement with the Bureau of Indian Affairs to obtain authority to investigate violations of federal law on the disputed lands.

In 2016, the Band entered into a Deputation Agreement with the Bureau of Indian Affairs and Band officers obtained SLECs under 25 U.S.C. §§ 2801 and 2804. This Deputation Agreement was the result of active efforts by the Band to seek concurrent federal jurisdiction under 18 U.S.C. § 1162(d). At the time, the County opposed those efforts. Countercl. ¶46. The Deputation Agreement adopts the Band's claims to the disputed lands—thus giving the Band's police officers authority to investigate violations of federal law *throughout the Reservation* and to arrest suspects (including non-Band members) as federal law enforcement officers. *See* Compl. ¶¶5H, 5K. But, because the 1855 Reservation was disestablished or diminished by subsequent treaties, and because the vast majority of the lands within the 1855 Reservation boundaries are fee lands, this Agreement imbues the Band with authority that it does not lawfully possess. Acting as federal officers on lands that are not Indian country, within the meaning of 18 U.S.C. § 1151, is an injury in fact—whether actual or threatened—to the County's jurisdiction and authority. The County adequately pleaded this injury in its Counterclaim.

In short, the Band has acted as though they have *de facto* jurisdiction over the disputed 58,000 acres[5] of land in a manner inconsistent with the County's legal exercise of its jurisdiction. This is an injury in fact, and this lawsuit is the next step in the Band's efforts to exercise its claim of jurisdiction which is the source of the injury.

Additionally, the Answer and Counterclaim plead other types of injury. For example, the County pleaded that the Band's unlawful efforts to assert jurisdiction have caused a loss in tax revenue. Countercl. ¶55. At this stage of the litigation, this allegation must be accepted as true, and it provides another basis for an injury in fact.

II. The Declaratory Judgment Action Counterclaims Are Properly Pleaded.

A. A declaratory judgment action is cognizable where parties have adverse legal interests of sufficient immediacy and reality.

The Declaratory Judgment Act provides that any federal court, "[i]n a case of actual controversy within its jurisdiction . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). The phrase "case of actual controversy" in § 2201 "refers to the type of 'Cases' and 'Controversies'

[5] Of the approximately 61,000 acres of the original 1855 Reservation, 3,572 are in trust. Compl. ¶5A. This leaves approximately 58,000 acres where the status as Indian country is in dispute.

that are justiciable under Article III." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126 (2007). As the Eighth Circuit has stated, "[t]here must be a concrete dispute between parties having adverse legal interests, and the declaratory judgment plaintiff must seek 'specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *Maytag Corp. v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 687 F.3d 1076, 1081 (8th Cir. 2012) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937)).

To qualify for a declaratory judgment action, the claim must allow for resolution of the case or controversy in its entirety, rather than determining a collateral legal issue governing certain aspects of the pending suit. *See Calderon v. Ashmus*, 523 U.S. 740, 747, 749 (1998) (holding that "this action for a declaratory judgment and injunctive relief is not a justiciable case within the meaning of Article III," where "[t]he present declaratory judgment action would not completely resolve those challenges, but would simply carve out one issue in the dispute for separate adjudication."). In addition, while "[a] declaratory judgment action can be sustained if no injury has yet occurred[, b]efore a claim is ripe for adjudication, however, the plaintiff must face an injury that is 'certainly impending.'" *Public Water Supply Dist. No. 8 of Clay County, Mo. v. City of Kearney*, 401 F.3d 930, 932 (8th Cir. 2005). "Whether the factual basis of a declaratory

judgment action is hypothetical-or more aptly, too hypothetical-for purposes of the ripeness doctrine (and concomitantly Article III) is a question of degree." *Id.* at 932 (internal citation omitted).

In summary, "the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between the parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune*, 127 S. Ct. at 771 (quoting *Maryland Casualty Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

B. The County has adequately pleaded a declaratory judgment action because the parties have adverse legal interests concerning the real and immediate exercise of civil and criminal jurisdiction over some 58,000 acres of land.

Here, the County has pleaded more than sufficient facts to support a declaratory judgment action and to warrant the issuance of a declaratory judgment. First, the parties have adverse legal interests and a concrete dispute. The Counterclaim makes clear that the parties' dispute centers on the extent to which the involved government entities—the County and the Band—have regulatory and criminal jurisdiction over some 58,000 acres of land. The Band asserts that the 1855 Reservation, which was just over 61,000 acres and today is comprised of the townships of Kathio, Isle Harbour and South Harbour, remains intact and is properly considered Indian country. To the contrary, the County contends that the 3,572 acres of land owned by the United States in trust for the

Band is the only land from the 1855 Reservation that remains Indian country. Under the County's position, it has regulatory and criminal jurisdiction over the disputed 58,000 acres, just as it does over all other County land. Under the Band's position, the County would lose some jurisdiction over the 58,000 acres, including civil regulatory authority over Band members, and the Band would gain jurisdiction, including criminal investigatory jurisdiction, over Indians and non-Indians alike. Accordingly, the dispute boils down to a question of which government entity may lawfully exercise jurisdiction over 58,000 acres of land: either the Band is correct in its interpretation of treaties, federal statutes, and case law, and it may exercise jurisdiction over the 58,000 acres as Indian country, or the County is correct in its interpretation of the same, and it may exercise jurisdiction over the 58,000 acres just as it does over the rest of Mille Lacs County land. The parties have adverse legal interests and present the Court with a concrete dispute.

Second, the dispute is sufficiently immediate and real to justify a declaratory judgment because the County faces injury that is threatened, imminent, and impending. As the Supreme Court stated in *MedImmune*, the phrase "case of actual controversy" in § 2201 "refers to the type of 'Cases' and 'Controversies' that are justiciable under Article III." As such, if a party demonstrates an actual or imminent injury sufficient to satisfy Article III's case or

controversy requirement, the party has likewise demonstrated that the dispute is of sufficient immediacy so as to support a declaratory judgment. As discussed at length above, the County has pleaded an actual or imminent injury and therefore it has pleaded a dispute of sufficient immediacy and reality under § 2201.

Finally, the County's declaratory judgment action would conclusively and completely resolve the parties' adverse legal interests. The County pleaded its declaratory judgment action in three counts, each one requesting a decree from the Court that would result in a conclusive and complete resolution of the parties' competing legal interests concerning their respective jurisdiction over the disputed 58,000 acres of land. Count I of the County's Counterclaim asks for a declaratory judgment that the 1855 Reservation was disestablished. If such a decree were made, it would be a direct repudiation of the Band's assertions that the 58,000 acres of disputed land are Indian country. This requested relief would therefore resolve the issue of the parties' respective jurisdiction over the land.

Count III of the County's Counterclaim asks for a declaratory judgment that the Band is estopped, based on its prior litigation, from asserting that the 1855 reservation was not disestablished and therefore it is likewise estopped from asserting the 58,000 of disputed land is Indian country. Again, this requested relief would completely resolve the dispute between the parties because the Band would be estopped from asserting that 58,000 acres is not

under the County's jurisdiction, thereby resolving the competing legal interests of the two government entities, each of which asserts that it has the right to exercise mutually exclusive aspects of jurisdiction over the 58,000 acres.

Count IV of the County's Counterclaim asserts that the Indian Claims Commission Act bars the Band's attempted resurrection of the 1855 Reservation. The Indian Claims Commission Act established a statute of limitations of five years, meaning that claims must have been filed by August 13, 1951. Section 12 of the Act also contained a jurisdictional bar to prevent tribes from bringing these claims to any court or administrative agency for consideration. 60 Stat. 1049 § 12. The Band filed claims for the taking of the entire reservation, both prior to and in the Indian Claims Commission, and received compensation in both instances. As noted, the United States Supreme Court held that the reservation had been "relinquish[ed]." 229 U.S at 507. If the Band had wanted to claim that the 1855 Reservation still existed, the Band was required to make that claim at the Indian Claims Commission. Instead, the Band sought compensation for the taking of the entire reservation. Under the Act, then, the Band is therefore barred from claiming, before this Court or any administrative agency, that the 1855 Reservation still exists. As such, a decree from the Court on this basis would completely resolve the parties' adverse legal interests concerning jurisdiction over the disputed 58,000 acres of land.

Through its declaratory judgment action Counterclaim, the County seeks to resolve the parties' legal dispute concerning the County's and the Band's jurisdiction over some 58,000 acres of land.[6] As the Eighth Circuit has fittingly stated: "The lines are drawn, the parties are at odds, the dispute is real." *Capitol Indemnity Corp. v. Miles*, 978 F.2d 437, 438 (8th Cir. 1992). The same is true here, and the County's Counterclaim properly asks the Court to resolve the longstanding dispute over whether the disputed 58,000 acres are Indian country or County land.

C. Counterclaim Defendants' arguments concerning the adequacy of the pleaded Counterclaim should be rejected because they misapprehend the law and misstate the pleaded facts.

The Band's argument that the County's declaratory judgment action should be dismissed because the Declaratory Judgment Act "provides a remedy, not a cause of action" should be rejected because it misapprehends the law. The Band argues that the declaratory judgment action fails because "no law . . . makes that attempt [to resurrect the 1855 Reservation] unlawful or creates a cause of action . . . for taking the position that the Reservation still exists." Countercl. Defs.' Mem. 20. Thus, rather than merely asserting that the 1855 Reservation was not disestablished, the Band is on the precipice of exerting

[6] As discussed below, *infra* at Part III, the status of the disputed 58,000 acres, while an aspect of Plaintiffs' claims, will not necessarily be resolved by Plaintiffs' claims.

jurisdiction over the disputed 58,000 acres as if it were Indian country. Indeed, through its actions since 2002 and by bringing this lawsuit, it is fairly stated that the Band is presently in the process of exerting that jurisdiction. The County asserts that this is a violation of treaties, federal statutes, and previous decisions of the Indian Claims Commission and federal courts. As such, the Band's assertion that nothing in the Counterclaim alleges that the Band is doing something unlawful is wrong.

Moreover, the case law cited by the Band does not support its argument that the declaratory judgment act only provides a remedy. *Schilling v. Rogers* does not bear on this issue, but instead dealt with whether a provision of the Trading with the Enemy Act preempted the plaintiff's cause of action under the Declaratory Judgment Act. 363 U.S. 666, 677 (1960). Neither does this Court's decision in *Wolff v. Bank of N.Y. Mellon* support the Band's position. 997 F. Supp. 2d 964 (D. Minn. 2014). In *Wolff*, the Court resolved a foreclosure case involving so-called robo-signatures and securitized mortgages. The Court rejected the plaintiff's interpretations of state law and the relevant instruments. Based on that, the Court reasoned that the plaintiff's claims of substantive rights failed, and so did the declaratory judgment action. Here, the Band makes no argument that the County's substantive assertions, i.e., that the disputed 58,000 acres of land is not Indian Country, fail as a matter of law. As such, *Wolff* is inapposite.

Further, *W. Cas. & Sur. Co. v. Herman* actually contradicts the Band's arguments. In *Herman*, the Eighth Circuit reasoned: "[t]he Declaratory Judgment Act, 28 U.S.C.A. §§ 2201 and 2202, does not create any new substantive right but rather creates a procedure for adjudicating existing rights." 405 F.2d 121, 124 (8th Cir. 1968). This holding is consistent with the Counterclaim: the substantive rights are created by the applicable treaties, federal statutes, federal case law, and the rulings of the Indian Claims Commission. The parties' differing views on these substantive rights, and the Band's actions in furtherance of its view, makes their positions adverse, real, and concrete. The Declaratory Judgment Act provides the procedural mechanism for resolving this dispute in this Court rather than forcing the parties to take, or continue to take, actions that the other side contends are unlawful.

The Band's argument regarding the Counterclaim seeking declaratory judgments on affirmative defenses should likewise be rejected. The Band argues that the claims of estoppel and the Indian Claims Commission Act should be dismissed because such claims, according to the Band, are affirmative defenses and are "not a stand-alone cause of action." Countercl. Defs.' Mem. 21. The Band's argument is easily rejected because it proves too much. Under the Band's reasoning, no declaratory judgment action could rest on any affirmative defense. But this is squarely contradicted by the fact that nearly every accused patent

infringer brings a declaratory judgment action asserting patent invalidity, which is an affirmative defense. Further, the Band's argument has been rejected by the Eighth Circuit: "courts regularly consider the merits of affirmative defenses raised by declaratory plaintiffs, and so [Plaintiffs are] off the mark in advocating a blanket prohibition on raising affirmative defenses by declaratory action." *BASF Corp. v. Symington*, 50 F.3d 555, 558 (8th Cir. 1995) (collecting cases). In fact, one of the cases cited by the *Symington* court is described as "stating in dicta that the affirmative defense of estoppel could form the basis of [a] claim for declaratory relief." *Id.* (citing *Slice v. Sons of Norway*, 34 F.3d 630, 633 (8th Cir. 1994)). Here, and as discussed above, the County's declaratory judgment action claims based on estoppel and the Indian Claims Commission Act would entirely resolve the parties' dispute over the status of the disputed land are therefore properly brought as declaratory judgment actions.

The Band repeatedly asserts that the County's Counterclaim fails because there is no allegation that the Band acted unlawfully. As discussed above, however, the issue is that the Band is threatening to exercise jurisdiction over the disputed land as if it were Indian country. According to the facts pleaded by the County, this would be in violation of treaties, federal statutes, federal case law, and litigation that occurred before the Indian Claims Commission. Either the disputed 58,000 acres of land is Indian country or it is not. If it is not Indian

country, and the Band exercises jurisdiction over the lands as if it were, then the Band would be in violation of treaties and law. The Declaratory Judgment Act allows them to bring a claim before actually engaging in the arguably-unlawful conduct. But consider the other side of this equation: if the 58,000 is Indian country, then the County would not be allowed to exercise all of the jurisdictional authority that it exercises currently. And just as the Declaratory Judgment Act gives the Band the right to resolve this issue now, it also gives the County the right to resolve the issue *now* rather than continuing, in a cloud of uncertainty, to exercise its full jurisdictional authority in a way the Band contends is unlawful.

> The remedy made available by the Declaratory Judgment Act and Rule 57 is intended to minimize the danger of avoidable loss and the unnecessary accrual of damages and to afford one threatened with liability an early adjudication without waiting until an adversary should see fit to begin an action after the damage has accrued.

10B Charles Alan Wright et al., Federal Practice and Procedure § 2751 (4th ed., April 2017 update). The Band is threatening the County with liability, alleging that the County does not have full jurisdiction over the disputed land, and the Band has taken numerous, concrete actions establishing an imminent injury to the County. The County should be allowed to bring a declaratory judgment action now to minimize the accrual of damages to either side. The Declaratory

Judgment Act therefore provides the procedural mechanism to decide the issue of whether the disputed 58,000 acres is or is not Indian country.[7]

D. The County's Counterclaim for an injunction is properly pleaded.

The only argument that the Band presents regarding the County's injunction claim is that an injunction is a remedy, not a cause of action. Countercl. Defs.' Mem. 20. The Band's argument again misses the thrust of the County's claims: the Band has taken actions and threatens to exercise jurisdiction over the disputed land as if it were Indian country. This is in violation of treaties, federal law, and holdings by the Indian Claims Commission. Based on these allegations of the Band's imminent violation of law, the County asks the Court for equitable relief to enjoin the Band from committing such violations. The Band's citation to *Newman v. JP Morgan Chase Bank, N.A.*, 81 F. Supp. 3d 735 (D. Minn. 2014), does not support its position that the injunction claim should be dismissed. *Newman* is another foreclosure case where the Court held that the plaintiff's claims failed on the merits of the substantive state-law claims. With no substantive claims, the Court reasoned, there could be no injunction. Obviously,

[7] As discussed below, there are important differences between the parties' declaratory judgment action claims, so that the County's claims are not simply the mirror image of the Band's. It is possible that the Band's claims could be decided without reaching the issue of whether the dispute land is Indian country. The County's counterclaims ensure that this issue will be decided and the Court should therefore exercise its discretion and decide those counterclaims.

the County would concede that if it failed on its substantive claims that the disputed land is not Indian country, then the claim for injunctive relief would likewise fail. But this is not the argument brought by the Band, and the allegations in the County's Counterclaim adequately support its substantive claim. Accordingly, the claim for an injunction is properly pleaded and the Band's Motion on this point should be denied.

III. Counterclaim Defendants' Motion to Strike the Counterclaim Should Be Denied Because the County's Counterclaims Are Not Redundant.

Federal Rule of Civil Procedure 12(f) permits the Court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." However, such relief is an "extreme measure" and motions to strike "are viewed with disfavor in the Eighth Circuit and are infrequently granted." *E.E.O.C. v. Prod. Fabricators, Inc.*, 873 F. Supp. 2d 1093, 1097 (D. Minn. 2012) (citing *Stanbury Law Firm, P.A. v. Internal Revenue Serv.*, 221 F.3d 1059, 1063 (8th Cir. 2000); *Daigle v. Ford Motor Co.*, 713 F. Supp. 2d 822, 830 (D. Minn. 2010)).

A counterclaim is not redundant if it seeks relief beyond that which is sought by the plaintiff's claim. *E.g.*, *Aldens, Inc. v. Packel*, 524 F.2d 38, 52 (3d 1975); *Iron Mountain Sec. Storage Corp. v. Am. Specialty Foods, Inc.*, 457 F. Supp. 1158, 1162 (E.D. Pa. 1978); *accord East Iowa Plastics, Inc. v. PI, Inc.*, 832 F.3d 899, 906-07 (8th Cir. 2016) (concluding neither party prevailed in case with "virtually identical" claims and counterclaims).

A. The Counterclaim is not redundant of the Complaint and Answer.

The four-count Counterclaim and its eight-part prayer for relief is not a mirror image of the single-count Complaint and its four-part prayer for relief. The Plaintiffs and the non-Plaintiff Counterclaim Defendants argue that the Counterclaim and the Complaint raise identical factual and legal issues, and that, as a result, a resolution of the Band's claims would resolve all questions raised by the Counterclaim. Countercl. Defs.' Mem. 23-24. On the contrary, the Band's claims could be resolved in such a manner that the status of the disputed 58,000 acres is not resolved. And relief against the Counterclaim Defendants who are not also Plaintiffs *cannot* be had in absence of the Counterclaim. The County's Counterclaim ensures that this issue, which has been a source of real legal conflict for fifteen years, will be finally and completely resolved. Indeed, the parties to the Complaint and the parties to the Counterclaim are not identical.

The Complaint's request for relief is narrow. In the first part of the Complaint's prayer for relief, the Band seeks a declaration that it possesses inherent sovereign authority to establish a police department and to authorize Band police officers to investigate violations of federal, state and tribal law, within the Mille Lacs Indian Reservation as established in the 1855 Treaty. Compl., Demand for Relief, ¶1.A. The second part of the Complaint's prayer for relief seeks a declaration that, under federal law and under the Deputation

Agreement between the Band and the BIA, and the SLECs issued to the Band police officers by the BIA, Band police officers have the authority to investigate violations of federal law within the 1855 Reservation boundaries. Compl., Demand for Relief, ¶2.A. The Complaint also seeks an injunction against Defendants.

In contrast, the Counterclaim's request for relief is broad. The Counterclaim's first claim for relief seeks a declaration that the 1855 Reservation was disestablished. Countercl. ¶¶56-62. Although this precise issue is buried inside the Band's claims, the Band's claims for declaratory relief are broader in scope than the County's, and thus, the Counterclaim is not a "mirror image" of the Band's claims. *Iron Mountain Sec. Storage Corp. v. Am. Specialty Foods, Inc.*, 457 F. Supp. 1158, 1162 (E.D. Pa. 1978) (holding that the defendants' counterclaim is not redundant of the plaintiff's claim, as it seeks relief beyond that which is sought by the plaintiff's claim).[8] The Counterclaim alternatively seeks a declaration that 1855 Reservation was diminished, (Countercl., Prayer ¶ 2), an injunction against the counterclaim defendants—a group not identical with the Plaintiffs (*id.* ¶ 3), a declaration of estoppel against the Counterclaim Defendants (*id.* ¶ 4), a declaration that the Indian Claims Commission Act of 1946 prevents

[8] The Band tacitly admits this when it argues that if the County prevails after the Counterclaim is dismissed, the County would not be prevented "from seeking such relief later." Countercl. Defs.' Mem. 26.

resurrection of the 1855 Reservation Boundaries (*id.* ¶ 5), dismissal of the Complaint (*id.* ¶ 6), and granting the County costs, disbursements, and further appropriate relief (*Id.* ¶¶ 7-8.)

In other words, the Band's claims could be resolved by the Court without reaching the issue of the disputed land's status, because their claims could fail on any number of independent issues, such as the nature of the Band's criminal investigatory jurisdiction and the facts concerning the Deputation Agreement. The status of the disputed land as Indian country is a necessary condition to the Band's claims, but it is not sufficient to dispose of its claims. The County's Counterclaim is singularly focused on resolving the status of the disputed 58,000 acres. In this sense, the situation here parallels the common practice of counterclaiming the affirmative defense of invalidity in a patent infringement case. A patentee's claim could be lost on the issue of noninfringement, but by allowing a counterclaim declaratory judgment action on the issue of patent invalidity, courts ensure that the important issue of validity itself is decided in the pending lawsuit. *E.g.*, *Fort James Corp. v. Solo Cup Co.*, 412 F.3d 1340, 1348-49 (Fed. Cir. 2005) (reversing dismissal of declaratory judgment counterclaim, explaining that a "counterclaim questioning the validity or enforceability of a patent raises issues beyond the initial claim for infringement that are not disposed of by a decision of non-infringement"). Therefore, the Counterclaim is

not redundant and should be decided to ensure that the issue of the disputed land's status is resolved.

The Band cites to *Mille Lacs Band of Chippewa Indians v. State of Minnesota*, 152 F.R.D. 580, 582 (D. Minn. 1993) for the proposition that a counterclaim that seeks identical factual and legal relief is an improper form of declaratory relief and must be stricken. There, both parties sought a declaration of the meaning of the same treaty, and thus, the rights of each party under the treaty. *Id*. Thus, the resolution of one of their claims would fully resolve the matter for both parties. But this case differs. Plaintiffs do not seek a simple declaration that the Reservation of 1855 is still in existence. Rather, Plaintiffs' first claim for declaratory relief hinges on the Court recognizing their inherent legal authority to police and investigate actions. Plaintiffs' second claim for relief is even broader than their first, as it focuses on the meaning of the Deputation Agreement and the authority the Band possesses under that Agreement. At this early stage in the litigation, it is impossible to predict the evidence that will ultimately be entered before the Court, and whether the precise issue of the Reservation's existence will be determined. Unless that *discrete* issue is before the Court—which it is not unless the County's Counterclaim is pleaded—the uncertainty surrounding the disputed lands may continue. "The safe course for the court to follow is to deny a request to dismiss a counterclaim for declaratory relief unless there is no doubt

that it will be rendered moot by the adjudication of the main action." *Handi-Craft Co. v. Travelers Cas. & Sur. Co. of Am.*, No. 4:12CV63 JCH, 2012 WL 1432566, at *3 (E.D. Mo. Apr. 25, 2012) (quoting 6 Charles Alan Wright, et al., Federal Practice and Procedure § 1406 (3d ed. 1990)).

B. The Motion to Strike is a means of delay and should be denied in the interests of justice and ensuring resolution of the issues.

Motions to strike are disfavored because they potentially only serve to delay resolution of the issues. *Heller Financial, Inc. v. Midwhey Powder Co., Inc.*, 883 F.2d 1286, 1294 (7th Cir. 1989). To ensure resolution of the dispute between the parties is not delayed, the court should allow the counterclaim to proceed. *Oneida Tribe of Indians of Wis. v. Vill. of Hobart*, 500 F. Supp. 2d 1143, n.3 (E.D. Wis. 2007). The *Oneida* case is instructive. There, the Oneida Tribe filed suit against the Village of Hobart seeking declaratory and injunctive relief that property it recently purchased was within the original boundaries of its reservation, and thus, not subject to state laws authorizing taxes and special assessments from the Village. The Village counterclaimed, seeking a declaration that the property the Oneida Tribe acquired was subject to those state laws. The court denied the Oneida Tribe's motion to dismiss the Village's counterclaim for declaratory relief, explaining:

> The Tribe also argues that the Village would suffer no harm if its counterclaim for declaratory relief were dismissed since the Village's counterclaim is "virtually identical" to the Tribe's claim. (Reply Br.

> at 4.) In essence, the Tribe claims that the Village's claim for declaratory relief is redundant. At argument, however, the Village noted that it has been seeking a judicial resolution of its dispute with the Tribe for several years. Its previously-filed state court action has now been dismissed in response to the Tribe's lawsuit, and the Village fears voluntary dismissal of this action by the Tribe at a later date could further delay its efforts to finally resolve the matter if its counterclaim is dismissed at this stage. There is some support for the Tribe's position that the Village's counterclaim for declaratory relief should be dismissed as redundant, especially since the Federal Rules of Civil Procedure now limit the right of a plaintiff to voluntarily dismiss an action once the defendant has filed an answer. *See* Fed. R. Civ. P. 41(a); *Scruggs v. Casco Corp.* 32 F. Supp. 625 (D.Conn.1940). But the majority rule is to the contrary, since it is often difficult to determine whether a declaratory judgment counterclaim really is redundant prior to trial. 6 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 2d* § 1406, at 34 (1990). For this reason, and to insure resolution of the dispute is not delayed, the better policy is to allow the counterclaim to proceed.

Id. at n.3. Here, too, the dispute between the parties has been ongoing for some years. Unless the Counterclaim is allowed to proceed, it is possible that the status of the disputed lands will not be resolved in this litigation.[9] Indeed, because some of the Counterclaim Defendants are not Plaintiffs, relief can be had against them *only* if the Counterclaim is allowed to proceed. Dismissal of the Counterclaim would make them nonparties. Thus, in the interests of justice, and to ensure resolution of the boundary dispute between the parties, the Court should deny the Band's Motion to Strike.

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[9] If the counterclaims were dismissed as a mirror image, Counterclaim Plaintiff could nonetheless bring an independent action seeking the declaratory judgment sought here.

CONCLUSION

For the reasons stated above, the County respectfully requests that the Court deny the Counterclaim Defendants' Motion to Dismiss.

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Respectfully submitted,

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