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,

v.

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,

v.

MILLE LACS BAND OF OJIBWE, a federally recognized Indian tribe; SARA RICE, individually and in her in official capacity as the Mille Lacs Band Chief of Police; DERRICK

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

COUNTERCLAIM DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS OR STRIKE COUNTERCLAIM UNDER RULES 12(b)(1), 12(b)(6) AND 12(f)

NAUMANN, individually and in his official capacity as Sergeant of the Mille Lacs Band Police Department; and MELANIE BENJAMIN, CAROLYN SHAW-BEAULIEU, SANDRA BLAKE, DAVID AUBID, and HARRY DAVIS, individually and in their official capacities as the elected officials of the Mille Lacs Band Assembly,

Counterclaim Defendants.

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Mille Lacs County's Counterclaim should be dismissed or stricken because it does not establish standing, fails to state a claim on which relief can be granted, and is redundant of the claims and defenses presented in the Band's Complaint and the County's Answer.

A. Standing.

The County argues its Counterclaim establishes standing by alleging: (1) the Counterclaim Defendants have "'injured the County in the exercise of its criminal and civil regulatory authority outside of trust lands'"; and (2) that "[t]hese controversies [over jurisdiction] 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." County Memo. (ECF 35) at 15 (citing Counterclaim ¶¶ 54-55). These allegations do not establish standing.

1. Injury to Criminal and Civil Regulatory Authority.

The County's response identifies no allegation in the Counterclaim that the Band has actually exercised criminal or civil jurisdiction on non-trust lands.[1] *See* ECF 35 at 22 (suggesting discovery might uncover evidence of such an exercise of jurisdiction on trust lands). More importantly, the County does not allege any actual harm from such an

[1] The Counterclaim alleges the Band cooperated with EPA's assertion of jurisdiction outside trust lands but does not allege the Band itself exercised such jurisdiction, and the County concedes EPA's alleged exercise of jurisdiction *did not* injure the County's regulatory authority. ECF 35 at 11 n.3 ("it is Minnesota, not the County, that has authority to regulate underground storage tanks"). The County's further speculation that, perhaps, no one will challenge EPA's jurisdiction, and, perhaps, the Band will rely on the absence of a challenge to assert the land is Indian country, and, perhaps the Band will then stop applying for County land use permits, causing injury to the County, provides no basis for standing. *See Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1031 (8th Cir. 2014) ("speculation and conjecture are not injuries cognizable under Article III").

exercise of jurisdiction. *Cf. Bd. of Educ. for Gallup-Mckinley Cnty. Sch. v. Henderson*, 696 Fed. App'x 355, 358 (10th Cir. 2017) (school board lacked standing to seek relief barring future tribal jurisdiction over board because board failed to identify "what legally protected interest was invaded"). Specifically, it identifies no allegation in the Counterclaim that the Band has interfered with *the County's* exercise of jurisdiction on non-trust lands, or that the County has been unable to exercise its own jurisdiction on non-trust lands due to any action by the Band. To the contrary, while asserting it is operating "in a cloud of uncertainty," the County acknowledges it is "continuing … to exercise its full jurisdictional authority …." ECF 35 at 34.

The absence of interference with the County's exercise of jurisdiction led to dismissal of the County's 2002 lawsuit. *Cnty. of Mille Lacs v. Benjamin*, 361 F.3d 460, 464 (8th Cir. 2004). The County's failure to *allege* interference with its exercise of jurisdiction is equally fatal here.

The County relies on four actions allegedly taken by the Band since *Benjamin* to establish standing, first mentioning this lawsuit. ECF 35 at 19. However, the Band's Complaint seeks no relief that would interfere with *the County's* criminal or regulatory authority; the *only* relief the Band seeks is to prevent County interference with *the Band's* law enforcement authority. ECF 1 at 7-8.[2] Although the Band's complaint alleges non-

[2] The County argues "'potential liability stemming from a filed complaint'" is sufficient to confer standing. ECF 35 at 9 (quoting *Cnty. of Mille Lacs v. Benjamin*, 262 F. Supp. 2d 990, 997 (D. Minn. 2003)). However, *Benjamin* stated only that such liability "can" be sufficient to confer standing; it did not hold that such liability is sufficient in every case. Further, because "standing is not dispensed in gross," *e.g. Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017), the Band's Complaint would at most give the

trust lands comprise Indian country because they are within the Mille Lacs Reservation, *id.* at 3, their "Indian country" status has no effect on the County's criminal authority. As the counterclaim recognizes, because of Public Law 83-280 "all state crimes committed by Indians or non-Indians within Indian country in Minnesota are prosecuted by the state and local government officials *without reference to reservation status.*" County Answer & Countercl. (ECF 17) at 27 (emphasis added). Although the "Indian country" status of non-trust lands could affect the County's civil regulatory authority, the Band seeks no relief regarding such authority. Thus, nothing in the Band's Complaint presents an imminent threat to the County's criminal or civil regulatory authority.

Second, the County argues the Band sought "concurrent federal criminal jurisdiction over the disputed lands." ECF 35 at 20-21. However, the Counterclaim does not allege this had any effect on the County's criminal jurisdiction. *See* ECF 17 at 25 (¶ 46). Nor could it, since nothing in the authorizing statute, 18 U.S.C. § 1162(d), "alters existing tribal, State, or local jurisdiction." 76 Fed. Reg. 76,037, 76,040 (Dec. 6, 2011); *see also* 81 Fed. Reg. 4,335, 4,336 (Jan. 26, 2016) (granting Band's request allows the United States to assume concurrent criminal jurisdiction over offenses within the Band's Indian country "*without eliminating or affecting the State's existing criminal jurisdiction.*") (emphasis added).

County standing to seek a declaration that it is not liable for interference with the Band's law enforcement authority. Because that claim would be entirely redundant of the claims and defenses already asserted in this case, it should be dismissed. *See* Section C *infra*.

Third, the County argues the Band sought and received an opinion from the Interior Solicitor's Office that the Mille Lacs Reservation had not been diminished or disestablished. ECF 35 at 22.[3] The County asserts it "is injured by the Band's exercise over and claim to lands that are not 'Indian country,'" *id*., but, as discussed above, the Counterclaim does not allege the Band has exercised or interfered with the County's exercise of jurisdiction on such lands.

Fourth, the County argues the Band entered into a Deputation Agreement with the Bureau of Indian Affairs to obtain authority to investigate federal-law violations on disputed lands. ECF 35 at 23. According to the County, "[t]he 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." *Id*. (emphasis in original). Although the County asserts that "[a]cting as federal officers on lands that are not Indian country … is an injury in fact – whether actual or threatened – to the County's jurisdiction and authority," *id.*, it alleges no actual interference with the County's authority. The County's interest in ensuring Band officers operate within the scope of their authority is not, by itself, sufficient to establish standing absent allegations

[3] The County's request (ECF 35 at 10 n.2) to strike the opinion should be denied. Because the County referenced the opinion in its counterclaim (ECF 17 at 25 (¶ 47)) and relies on it in its opposition memorandum, the opinion is "necessarily embraced by the pleadings" as a "document[] whose contents are alleged in a complaint and whose authenticity no party questions," *Ashanti v. City of Golden Valley*, 666 F.3d 1148, 1151 (8th Cir. 2012), and may be considered without converting the motion to one for summary judgment. *Levy v. Ohl*, 477 F.3d 988, 991-92 (8th Cir. 2007).

that their allegedly extra-jurisdictional actions have caused an actual injury to the County. *See*, *e.g.*, *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 482-83 (1982) (standing cannot rest on "the right, possessed by every citizen, to require that the Government be administered according to law"). In *Virginia v. Hicks*, 539 U.S. 113, 121 (2003), a state's inability to prosecute a citizen for trespass established standing. Here, the County makes no allegation it has been, or that there is an imminent threat it will be, prevented from investigating or prosecuting anyone.

There are other problems with the County's effort to distinguish *Benjamin*. First, the injury-in-fact test requires more than injury to a cognizable interest; it requires the party seeking review "be himself among the injured." *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972). However, the County itself has no power to exercise the *State's* criminal jurisdiction. *See* Minn. Stat. § 373.01 (listing county powers). Rather, as the County recognizes, the County Sheriff and the County Attorney – neither of whom has joined in the Counterclaim – are the elected "senior officials in charge of public safety and law enforcement within the County." ECF 35 at 20; *see* Minn. Stat. § 387.03 ("sheriff shall keep and preserve the peace of the county"); Minn. Stat § 388.051 (County Attorney's powers). Absent a showing that the State has delegated its law enforcement authority to *the County*, the County's arguments regarding interference with law enforcement do not satisfy the injury-in-fact test.

Second, except for the Band's filing of this lawsuit, all the post-*Benjamin* actions cited by the County involve actions by the Federal Government. *See* ECF 35 at 20-23. Although the Band may have been "involved" in these actions, any actual injury to the

County is the result of *Federal* action, which cannot establish standing to sue *the Band*. *Bennett v. Spear*, 520 U.S. 154, 167 (1997).

Third, the County makes no attempt to trace its alleged injuries to the Band's elected officials (Counterclaim Defendants Benjamin, Shaw-Beaulieu, Blake, Aubid, and Davis). Even if the County sufficiently alleged injury fairly traceable to the Band, Police Chief Rice or Sergeant Naumann, its failure to trace its alleged injuries to the Band's elected officials requires the Counterclaim's dismissal as to them.

2. Reduced Tax Base.

The reduced-tax-base claim (ECF 17 at 29 ¶ 55) alleges the same injury this Court found insufficient as a matter of law in 2003. *See Benjamin*, 262 F. Supp. at 998-99. The court's decision did not rest solely on lack of admissible evidence; it found that even if there were a reduction in property values, the County's injury would not be traceable to actions of the Band and may not be redressable by a decision on the merits. *Id.* The County makes no allegations that change the result here.

B. Failure to State a Claim.

The Counterclaim fails to state a claim on which relief can be granted because it fails: (1) to allege an unlawful act by any Counterclaim Defendant; or (2) to identify an independent cause of action. Countercl. Defs.' Memo. (ECF 27) at 20-21. The County argues these requirements do not apply to a declaratory judgment action and that, in any event, it satisfied them. Neither argument has merit.

1. Declaratory Judgment Actions.

The County argues a declaratory judgment requires only "'a substantial controversy, between the parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" ECF 35 at 26 (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007)). Although these elements are necessary, they are not sufficient.

First, as the County acknowledges, a declaratory judgment claim "must allow for resolution of the case or controversy in its entirety." ECF 35 at 25 (citing *Calderon v. Ashmus*, 523 U.S. 740, 747, 749 (1998)). Because most of the County's alleged injuries can be traced to Federal actions (the Attorney General's approval of concurrent Federal jurisdiction, the Interior Solicitor's Opinion and the BIA Deputation Agreement), and because the County has not sued the Federal Government, its claim will not resolve the controversy "in its entirety."

Second, courts should not consider declaratory judgment suits filed merely for strategic advantage, *Calderon*, 523 U.S. at 747, but only "when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue." *See Alsager v. Dist. Court of Polk Cnty.*, 518 F.2d 1160, 1163 (8th Cir. 1975). In *Calderon*, declaratory judgment was unavailable because the legal issues raised would be resolved more directly in other disputes. The same is true here – all the issues raised by the County will be resolved in the Band's case because the Band's claims turn on the continuing existence of the 1855 Reservation.

Third, a substantial controversy between parties having adverse legal interests does not displace the obligation to plead a valid, independent cause of action. *See Schilling v. Rogers*, 363 U.S. 666, 677 (1960). It isn't enough to identify federal laws, describe the parties' differing legal positions, and invoke the Declaratory Judgment Act. *See* ECF 35 at 31-32. The counterclaim must identify a cause of action based on a "judicially remediable right" to avoid dismissal. *See Schilling*, 363 U.S. at 677.

Contrary to the County's argument, ECF 35 at 31, *Schilling* was not limited to cases in which the plaintiff's declaratory judgment application was preempted by federal law; the suit was dismissed because the claimant, like the County, did not identify a cause of action – a "judicially remediable right." 363 U.S. at 677. Since *Schilling*, it has become black letter law that "[a] successful action for declaratory judgment requires a viable underlying cause of action." *Essling's Homes Plus v. City of St. Paul*, 356 F. Supp. 2d 971, 984 (D. Minn. 2004)). In *Jones v. Hobbs*, 745 F. Supp. 2d 886, 893 (E.D. Ark. 2010), the court held:

> *Merrell Dow*, *Skelly*, *Schilling*, and *Heckler* lead to the conclusion that the Declaratory Judgment Act does not authorize actions to decide whether federal statutes have been or will be violated when no private right of action to enforce the statutes has been created by Congress.

The cases on which the County relies are not to the contrary. *Western Cas. & Sur. Co. v. Herman*, 405 F.2d 121, 124 (8th Cir. 1968), confirmed that the Declaratory Judgment Act "does not create any new substantive right;" the claims proceeded because contract law and the parties' contractual relationship provided an existing substantive right. In *BASF Corp. v. Symington*, 50 F.3d 555, 558 (8th Cir. 1995), the court analyzed qualified

affirmative defenses raised by declaratory-action plaintiffs where the parties had an existing substantive legal relationship that gave rise to an independent cause of action. Likewise, *Slice v. Sons of Norway*, 34 F.3d 630, 633 (8th Cir. 1994), involved an affirmative claim of equitable estoppel asserted under federal common law as a claim for damages.

The County points to no authority that its affirmative defenses are also stand-alone claims. *See* Section B.2 *infra*. Its argument that "nearly every accused patent infringer brings a declaratory judgment action asserting patent invalidity, which is an affirmative defense," ECF 35 at 32-33, is unavailing because patent infringement and patent invalidity are independent causes of action "'arising under an Act of Congress relating to patents,' 28 U.S.C. §1338(a)." *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S. Ct. 843, 849 (2014).

2. Sufficiency of the Counterclaim.

To demonstrate it has pleaded a valid cause of action, the County first points to the allegation in its answer that the Band "impermissibly" petitioned federal agencies to recognize the Reservation in violation of the Indian Claims Commission Act (ICCA), 60 Stat. 1049, § 12. *See* ECF 35 at 6-7 (citing ECF 17 at 10-11 (¶ 12)). However, the County does not show the ICCA creates a private cause of action or that the County is within the ICCA's zone of interests. *See Warth v. Seldin*, 422 U.S. 490, 500 (1975); *see also Mille Lacs Band v. Minnesota*, 853 F. Supp. 1118, 1138-39 (D. Minn. 1994) (rejecting identical ICCA argument in suit to enforce existing federal rights where, as here, the Band makes no claim that the United States abrogated its rights).

Second, the County alleges the Band's assertions regarding the Reservation are contrary to its positions in previous litigation. ECF 35 at 7. However, the County cites no law that makes those assertions unlawful. Judicial estoppel, collateral estoppel and res judicata are affirmative defenses in a court of law, but do not proscribe speech. *See, e.g., State v. Lemmer*, 736 N.W.2d 650, 658 (Minn. 2007) ("Nothing in the application of collateral estoppel creates, defines, or regulates rights, defines a crime, or prescribes punishment."). There is no authority that the Band's exercise of a fundamental right to discuss matters of political concern with federal agencies is unlawful. *See, e.g.*, U.S. Const. amend. I; *McDonald v. Smith*, 472 U.S. 479, 482-483 (1985).

Third, the County argues it has alleged that the Band is intent on violating the law by exercising jurisdiction beyond its lawful authority. *See, e.g.,* ECF 35 at 30-31, 33. However, the Counterclaim itself does not allege that the Band intends to *exercise jurisdiction* over non-trust lands; its allegations are limited to the Band's alleged "efforts … to incrementally reestablish the 1855 Reservation." *See*, *e.g.*, ECF 17 at 27 (¶ 51), 28-29 (¶ 55). Moreover, while the County contends such actions would violate treaties and statutes allegedly disestablishing the Reservation, ECF 35 at 30-31, it does not show it has a cause of action under those treaties or statutes.

Indeed, State and local governments may *not* invoke the Declaratory Judgment Act to obtain a declaration that they may enforce their own laws despite possibly conflicting federal law:

> There are good reasons why the federal courts should not entertain suits by the States to declare the validity of their regulations despite possibly conflicting federal law. States are not significantly prejudiced by an inability to come to federal court for a

> declaratory judgment in advance of a possible injunctive suit by a person subject to federal regulation. They have a variety of means by which they can enforce their own laws in their own courts, and they do not suffer if the pre-emption questions such enforcement may raise are tested there.

Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 20-21 (1983); *see also Missouri v. Cuffley*, 112 F.3d 1332, 1336 (8th Cir. 1997). This is precisely what the County is doing here: concerned about its ability to enforce State and local law within the 1855 Reservation, it is seeking a declaratory judgment that the Reservation does not exist so that it can continue to enforce its laws despite the Band's potential Reservation-based claims. *See*, *e.g.*, ECF 35 at 27 (County is suing to prevent loss of jurisdiction if Band's position regarding Reservation were correct), 34 (County wants declaration that it may continue to exercise "its full jurisdictional authority in a way the Band contends is unlawful"). *Franchise Tax Board* bars that claim.

Finally, it bears repeating that the County has made no allegations of past or intended future action by any of the Band's elected officials, and concedes they have been sued solely to avoid a possible sovereign immunity defense. ECF 35 at 12-13. The County's failure to identify any actions that have been taken by the Band's elected officials compels dismissal of its claims against them. ECF 27 at 24 n.5.

C. Redundancy.

The County argues its Counterclaim should not be stricken as redundant because it is broader than the Complaint and should be preserved in the interests of justice. Neither argument has merit.

1. Breadth of the Counterclaim.

The County asserts that "[t]he Complaint's request for relief is narrow" because it is tailored to the law enforcement dispute giving rise the Band's claim, while the Counterclaim's request for relief "is broad," seeking a stand-alone declaration "that the 1855 Reservation was disestablished." ECF 35 at 37-38; *but cf. Benjamin*, 262 F. Supp. 2d at 1000 (justiciable case involves particularized dispute over exercise of sovereign powers, not "abstracted concerns over reservation boundaries"). According to the County, "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." *Id*. at 39. It also contends that, "because some of the Counterclaim Defendants are not Plaintiffs, relief can be had against them *only* if the Counterclaim is allowed to proceed." *Id*. at 42 (emphasis in original).

These arguments lack merit. First, the Complaint and the Answer squarely present the issue of the Reservation's status. The Complaint alleges that the Reservation continues to exist and predicates its claims of Band law enforcement authority on the Reservation's existence. ECF 1 at 3-5 (¶¶ 5.B, 5.C, 5.H & 5.K). The Answer repeatedly denies the Reservation still exists and predicates its denial of Band law enforcement authority on the Reservation's disestablishment or diminishment. ECF 17 at 3-9. The issue the County wants to litigate is thus squarely presented in the Complaint and Answer.

Second, the County makes no plausible argument that the Band's claims can be resolved without deciding the Reservation issue. Under 18 U.S.C. § 1151, all lands within

a reservation are Indian country. The County admits that the Band has *at least some* inherent and federally delegated law enforcement authority in Indian country, but contends it has *no* such authority on non-trust lands within the 1855 Reservation. *See*, *e.g.*, ECF 17 at 6-7 (¶¶ 5.H & 5.K). Its argument does not turn on the nature of the Band's jurisdiction or facts concerning the Deputation Agreement, but solely on whether the lands are within an Indian reservation. Thus, no matter how the court resolves the precise scope of the Band's law enforcement authority, it will need to decide whether the Reservation still exists to determine whether that authority extends to non-trust lands.

Third, the assertion that the Counterclaim is broader than the Band's Complaint runs head-on into the standing issue. To the extent the County predicates its standing on the Band's Complaint, it has not established standing to assert claims that are broader than those asserted in the Complaint. *See*, *e.g.*, *Chester*, 137 S. Ct. at 1650 (because standing is not dispensed in gross, "'a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought'" (quoting *Davis v. Federal Election Comm'n*, 554 U.S. 724, 734 (2008)).

Fourth, in arguing some of the Counterclaim Defendants are not Plaintiffs, the County fails to show how a judgment in the Band's case would be less adequate because of their absence (especially since they are only sued to ensure the judgment binds the Band). Moreover, because the claims against those defendants must be dismissed for lack of standing and failure to state a claim, they provide no basis for preserving the Counterclaim.

2. Interests of Justice.

The County argues that the Counterclaim should be preserved to ensure resolution of the parties' dispute is not delayed. ECF 35 at 41 (citing *Oneida Tribe of Indians of Wis. v. Vill. Of Hobart*, 500 F. Supp. 2d 1143 n.3 (E.D. Wis. 2007)). The *Oneida* court recognized there was support for dismissing a counterclaim as redundant, but asserted the majority rule was to the contrary, because "it is often difficult to determine whether a declaratory judgment counterclaim really is redundant prior to trial." *Id*. (citing Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 1406).

However, where courts have been able to determine a counterclaim is redundant, they have not hesitated to strike it. *See Great Lakes Gas Transmission Ltd. P'ship v. Essar Steel Minn. LLC*, 871 F. Supp. 843, 862 (D. Minn. 2012) (dismissing counterclaim where "resolution of Plaintiff's claims, including Defendants' affirmative defenses, would resolve the questions presented by" the counterclaim); *Gratke v. Andersen Windows, Inc.*, No. 10-CV-963 (PJS/LIB), 2010 U.S. Dist. LEXIS 137047 at *7 (D. Minn. Dec. 8, 2010); *Daily v. Fed. Ins. Co.*, No. C 04-3791 PJH, 2005 U.S. Dist. LEXIS 46001 at *21 (N. D. Cal. 2005) (dismissing counterclaim and noting that "cautionary language from Wright and Miller is logically less applicable in cases where both the plaintiff's cause of action and the defendant's counterclaim are for declaratory relief, on the same issue"). Because resolution of the Band's claims and the County's affirmative defenses will necessarily resolve the issues raised in the counterclaim – the existence of the Reservation, the scope of the Band's law enforcement authority, and the County's estoppel and ICCA arguments – the Counterclaim should be stricken.

The Band has not sought to strike the Counterclaim for purposes of delaying its own litigation or any other improper purpose. Rather, it seeks to ensure the Court's resolution of this case rests on a solid jurisdictional foundation and to expedite the case by striking a redundant and unnecessary pleading. The Counterclaim should be dismissed or stricken.

ZIONTZ CHESTNUT

Dated: April 2, 2018

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