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 Police Department, Plaintiffs, v. County of Mille Lacs, Minnesota; Joseph Walsh, individually and in his official capacity as County Attorney for Mille Lacs County; and Don Lorge, individually and in his official capacity as Sheriff of Mille Lacs County, Defendants.	Case No. 17-cv-05155 (SRN/LIB) **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON STANDING, RIPENESS AND MOOTNESS**

I. INTRODUCTION.

Plaintiffs – the Mille Lacs Band of Ojibwe, a federally recognized Indian tribe; Sara Rice, the Band's Chief of Police; and Derrick Naumann, a Sergeant in the Band's Police Department[1] – submit this memorandum in support of their motion for summary judgment on standing, ripeness and mootness.

[1] *See* Complaint (Doc. 1) ¶ 1; *see also* Exs. A at 7, B at 6 and C at 6 (Defendants' Responses to Request for Admission No. 11, admitting the Band is federally recognized for purposes of this case). All exhibits cited in this Memorandum are attached to the Declaration of Beth Baldwin in Support of Plaintiffs' Motion for Summary Judgment on Standing, Ripeness and Mootness, unless otherwise noted.

Plaintiffs seek declaratory relief pursuant to 28 U.S.C. § 2201 that:

> A. As a matter of federal law, the Band 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 Article 2 of the Treaty with the Chippewa, 10 Stat. 1165 (Feb. 22, 1855) [the Reservation], and, in exercising such authority, to apprehend suspects (including Band and non-Band members) and turn them over to jurisdictions with prosecutorial authority; and
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> B. Pursuant to 18 U.S.C. § 1162(d), 25 U.S.C. §§ 2801 and 2804, [a] Deputation Agreement between the Band and the Bureau of Indian Affairs [BIA] and [Special Law Enforcement Commissions] issued to Band police officers by [BIA], Band police officers have federal authority to investigate violations of federal law within the [Reservation], and, in exercising such authority, to arrest suspects (including Band and non-Band members) for violations of federal law.[2]

Plaintiffs also seek an injunction enjoining defendants – Mille Lacs County, the County Attorney and County Sheriff – from taking actions that interfere with Band authority as declared by the Court.[3] Plaintiffs seek no other relief except costs and fees.[4]

Defendants' Answers did not contest standing and admitted some or all of plaintiffs' claims are ripe.[5] However, defendants subsequently asserted they had not waived a

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[2] Complaint (Doc. 1) at 7 (¶ 1). On the merits, plaintiffs contend subsequent treaties preserved the Reservation for the Band and, despite conveyance of Reservation lands to non-Indians, Congress has not altered the Reservation boundary. Complaint (Doc. 1) ¶ 5.B. The United States and the State of Minnesota agree. *See*, *e.g.*, Exs. D (11-20-2015 Solicitor's M Opinion), E (11-8-2017 Letter from Humbert to Walsh) and F (2-19-2020 State Memorandum in *Walsh v. State* at 7-10). For plaintiffs' contentions regarding the Band's police authority within the Reservation, *see* Complaint (Doc. 1) ¶¶ 5.H and K and Ex. G (12-22-2016 Letter from Slonim to Walsh).

[3] Complaint (Doc. 1) at 2 (¶ 2) and 8 (¶ 2).

[4] *See id.* at 8 (¶ 3).

[5] *See* County Answer (Doc. 17) at ¶ 5.V (admitting "scope of [Band police officers'] law enforcement authority … is ripe for resolution by this Court"); County Attorney Answer

standing defense and plaintiffs' claims are moot.[6] Plaintiffs seek summary judgment on these threshold issues.

II. FACTUAL BACKGROUND.

A. Summary.

Plaintiffs' standing arises from an opinion and protocol issued by Mille Lacs County Attorney Joseph Walsh and actions taken by Walsh and then-Mille Lacs County Sheriff Brent Lindgren to implement the opinion and protocol. These actions were taken on behalf of Mille Lacs County.

Defendants' actions: (1) limited the Band's inherent and federally delegated law enforcement authority to about 3,600 acres of trust lands within the Reservation, excluding 57,400 acres of non-trust lands (including 6,000 acres of Band-owned fee lands);[7] and (2) prohibited Band police from investigating state-law violations, even on trust lands. These restrictions injured plaintiffs by: (1) impairing the Band's sovereignty; (2) limiting Rice and Naumann's ability to pursue their chosen professions, driving down morale among Band police and inducing some officers to leave; and (3) impairing plaintiffs' ability to

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(Doc. 21) ¶ 3 and ¶ 5V (admitting subject matter jurisdiction and that the "scope of [Band police officers'] law enforcement authority … outside of trust lands is ripe"); County Sheriff's Answer (Doc. 19) ¶ 3 and ¶ 5.V (same).

[6] Defendants' standing claim was made in a hearing on a discovery dispute. *See* Order on Discovery Motions (Doc. 130) at 13-15 (discussing standing). Defendants' mootness claim was made in their Joint Statement of the Case (Doc. 50) at 6.

[7] *See* Complaint (Doc. 1) ¶ 5.A and Quist Decl. ¶¶ 3-5 (acreage amounts).

prevent and respond to criminal activity (including drug-dealing and overdoses) on the Reservation.

Defendants' actions and the resulting injuries to plaintiffs created a concrete, non-hypothetical controversy between parties having adverse legal interests. The relief plaintiffs seek would redress their injuries by confirming that the Band's police authority extends throughout the Reservation and includes the authority to investigate state-law violations. The dispute was not mooted by the parties' 2018 cooperative agreement, which will terminate if this case is dismissed.

B. Opinion and Protocol.

On June 21, 2016, the County terminated a 2008 law enforcement agreement ("2008 Agreement") among the Band, the County and County Sheriff.[8] On July 18, 2016, County Attorney Walsh issued "Mille Lacs County Attorney's Office Opinion on the Mille Lacs Band's Law Enforcement Authority" ("Opinion") and Northern Mille Lacs County Protocol ("Protocol"), which purported to state the authority of Band police officers upon termination of the 2008 Agreement.[9] Among other things, the Opinion and Protocol asserted the Band's inherent law enforcement authority did not extend to non-trust lands

[8] *See* Ex. H (County Resolution with attached copy of 2008 Agreement).

[9] Ex. I at 2 (Opinion asserting it is "necessary to authoritatively state the legal relationships that exists among [County and Band] law enforcement officers under Minnesota law effective July 22, 2016"); Ex. J (Protocol stating it "is intended to guide law enforcement officers regarding the lawful authority of law enforcement officers" within the Reservation, and setting forth what Band officers "**May**" and "**May Not Lawfully**" do) (emphasis in original).

within the Reservation, and did not include authority to investigate state-law violations, even on trust lands.[10]

Walsh sent the Opinion and Protocol to Band police expecting they would adhere to it, and confirmed that expectation in subsequent communications.[11] The Opinion and

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[10] *See*, *e.g.* Ex. I at 14 ("[i]nherent tribal jurisdiction is limited to 'Indian country'" and the State and County "believe that 'Indian county in Mille Lacs County is limited to tribal trust lands"); *id.* at 9 ("[a]s all investigations of state law violations must be completed by a peace officer within his or her state law jurisdiction, either the Mille Lacs County Sheriff's Office or the police department of a municipality must take possession of all evidence gathered regarding that investigation");

Ex. J ("*Mille Lacs County's position is that inherent tribal criminal authority doesn't extend (1) outside of trust lands or (2) to non-members of the Mille Lacs Band*"; Band officers "**May Not Lawfully** … [c]onduct investigations regarding violations of state law including statements, investigative stops, traffic stops, and gathering evidence") (emphasis in original; footnote omitted);

Ex. K at 295-96, 299-300, 303-05 (Walsh testimony acknowledging the Protocol stated tribal officers could not lawfully conduct investigations regarding state-law violations on trust or fee lands and that the Protocol was intended to limit the exercise of inherent tribal authority to trust lands and to Indians);

Ex. L. at 59-60 (former Assistant Mille Lacs County Attorney Kali Gardner testimony that purpose of the Opinion and Protocol was "[t]o notify law enforcement of what they could or should be doing," and agreeing Band police were not "free to continue exercising authority on non-trust lands or to investigate violations of state law on trust lands").

The Opinion and Protocol recognized Band police had limited authority to make warrant arrests under state law on trust and non-trust lands and inherent authority to investigate violations of Band law by Band members on trust lands. *See*, *e.g*, Ex. I at 6-7, 14-15; Ex. J. However, those authorities did not permit Band officers to conduct other law enforcement activities on non-trust lands or to investigate state law violations, even on trust lands, except searches incident to a warrant arrest. *Id.*

[11] *See* Ex. K at 290, 305 (Walsh testimony that he "hoped" Band police would follow the Protocol and never suggested it was voluntary);

Protocol stated Band officers who exercised police authority beyond that allowed in the Opinion and Protocol could be subject to criminal and civil penalties for unauthorized use of force, obstruction of justice and impersonating a peace officer.[12] The County Attorney also stated he would not prosecute suspects apprehended by Band officers who exercised authority beyond that authorized in the Opinion and Protocol.[13]

Ex. L at 59-60 (Gardner testimony that Walsh expected Band police to adhere to the Opinion and Protocol and "other officers were advised that they could arrest tribal police officers" for violations);

Ex. M (7-25-2016 Walsh Email to former Band Police Chief Rosati stating Walsh trusts the Protocol "has been provided to all of your officers and that *they have been directed to follow it*") (emphasis added);

Ex. N at 2 (8-25-2016 Walsh Letter to Rosati complaining about trend away from compliance with the Protocol and stating violations "could … *constitute obstruction of justice and the unauthorized practice of a law enforcement officer*") (emphasis added);

Ex. O at 1 (9-20-2016 Walsh Letter to Band Officer Kintop stating Walsh "*expect[s] all tribal police officers to follow* the [Opinion and Protocol] for as long as [they are] in place") (emphasis added);

Ex. P at 5 (8-23-2016 Walsh Email to Rosati quoting Protocol and opining Band officer did not have authority to investigate a non-Native suspect on trust lands because "there would be no inherent criminal authority").

[12] *See* Ex. I at 11-12 ("Risks Inherent in Peace Officers' Out-of-Jurisdiction Citizens' Arrests" include civil and criminal liability and criminal penalties for unauthorized practice of a law enforcement officer and conduct that obstructs or interferes with a peace officer);

Ex. J (Band officers "**May Not Lawfully** … [i]mpersonate a state peace officer, obstruct justice, or engage in the unauthorized practice of a peace officer, primarily by interfering with investigations within Mille Lacs County") (emphasis in original).

[13] *See*, *e.g.*, Ex. O at 2 (Walsh Letter to Band Officer Kintop stating "[i]f you wish for controlled substance offenders to be prosecuted in Minnesota District Court … please comply with the Opinion and Protocol as long as it is in effect ….");

C. Sheriff's Implementation of Opinion and Protocol.

The Protocol stated Sheriff's deputies could not lawfully allow the exercise of law enforcement authority by Band officers except as authorized in the Opinion and Protocol.[14] The Sheriff instructed his deputies to follow the Opinion and Protocol.[15] This included, among other things: monitoring Band officers' compliance with the Protocol and reporting violations;[16] not referring calls for service to Band officers from the Sheriff's dispatch office, which handles all 911 calls in the County;[17] taking control of crime scenes from

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Ex. L at 41, 46 (Gardner testimony that Walsh would not charge cases where Band police acted outside Opinion and Protocol).

[14] Ex. J ("**State Peace Officers May Not Lawfully** … [a]uthorize or knowingly allow the unauthorized practice of a peace officer") (emphasis in original).

[15] *See*, *e.g.*, Ex. R (7-21-2016 Lindgren Email directing all employees to "adhere to" the Opinion and Protocol);

Ex. P at 2 (8-22-2016 Lindgren Email to Rosati stating Sheriff's employees have been given the Opinion and Protocol "and are following it");

Ex. T (Defendants' Rule 26(a)(2)(C) Disclosures at 2 (Lindgren "will opine that Sheriff's deputies and employees followed" the Opinion and Protocol)).

[16] *See*, *e.g.*, Ex. U at 2 (7-25-2016 Deputy Holada Email stating Protocol defines "when [Band police] can act as police officers and when they should act as citizens" and listing alleged violations);

Ex. V (9-21-2016 Lindgren Email directing deputies to "continue to keep your direct supervisors apprised of day to day operations involving cooperation of Band Officers following County Attorney Opinion and Protocol").

[17] *See*, *e.g.*, Ex. W (6-21-2016 Lindgren Statement that, upon revocation of the 2008 Agreement, calls for service "previously dispatched … to the … Band Police Department will be handled by the … County Sheriff's Office").

Band officers to prevent Band officers from conducting investigations or to re-do such investigations; and taking statements from Band officers as civilians.[18]

[18] *See*, *e.g.*: A. Burton Decl. ¶¶ 8-11 (describing 8-9-2016 incident in which Band Officer Ashley Burton (then Stavish) responded to a call on trust lands but was informed by a deputy that she was a civilian and the deputy would need to take a statement from her before he could arrest the suspect);

Ex. P at 6 (Lindgren Email to Rosati stating "Sheriff's office has the ultimate discretion to control any designated crime scene" and expressing appreciation for the Band's "willingness to undertake [County deputy's] direction and control");

Ex. X (8-26-2016 Lindgren Email stating deputies "are to complete independent investigations consistent with the County Attorney's Opinion and Protocol"; that "Band Police are to notify you before any investigation takes place regarding evidence of criminal activity"; and that "[i]f Band Police have a civil/regulatory stop on trust lands related to a band member once that mater [*sic*] related to the stop is completed, their role in any joint investigation is over unless and until they are given direction by you to provide assistance");

A. Burton Decl. ¶¶ 12-16 (describing incident in which deputy demanded that she turn over drugs and drug paraphernalia obtained during a search of a Band member on trust lands);

D. Burton Decl. ¶¶ 8-10 (describing incident in which Band officers assisted Crow Wing County deputies with a pursuit that ended on trust lands; while Officer Burton was speaking with a passenger in the suspect vehicle, who was relaying information on the location of another individual with a felony warrant, a Mille Lacs County deputy approached the passenger and directed her away from Band officers in the middle of their interview);

Heidt Decl. ¶¶ 8-11 (describing 9-8-2016 incident in which Band officers investigated a stabbing and took a taped statement from a witness; a deputy advised them to hold off on taking the statement until a Sheriff's investigator arrived and then took his own taped statement from the same witness);

Ex. Y (11-21-2016 Sheriff's Captain LaSart Email stating deputies must take a recorded statement from Band officers "every time a band officer becomes involved in a criminal investigation and either handles evidence or collects information needed during a criminal investigation");

Ex. Z at 82 (Naumann testimony describing 10-12-2017 incident in which Band police initiated a traffic stop, located a Department of Corrections fugitive, removed people from

D. Band Compliance with Opinion and Protocol.

The Band's Solicitor General, Todd Matha, disagreed with the limitations the

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the vehicle and located a firearm; when a deputy arrived he "was yelling at us telling us to stop searching the vehicle and basically getting in the way of my investigation, preventing me from conducting a thorough investigation");

Ex. AA (10-24-2017 Lindgren Email with deputy's account of the preceding incident confirming that the deputy "took control of the scene");

D. Burton Decl. ¶¶ 15-20 (describing 11-20-2016 incident in which a deputy directed Band officers to stop investigating a death and to leave the scene);

Gadbois Decl. ¶¶ 10-18 (describing 9-29-2017 incident in which a deputy re-investigated a car and suspect investigated by Band officers);

id. ¶¶ 20-25 (describing 11-3-2017 incident in which a deputy took over a drug investigation initiated by a Band officer);

Ex. BB at 47-48 (Band Deputy Police Chief West testimony describing "interruption in [Band] officers' investigations" and noting that, "[w]hen [Band officers] show up on a scene, domestic or whatever it might be, they start talking to a victim or holding a suspect, and a sheriff's deputy arrives and butt right in and take over the interview, or take possession of somebody that's technically not under arrest");

Ex. Z at 93-94 (Naumann testimony describing how Band officers "had to just stand by and let [deputies] take over our scene");

Ex. CC at 182-83 (Band Sergeant Dieter 30(b)(6) testimony that "[o]ften times county deputies would try to take statements from officers as witnesses rather than just relying on our reports. They would often take multiple statements. If we took a statement from a witness, they might take a second statement from the same witness.");

id. at 197-98 (describing instances in which Sheriff's deputies interfered with Band police investigations);

Ex. L at 42, 44, 61-62 (former Assistant County Attorney Gardner testimony that Band police "were treated as witnesses and not as law enforcement officers" and that "deputies were instructed to take statements from" Band officers).

Opinion and Protocol imposed on Band police authority but advised Band police to comply because: (1) he was concerned about potential criminal and civil liability as described in the Opinion and Protocol; and (2) he wanted to avoid conflicts between Band officers and Sheriff's deputies in the field.[19] The Band's Police Chief, Jared Rosati, also directed Band officers to comply because of concerns about potential criminal and civil liability and jeopardizing prosecutions of suspects investigated or apprehended by Band officers.[20]

The Band's current Police Chief, Plaintiff Rice, who was Deputy Chief in July 2016 and became interim Chief in September 2016, directed Band officers to follow the Protocol because of potential consequences for their careers:

> … [A]ll the way through the entire revocation, not just in the beginning or when we received [the Protocol], it was in entirety that we abided by this because no one wants to lose their career. I don't want to lose my career. I don't want any of the cops to lose their career either, or to go to jail.
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> What if we were to have to arrest somebody or something happened, or use of force issue, or even deadly force? That was my concern. So I just didn't – we just made sure we abided by it.[21]

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[19] *See* Ex. DD (Matha deposition) at 205-09. The Solicitor General supervises the Police Department. *See* 24 Mille Lacs Band Statutes § 1054(g), *available at* http://millelacsbandlegislativebranch.com/wp-content/uploads/2015/01/Title-24-Judicial-Proceedings.pdf (pp. 55-56).

[20] *See* Ex. EE (Rosati deposition) at 92-93, 102, 104-05, 116-19, 158, 211; *see also* Ex. FF (7-27-2016 Rosati Email to Walsh stating "we are in good faith trying to follow your direction in the lack of a [cooperative agreement]").

[21] Ex. GG at 150-51; *see also id*. at 145-47. Rice's concerns about restrictions on use of force were echoed by Band Sergeant Nguyen. *See* Ex. HH at 46 ("There are circumstances when it comes to officers' personal safety when officers need to use a firearm, not to discharge it but to gain control of certain subjects involving crimes that are high violence in nature involving weapons, drugs, gangs, so on and so forth. [The Protocol] restrict[s] us not being able to do that.").

At an informal meeting shortly after the Protocol issued, Sheriff Lindgren told then-Deputy Chief Rice that the Sheriff's office would not arrest Band officers.[22] However, that did not allay her concerns:

> Q. If the sheriff's office is not going to arrest anybody, it would follow that there wouldn't be any charges brought against tribal police officers for violating protocol?
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> A. That's not a risk that I'm going to take or allow officers to take that risk either. Just because somebody tells me they are not going to do something doesn't mean they are not going to do something.
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> It's in black and white. [The Sheriff is] abiding by that protocol. He had said that even after that meeting that he was going to abide by that protocol.[[23]] …
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> I'm not going to trust the fact that somebody is telling me – I'm not going to do something and then go out and do it and then end up getting arrested and prosecuted. That's not a risk that I'm willing it [*sic*] to take. … I wasn't about to risk all of our careers for that.
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> So yes he did say that, and I'm admitting to that, but I'm not admitting that I fell for it, or that I would allow the other guys to fall for it either.

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[22] *See* Ex. GG at 154-57; *but cf*. Ex. L at 44, 59-60 (former Assistant County Attorney Gardner's testimony that Sheriff's deputies, State Patrol troopers and Department of Natural Resources officers were advised they had the ability to arrest Band officers for impersonating police officers).

[23] *See* notes 11 and 15, *supra*, for examples of subsequent statements by Walsh and Lindgren that they were abiding by, and expected Band police officers to abide by, the Opinion and Protocol, including Walsh's subsequent statement that violations by Band officers could constitute obstruction of justice and unauthorized practice of a law enforcement officer. *See also* Ex. GG at 216 (Rice testimony confirming there were instances after her informal meeting with Lindgren when Walsh told Band police they were required to follow the Protocol and the Sheriff's Office documented violations of the Protocol).

> Q. Isn't it a fact that the sheriff's office did not arrest any tribal police officers for not following the protocol?
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> A. Because we followed the protocol. That's why we didn't get arrested.[24]

Other Band officers shared these concerns. They confirmed that they were directed to follow the Protocol and did so.[25] For example, the Band's current Deputy Police Chief, James West, testified:

> A. As the chief of police, [Rosati] would make that recommendation or directive to the officers to follow [the Protocol] or not.
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> Q. Did he give you that guidance to [Band police]?
>
> A. Yeah. There was a lot of fear within the officers regarding getting arrested for impersonating officers. There was [guidance] by Jared [Rosati] to follow the protocol. I know there was some jokingly comments that were made in regard to it, but overall, I believe the directive was made to follow that protocol.
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> …
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> Q. You just mentioned this fear of being arrested for impersonating a police officer. Can you tell us where that fear came from?
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> A. It came from Joe Walsh's protocol, his Northern Protocol.
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> Q. Tell me what the officers were discussing at that time about this fear. What were they saying?
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> A. That we hear that with our tribal and inherent authority we can still stop, investigate, and detain people, but under the Northern Protocol of Joe, it contradicted that. It said if we exercise any authority outside

[24] Ex. GG at 204-05.

[25] *See*, *e.g.*, Ex. II at 2 (7-2-2017 Nguyen Email to Officer Kintop stating "we are still operating under Joe Walsh's northern protocol" and, therefore, "are restricted to reservation properties within the green signs and D2A [*i.e.*, trust lands]").

> of a civil arrest that officers would get arrested or charged for impersonating officers.[26]

Similarly, Plaintiff Naumann testified:

> [The Protocol] caused us not to be able to effectively do our jobs because guys were afraid to proactively patrol and initiate traffic stops. Because we have an oath to take care of our community and protect and serve, but at the same time, we have people with families, and mortgages, and stuff like that, and your career is potentially in jeopardy if someone decides to prosecute you for doing your job that you've done for years, and we weren't able to do our jobs. We were deterred from protecting our community.[27]

The County Attorney confirmed that Band police largely followed the Opinion and Protocol. In December 2016, he wrote that "the Mille Lacs County Sheriff's Office has taken on all state law enforcement services provided in the entirety of Mille Lacs County" and that "a tenuous status quo has been followed by the Mille Lacs County Sheriff's Office and the Mille Lacs Band Police Department *based upon my Opinion and Protocol*."[28] In deposition testimony, he acknowledged this statement was accurate, albeit "[w]ith some significant exceptions," and agreed that it "include[d] the County Sheriff's Office taking

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[26] Ex. BB at 37-38; *see also id.* at 42-48 (Band "[o]fficers followed the protocol" despite "some tit-for-tat stuff early on depending on how far an officer were to investigate, for instance, a traffic stop or something like that").

[27] *See* Ex. Z at 92; *see also id.* at 84-86 ("[b]ased on the Northern Protocol trying to restrict our ability to do our job … the only thing that we felt safe without being charged with a crime or prosecuted for doing our jobs was arrest people on warrants"); *id.* at 92 ("[n]o one was ever charged or prosecuted, but the thought of it being there was a serious deterrent"); Ex. CC at 210-11 (Sergeant Dieter's 30(b)(6) testimony that the Protocol "deterred some patrol officers from wanting to go out and be proactive under the idea if they were proactive and violated the Northern Protocol that they could be arrested for it. Ultimately it could affect their career, how they take care of their family, et cetera.").

[28] Ex. JJ at 1 (Undated Walsh Letter to Luger *et al*.) (emphasis added); *see also* Ex. KK at 375-78.

on the role of *investigating violations of state law on trust lands*" and "having *exclusive responsibility* for responding to calls and investigating violations *on non-trust lands*."[29]

E. Special Law Enforcement Commissions.

The United States assumed concurrent criminal jurisdiction within the Band's Indian country effective January 1, 2017.[30] In December 2016, BIA entered into a deputation agreement with the Band and issued Special Law Enforcement Commissions (SLECs) to certain Band officers, including Sergeant Naumann.[31] The Deputation Agreement and SLECs authorized Band officers to investigate violations of federal law throughout the Band's Indian country (including, according to BIA, on all lands within the Reservation) and to make arrests as federal law enforcement officers.[32]

Despite the Deputation Agreement and SLECs, the County Attorney did not change the Opinion or Protocol.[33] He believed Band officers could not exercise SLEC authority on non-trust lands,[34] and continued to advise them to follow his Opinion and Protocol to

[29] Ex. KK at 377-78 (emphasis added); *see also id*. at 373-74 (acknowledging that "at least some part of the Band officers[']' investigative role had been transitioned to the county sheriff's deputies").

[30] *See* Ex. LL (1-8-2016 Letter from Yates to Benjamin).

[31] *See*, *e.g.*, Ex. MM (Deputation Agreement); Ex. NN (SLEC cards); Ex. Z at 38 (Naumann testimony).

[32] *See* Ex. MM; *see also* Ex. E (describing SLEC authority).

[33] *See* Ex. KK at 381-83.

[34] *Id*. at 384-85.

avoid jurisdictional challenges in state court.[35] He also encouraged the U.S. Attorney's Office to limit Band police "to the lands held in trust."[36]

F. Law Enforcement and Public Safety Impacts.

There were significant drug and gang problems on the Reservation when defendants adopted and implemented the Opinion and Protocol. A 2014 Threat Assessment prepared by the Sheriff's Office reported heroin addiction was "rampant" in the County and that drug trafficking and associated gang activities and violence were centered on the Reservation.[37] By November 17, 2017, when plaintiffs commenced this case, the Reservation's drug problems had worsened. While the Threat Assessment reported that, in 2014, Mille Lacs County as a whole had had approximately 12 overdoses,[38] Band police

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[35] *See* Ex. OO at 2-3 (12-28-2017 Walsh Email to Dieter indicating that, although the Protocol was created before issuance of SLECs, its provisions should continue to be followed to avoid jurisdictional challenges). Walsh's insistence on Protocol compliance as a condition for prosecuting cases reinforced the limitations imposed by the Protocol. *See* Ex. CC at 201-02, 211; Ex. GG at 169 (Rice testimony that after receiving SLECs Band officers continued to limit patrols to trust lands "per the Northern Protocol").

[36] *See* Ex. JJ at 2; *see also* Ex. CC at 177-78 (Dieter's 30(b)(6) deposition testimony that Walsh's request to the U.S. Attorney's Office affected the ability of Band police to exercise SLEC authority).

[37] Ex. PP at 1-6. Threat Assessment used euphemisms such as "Vineland," "the Mille Lacs Indian Lands," "the Mille Lacs Indian Community" or "the north end of Mille Lacs County" to refer to the Reservation, *id.,* because a 2008 protocol prohibited the Sheriff's Office from using the term "Reservation." Ex. QQ at 2. Former Sheriff Lindgren confirmed the Threat Assessment was accurate when prepared in 2014 and that it continued to accurately describe the situation on the Reservation in 2016. *See* Ex. Q at 50-62.

See also Ex. L at 19-20 (Gardner testimony that gangs and drugs were more prevalent on the Reservation than elsewhere in the County).

[38] Ex. PP at 1, 7.

officers alone responded to 61 overdose calls just on the Reservation in 2017.[39] According to data compiled by defendants, six Native Americans including four Band members died of overdoses on the Reservation in 2017,[40] which County Attorney Walsh acknowledged was an increase over prior years and could be considered a crisis.[41] In September 2017, Governor Dayton wrote that the overdoses on the Reservation constituted "a public safety emergency."[42]

Against this backdrop, defendants' actions (1) injured the Band by limiting its exercise of sovereign and federally delegated police authority; (2) injured Band police officers, including plaintiffs Rice and Naumann, by limiting their ability to practice their chosen profession, driving down morale and inducing some officers to leave the Band police department;[43] and (3) impaired the Band's ability to respond to drug trafficking and

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[39] Ex. RR (Band police list of overdose calls by year); *see also* Ex. GG at 243-50 (Rice deposition testimony discussing list).

[40] *See* Ex. GG at 238-40 (Rice deposition testimony).

[41] Ex. KK at 399-400.

[42] Ex. S (9-18-2017 Letter from Dayton to Benjamin *et al.*).

[43] *See*, *e.g.*, Ex. DD at 201-02 (Matha testimony that defendants' actions "drove down morale" among Band officers; "[t]hey took offense at … being relegated to essentially witnesses at a scene that had no more authority in relation to a criminal action than would often times just a bystander"; "all of that led to a … decrease in morale and just this lack of understanding as to how it was that they were to perform their job");

Ex. EE at 123 (Rosati testimony that Band officers "were no longer able to do our jobs as we knew it");

id. at 209-10 (after revocation, some Band officers left to work for other agencies, leaving Band police short-handed);

Ex. GG at 11-12 (Rice testimony that she was injured "[p]rofessionally because of the Northern Protocol");

id. at 187 (Protocol "deterred me from doing my job completely");

Ex. Z at 20 (Naumann testimony that the Opinion "in not so many words [said Walsh] was going to threaten to arrest and prosecute our officers for doing our jobs. It was insulting, demeaning, threatening …. [and] terrible");

id. at 92 (Band officers "were deterred from protecting our community"; although no one was charged or prosecuted, the Protocol "was a serious deterrent");

id. at 98 (Band police "[could]n't do anything" and were "[n]othing more than glorified security guards");

id. at 101 (during revocation, when the Opinion and Protocol were in effect, "[w]e lost officers because of not having a cooperative agreement. We had officers leaving. Morale went down. It was pretty terrible for the most part. It was the worst two and a half years of law enforcement in my career.");

Ex. HH at 30-31 (Nguyen testimony that Band Officers Heidt and Ashley Burton, among others, left because they were unable to do their jobs);

id. at 81-82 (Protocol deterred officers from doing their jobs and led some to try to find a job elsewhere);

Ex. L at 46-47 (Gardner testimony that Band officers left and went to work for different agencies "because they were not allowed to be police officers, and that's what they wanted their career to be");

Heidt Decl. ¶ 13 ("One of the reasons why I left the Tribal Police Department was because of the restrictions that the County Attorney's Protocol placed on me….");

A. Burton Decl. ¶ 25 ("I left the Tribal Police Department because of the restrictions that the County Attorney's Northern Protocol placed on me ….");

Gadbois Decl. ¶ 19 (deputies' re-doing investigations already done by Band officer "in full view of criminal suspects . . . undermined the credibility, authority and morale of Tribal Officers.");

D. Burton Decl. ¶ 21 (deputies' actions pursuant to Protocol "undermined my credibility as a police officer within the community and negatively affected my morale and that of my

other criminal activity on the Reservation.[44] Although the County added extra deputies to

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fellow Tribal Police officers," and "interfered with my ability to discharge my duties within the Reservation.").

[44] *See*, *e.g.*, Ex. EE at 101 (Rosati testimony that "from the opinion from the County Attorney, life as a patrol cop ceased to exist. We didn't feel we had the authority to go out and do our jobs, like make arrests. Like if we rolled up on a DWI, we wouldn't be able to make that arrest. Our protocol was to have the county come deal with it.");

id. at 103 ("Once … the criminal element on the reservation found out that we no longer had authority, they knew it. And they would blatantly say it to our officers, 'You can't even arrest me.'");

id. at 122 (defendants' actions rendered Band police "useless on the reservation, interfering with our day-to-day duties as to ensuring public safety on the reservation");

id. at 197 (revocation of law enforcement agreement made it more difficult for Band police to address increasing drug trafficking and overdoses; "[t]he people know when you're not making arrests or doing what we normally did, that word traveled pretty quick, so it made it pretty difficult for my officers to continue our normal course of action, as far as combatting those overdoses");

id. at 211 (Band officers attempted to comply with Protocol, which limited their ability to investigate crime on trust and non-trust lands);

Ex. CC at 196-97 (Dieter's 30(b)(6) testimony that failure to dispatch calls to Band police interfered with exercise of tribal authority);

Ex. GG at 176 (Rice testimony that "[a] majority [of Band police reports] are overdoses and drug involvement where officers are actually making traffic stops on the reservation, deputy shows up, blatant paraphernalia, blatant drugs right in front of everybody, they are not arresting them because they are on the phone with the county attorney's office and they are saying don't do anything, if [Band police] started that investigation, let it go. So they would long form that complaint, let people walk away who had significant amounts of drugs on them. … [I]t was all up to whether it was this deputy, that deputy. Some would get along with us, and some wouldn't.");

id. at 218-19 (Band police did not take action with respect to drug houses on the Reservation because of a fear of being arrested if they impeded the County's jurisdiction);

patrol and respond to calls within the Reservation, the deputies lacked the intimate knowledge of the Band community possessed by Band officers[45] and did not provide the

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Ex. HH at 76 (Nguyen testimony that "driving around and being present" was no longer a deterrent to criminal activity "because they knew we didn't have law enforcement authority when they saw a tribal cop, and they perceived it to be just a tribal cop, they don't have authority, and because of that, in my personal opinion, increased [*sic*] the drug availability, and people from out of town, people who we did not know came and with them they brought drugs, and the gang activity also increased");

Ex. L at 46 (Gardner testimony that Band officers' "credibility amongst the community deteriorated very quickly, because the community members knew that they, the tribal police officers, were not allowed to do anything");

id. at 62 (agreeing that the combined effect of revocation of 2008 Agreement, termination of other agreements and Opinion and Protocol "had a significant impact on the law enforcement authority of the tribal police department");

Gadbois Decl. ¶¶ 26-29 (criminal suspects appeared to believe that Tribal Officers "were no longer peace officers" and in one instance, refused to comply with Band officer's instructions because the suspect believed Band officer was "not a cop.").

[45] *See*, *e.g.*, Ex. EE at 123-24 (Rosati testimony that he did not feel deputies stationed "within [the Band] community knew the people like [Band officers] knew our people");

id. at 211-13 (describing Band officers' knowledge of the community, including "the family trees within the community");

Ex. Z at 100 (Naumann testimony that "statements [were] being taken from victims twice and from people that aren't familiar with the community that don't know the community, the community members, and the family structure");

Ex. L at 23-24 (Gardner testimony describing Band officers' knowledge of and connections to the Band community, which were "absolutely important and priceless" from a law enforcement perspective);

id. at 66-67;

id. at 27 (while some deputies had a little knowledge of the tribal community, it was not comparable to that possessed by Band officers);

same level of proactive policing as Band officers had.[46]

The results included an increase in open drug trafficking and use and a decline in public safety. Wade Lennox, a State Corrections Officer who works with felony offenders on the Reservation,[47] previously observed Band police "interacting with the community members":

Cash Decl. ¶¶ 8-9, 11 (Band officers "know the Band community and they care about the community. They also know who belongs in the community and who is an outsider. … When Sheriff's deputies took over for Band police, they did not know the people or the area. It became free rei[]n for people using drugs and committing crimes. … The Sheriff's deputies didn't know the drug houses or the dealers. It was an open market for drugs.").

[46] *See*, *e.g.*, Ex. EE at 213 (Rosati testimony noting decline in proactive police work);

Ex. Z at 92 (Naumann testimony that County Attorney's Protocol "caused us to not be able to effectively do our jobs because guys were afraid to proactively patrol and initiate traffic stops");

id. at 101 (response times were not the same because deputies "weren't always up on Vineland to respond right away" and "weren't conducting proactive patrols").

Ex. CC at 210-11 (Dieter's 30(b)(6) testimony that Protocol deterred patrol officers "from wanting to go out and be proactive");

Ex. GG at 181 (Rice testimony that "[t]here was more police presence … but there was nothing being done" because, while "tribal police were proactive," deputies were "all reactive");

id. at 182 (explaining how the Reservation became a "police free zone": "[P]eople saw the traffic stops and nothing happened. There wasn't any search warrants being executed on the reservation. There was police presence but they knew we were limited. You had deputies running around telling them we're not cops.");

Ex. L at 69 (Gardner testimony that "deputies … did not proactively patrol the reservation. Instead, they waited at the north end sheriff's station for a call to come in.").

[47] Ex. SS at 11-13 (Lennox testimony).

> It was clear that part of their mission work was to be available, regardless of the need. Crimes being committed, they were out, they were available. Showed up at traditional ceremonies. If there was something going on at the market, they would stop over just to talk to people. That's a big part of community policing.[48]

However, in April 2017, nine months into implementation of Walsh's Protocol, Lennox saw a significant change. In an unsolicited email to Chief Rice, he wrote:

> I can share with you *things have gotten significantly worse here*. *When I started working here many of the drug deals had been driven behind closed doors*. Chemical use, although abundant, was not visible in the public eye. I am here every week, many times twice weekly. *In the last several months I have witnessed numerous drug deals and use right out in the open*. Needles on the road side is not an uncommon observation. In the past, it would be a very rare occasion I would not see Tribal Officers out and about monitoring these obscure areas, I would see them on foot working together, checking out the various parts of the reservation likely only known to locals. *I do not see the same type of law enforcement taking place anymore and it has resulted in a much less safe area*.[49]

In October 2017, Lennox informed County Attorney Walsh that he (Lennox) "completely [stood] by the observations … in my email to Police Chief Rice":

> [T]here simply *is not the law enforcement presence on the Reservation there had been* and that has dramatically impacted our probationary work.
>
> … The officers from Tribal PD … had been one of the best departments I have worked with on many different levels. They shared detailed information with me personally regarding gang activity, drugs, the

[48] *Id*. at 17.

[49] Ex. TT (4-4-2017 Lennox Email to Rice) (emphasis added); *see also* Ex. L at 69 (Gardner deposition testimony explaining reasons Band police were no longer monitoring obscure areas of the Reservation: "[o]ne, because they were not allowed to investigate these types of activities; two, they lost a number of officers due to their inability to do their job; three, I believe they had a lack of communication between themselves and deputies; four, I also believe they were scared to lose their job, lose their post licenses, lose that ability and credibilities [*sic*], whatever they had").

> potential movement of firearms, etc. It was routine to have weekly, sometimes more, contact as things were happening there. I have had Tribal PD officers stop me on home visits to make sure I was up to speed on what they felt was important information for me [to] know. This was done professionally not only to keep me safe, but to keep the lines of communication open as we seek to evoke change from a very difficult client population. It was reassuring when walking out of a client's home to see Tribal PD out patrolling, even in the most obscure parts of the reservation. I certainly still do see County patrolling, *but not even remotely close to what was being done.*[50]

Lennox testified that his observations were accurate[51] and that, after implementation of the Opinion and Protocol, "[t]he general perception from the offenders we were working with at the time was kinda free rein."[52] As time went on, "there was a general sense that [the Reservation] became almost a safe haven [for drug trafficking]."[53] County Attorney Walsh testified he had no reason to question Lennox's observations.[54] Former Assistant County Attorney Gardner testified that Lennox's observations about the decline in effective

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[50] Ex. UU at 3 (10-10-2017 Lennox Email to Walsh) (emphasis added).

[51] Ex. SS at 16, 23-24 (discussing visible drug dealing in location not observed before revocation), 25-27 (discussing obscure areas of the Reservation that had been patrolled by Band police but were not patrolled by deputies and the impact that had on Lennox's work), 33 (confirming statement that "there simply is not the law enforcement presence on the reservation there had been … is 100 percent, absolutely correct").

[52] *Id*. at 15.

[53] *Id*. at 27-28. These observations were also confirmed by Colin Cash, a Band member who lives within the Reservation and started an organization to help people struggling to overcome drug addiction. *See* Cash Decl. ¶¶ 11-12 (describing influx of new gang members and drug dealers from Chicago and Twin Cities, and community perception that "there were fewer arrests, increasing drug abuse, more drug overdoses and more deaths," which contributed to "a real sense of despair because it appeared that no one at the County or State cared about what was happening to our community").

[54] Ex. KK at 406.

law enforcement and public safety were accurate.[55]

In November 2017, the United States Secretary of the Interior visited the Reservation to learn about the law enforcement issues firsthand. After his visit, BIA's Office of Justice Services temporarily assigned Special Agents to conduct saturation patrols and help combat drug trafficking on the Reservation. BIA Special Agents and Band officers conducted joint drug investigations on the Reservation in 2018. In a continuing attempt to comply with the County Attorney's Opinion and Protocol, Band officers notified County deputies of and involved them in those investigations.[56]

G. The 2018 Agreement.

A (if not *the*) primary reason the County revoked the 2008 Agreement was the dispute over the Reservation boundary.[57] The County proposed new agreements in September 2016, June 2017 and September 2017, which included provisions prohibiting the Band from exercising any form of inherent jurisdiction – civil or criminal – over any

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[55] Ex. L at 67-68.

[56] *See* Dieter Decl. ¶¶ 7-10; Ex. GG at 177-79; *see also* Ex. E at 2 (November 2017 Interior Department letter advising County not to interfere with Band officers exercising inherent or SLEC authority).

[57] *See* Ex. KK 318-19 (Walsh testimony that "[t]he primary motivating factor of the revocation … was the M-opinion [regarding the Reservation boundary], and what I think the board viewed as the Band using their law enforcement authority to improve their position vis-a-vis the boundary"); Confidential Ex. VV [redacted]; Confidential Ex. WW [redacted].

person outside trust lands; that is, they would have required the Band to act as if the Reservation boundary had been diminished.[58]

The parties entered into a new agreement in September 2018.[59] It does not contain the foregoing provisions, which had been rejected by the Band, but instead provides:

> This Agreement shall automatically terminate ninety (90) days after the final resolution, including the exhaustion of all appeals and any proceedings on remand, of the [instant] lawsuit … . *The County and the Sheriff are entering into this Agreement in reliance on the Court's determination of the issues raised in the lawsuit, including the existence and extent of Indian country in Mille Lacs County, and have not insisted upon the inclusion of provisions in this Agreement that would be essential to them in the absence of the lawsuit*.[60]

Thus, if this case were dismissed, the 2018 Agreement would terminate automatically, re-creating the same disputes over the Reservation boundary and the Band's law enforcement authority that triggered the Opinion and Protocol. The County Attorney confirmed in discovery that "*his position still today*[] is that there is no lawful authority stating that the Band has inherent law enforcement authority on Non-Trust Lands or over persons who are not members of a federally-recognized Indian tribe, nor can the federal government delegate such authority."[61]

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[58] *See* Ex. XX at ¶ 3.b.i (9-27-2016 Proposal); Ex. YY at ¶ 3.b.i (6-1-2017 Proposal); Ex. ZZ at ¶ 3.b.i (9-20-2017 County Letter to Dayton with proposed agreement).

[59] *See* Ex. AAA (9-18-2018 Mutual Aid/Cooperative Agreement).

[60] *Id*. at 15 (¶ 25(c)) (emphasis added).

[61] Ex. BBB at 11 (Def. Walsh's Answer to Plaintiffs' Interrogatory No. 11) (emphasis added).

III. SUMMARY JUDGMENT STANDARDS.

"Summary judgment is proper 'if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.'" *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (quoting Fed. R. Civ. P. 56(c)(2)). The substantive law identifies which facts are material: "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). "The nonmovant 'must do more than simply show that there is some metaphysical doubt as to the material facts,' and must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Torgerson*, 643 F.3d at 1042 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)). "'Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.'" *Id*. (quoting *Ricci v. DeStefano*, 129 S. Ct. 2658, 2677 (2009)).

IV. ARGUMENT.

A. Plaintiffs Have Standing.

In their Answers, no defendant contested plaintiffs' standing; to the contrary, the County Attorney and Sheriff admitted the Court had subject matter jurisdiction, and all defendants admitted some or all of plaintiffs' claims were ripe.[62] However, defendants

[62] *See* note 5, *supra*. Because lack of standing deprives the Court of subject matter jurisdiction, defendants' admission that the Court *has* subject matter jurisdiction is inconsistent with the claim that plaintiffs lack standing. *See*, *e.g.*, *ABF Freight Sys. v. Int'l Bhd. of Teamsters*, 645 F.3d 954, 958 (8th Cir. 2011). Similarly, because the constitutional

later asserted they had not waived a standing defense. For the following reasons, the Court should grant summary judgment that plaintiffs have standing.

1. Legal Standards.

There are three requirements to establish standing for each claim and form of relief. *See*, *e.g.*, *Young America's Found. v. Kaler*, 370 F. Supp. 3d 967, 979 (D. Minn. 2019); *see also* Order on Discovery Motions (Doc. 130) at 13. First, plaintiffs must have suffered an injury in fact. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). "[I]t is the existence – not the extent – of an injury that matters for purposes of Article III standing." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1958 (2019) (Alito, J., dissenting). A likelihood of "*some* . . . injury" is sufficient. *Food Mktg Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2362 (2019) (emphasis in original). "'Injury in fact' is an invasion of a legally cognizable right." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 591 (8th Cir. 2009).

Second, defendants must have caused the injury. However, "Article III 'requires no more than *de facto* causality.'" *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019) (quoting *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986)). Standing "requires only that the plaintiff's injury be fairly traceable to the defendant's conduct." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6

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component of ripeness "focuses on whether there is sufficient injury" and "is closely tied to the standing requirement," defendants' admission that plaintiffs' claims are ripe is also inconsistent with their new standing argument. *Portman v. City of Santa Clara*, 995 F.2d 898, 902-03 (9th Cir. 1993).

(2014). It does not matter whether the defendant was the sole cause of plaintiffs' injury or even if plaintiffs contributed in some manner to the injury. *See, e.g.*, *City of Wyoming v. P&G*, 210 F. Supp. 3d 1137, 1151-52 (D. Minn. 2016) ("plaintiff is not deprived of standing merely because he or she alleges a defendant's actions were a contributing cause instead of the lone cause of the plaintiff's injury"); *Liberation Party of Va. v. Judd*, 718 F.3d 308, 316 (4th Cir. 2013); *see also* Order on Discovery Motions (Doc. 130) at 15 n.5.

Third, there must be "a 'substantial likelihood that the requested relief will remedy the alleged injury in fact.'" *Sprint Communs. Co., L.P. v. APCC Servs.*, 554 U.S. 269, 287 (2008) (emphasis omitted) (quoting *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000)).

Standing "in no way depends on the merits of the plaintiffs' contention that particular conduct is illegal." *Warth v. Seldin*, 422 U.S. 490, 500 (1975); *accord Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 464 (2d Cir. 2013) (courts "must avoid conflating the requirement for injury-in-fact with the validity of the Tribe's claim") (internal quotation omitted). "As with all questions of subject matter jurisdiction except mootness, standing is determined as of the date of filing the complaint." *Carr v. Alta Verde Indus.*, 931 F.2d 1055, 1061 (5th Cir. 1991); *see also In re Patterson Cos.*, 479 F. Supp. 2d 1014, 1042 (D. Minn. 2007). If one plaintiff establishes standing, the standing of other plaintiffs is immaterial. *Jones v. Gale*, 470 F.3d 1261, 1265 (8th Cir. 2006).

2. Injury in Fact.

By the date they filed their complaint, plaintiffs had suffered at least three injuries, any one of which is sufficient to establish an injury in fact: (1) infringement of the Band's

inherent and federally delegated police authority; (2) injuries to Plaintiffs Rice and Naumann's ability to practice their chosen professions and to the Band police department by driving down morale and inducing some officers to leave; and (3) impairment of the Band's ability to respond to drug trafficking and other criminal activity, contributing to less effective law enforcement and a decline in public safety on the Reservation.

a. Infringement of Police Authority.

An invasion of a tribe's sovereignty is a "discrete claim of injury . . . so as to confer standing upon it apart from [a] monetary injury." *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 468 n.7 (1976); *accord Mashantucket Pequot Tribe*, 722 F.3d at 463 ("actual infringements on a tribe's sovereignty constitute a concrete injury sufficient to confer standing"); *see also Confederated Tribes & Bands of the Yakama Nation v. Yakima Cnty.*, No. 19-35199, 2020 U.S. App. LEXIS 20353, at *13-14 (9th Cir. June 29, 2020). "Since the substantive interest which Congress has sought to protect is tribal self-government, such a conclusion is quite consistent with other doctrines of standing." *Moe*, 425 U.S. at 468 n.7. Indeed, "tribes, like states, are afforded 'special solicitude in a court's standing analysis.'" *Mashantucket*, 722 F.3d at 463 (quoting *Mass. v. EPA*, 549 U.S. 497, 520 (2007)); *accord Quapaw Tribe of Okla. v. Blue Tee Corp.*, 653 F. Supp. 2d 1166, 1179 (N.D. Okla. 2009) ("Indian tribes, like states and other governmental entities, have standing to sue to protect sovereign or quasi-sovereign interests.").

In *Bishop Paiute Tribe v. Inyo County*, 863 F.3d 1144, 1153 (9th Cir. 2017), the court held a tribe's "'inherent sovereign authority to restrain, detain, and deliver to local

authorities a non-Indian on tribal lands that is in violation of both tribal and state law'" was a "concrete and particularized" interest, the impairment of which was sufficient to establish injury in fact. In his Order on Discovery Motions in this case (Doc. 130), Magistrate Judge Brisbois agreed. He held "[t]he Band has a legally protected interest in exercising its law enforcement authority," which "'is certainly concrete and particularized.'" *Id*. at 14 (quoting *Bishop Paiute Tribe*, 863 F.3d at 1153). Accordingly, "the relevant inquiry is simply whether Defendants improperly interfered with tribal law enforcement authority by taking steps to deter Band police officers from exercising the law enforcement authority conferred on them." *Id.* Because an injury to the Band's sovereignty is sufficient, "proof of any actual consequences of that deterrence is not an essential element of standing." *Id*.

The record here establishes the County Attorney and Sheriff: (1) sought to limit the Band's police authority to trust lands and, even on trust lands, to prevent Band police from investigating state-law violations; and (2) were largely successful in doing so. As the County Attorney acknowledged, by December 2016 "a tenuous status quo [had] been followed by the [Sheriff's Office and Band Police] based upon [his] Opinion and Protocol," which "include[d] the County Sheriff's Office taking on the role of *investigating violations of state law on trust lands*" and "having *exclusive responsibility* for responding to calls and investigating violations *on non-trust lands*."[63]

For standing, it is immaterial whether Band police officers followed the Opinion and Protocol in *every* instance or whether Sheriff's deputies interfered with the Band's

[63] Ex. JJ at 1; Ex. KK at 377-78 (emphasis added).

inherent or federally delegated authority in *every* case. What is material and dispositive is that, by the date plaintiffs filed their complaint, there were actual restrictions on the exercise of the Band's inherent and federally delegated police authority in at least some cases involving some officers. Because, on the record as a whole, the trier of fact could *not* conclude there were *no such restrictions*, plaintiffs are entitled to summary judgment that they have suffered an injury in fact. *See Torgerson*, 643 F.3d at 1042 (summary judgment standard); *Spokeo,* 136 S. Ct. at 1548 ("it is the existence – not the extent – of an injury that matters for purposes of Article III standing").

b. Harms to Plaintiffs Rice and Naumann and the Band's Police Department.

The right to practice one's chosen profession is a legally cognizable right, the impairment of which is an injury in fact. *See Sammon v. New Jersey Bd. of Medical Examiners*, 66 F.3d 639, 642 (3rd Cir. 1995) (citing *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 n.23 (1976)). Plaintiffs Rice and Naumann were unable to fully practice their chosen profession because they were unable to exercise law enforcement authority on non-trust lands or investigate state-law violations on trust lands, and because their authority as police officers was called into question, diminishing their authority to deter unlawful behavior. Both testified they were injured professionally, and Sergeant Naumann testified that the period when the Opinion and Protocol were in effect was the worst of his law enforcement career. These injuries were concrete and particularized because they affected Rice and Naumann in a personalized and individual way. *See Sammon*, 66 F.3d at 642. Because, on the record as a whole, a trier of fact could *not* conclude that Rice and Naumann

suffered *no* injury to their ability to practice their profession, plaintiffs are entitled to summary judgment that they suffered an injury in fact.

Adverse effects on employee morale are also cognizable injuries for standing purposes. For example, in *Viceroy Gold Corp. v. Aubry*, 858 F. Supp. 1007, 1014 (N.D. Cal. 1994), the court cited "decreased employee morale" among other factors in concluding the plaintiff-corporation "satisfied the minimum Article III standing requirements" on cross motions for summary judgment. Here, evidence of decreased morale within the Band's police department and of officers leaving to work for other agencies is also sufficient to establish injury in fact.

c. Less Effective Law Enforcement and Reduced Public Safety.

The Band has a "quasi-sovereign" interest in the health and wellbeing of its members, including an interest in their safety. *See Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 607 (1982). Where a general population is harmed in a substantial way, a sovereign may seek to remedy the harm under the *parens patriae* doctrine. *Maryland, et al. v. Louisiana*, 451 U.S. 725, 737 (1981); *accord Oglala Sioux Tribe v. Hunnik*, 993 F. Supp. 2d 1017, 1028 (D.S.D. 2014) (tribes had standing where court found action "inextricably bound up with the Tribes' ability to maintain their integrity and 'promote the stability and security of the Indian tribes and families'") (quoting 25 U.S.C. § 1902).

As discussed in Part II.F, *supra*, the record establishes that defendants' actions reduced Band policing and contributed to a decline in public safety on the Reservation. Wade Lennox's observations regarding the decline in law enforcement and public safety –

including a reduction in proactive police work and an increase in open drug trafficking and use – were not questioned by the County Attorney, and were corroborated by former Assistant County Attorney Gardner, Band police officers and Band member Colin Cash.

For these purposes, it is immaterial that the Sheriff's Office assigned additional deputies to patrol the Reservation or that a larger number of law enforcement officers (Band police and Sheriff's deputies combined) may have been available to respond to calls. Because, on the record as a whole, a trier of fact could *not* conclude that there was *no* reduction in proactive police work by officers with intimate knowledge of the Band community, or that there was *no* increase in open drug dealing and use, plaintiffs are entitled to summary judgment that they suffered an injury in fact.

3. Causation.

Plaintiffs' injuries are fairly traceable to defendants' conduct, including: (1) the Opinion and Protocol; (2) the County Attorney's communications informing Band officers that (a) he expected them to follow the Opinion and Protocol, (b) violations could give rise to criminal and civil liability, and (c) he would not charge suspects in cases in which Band officers exceeded their authority under the Opinion and Protocol; and (3) the Sheriff's actions to enforce the Opinion and Protocol, including asserting control of crime scenes, taking over investigations from Band officers, and treating Band officers as civilians. The Band's former Solicitor General, former Chief of Police, current Chief of Police and multiple Band officers testified that they limited their exercise of law enforcement authority because of the Opinion and Protocol and because of the statements and actions by the County Attorney and County Sheriff. The County Attorney himself wrote that law

enforcement on the Reservation transitioned from Band police to the Sheriff's Office based upon the Opinion and Protocol.[64]

Under these circumstances, it is immaterial that no Band officer was actually arrested or charged with a violation of the Opinion and Protocol or that the Sheriff stated in an informal meeting with then-Deputy Chief Rice that no Band officer would be arrested. "[I]t is not necessary that [a plaintiff] first expose himself to actual arrest or prosecution" in order to establish standing based on fear of prosecution. *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). Rather, a "plaintiff who alleges a threat of prosecution that 'is not imaginary or wholly speculative' has standing." *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 485 (8th Cir. 2006) (quoting *Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979)). A defendant's own "claims that it would never enforce" a law that provides for the prosecution of plaintiff's activities "do not rule out the possibility that it will change its mind and enforce the law more aggressively in the future." *Rodgers v. Bryant*, 942 F.3d 451, 455 (8th Cir. 2019).

In this case, the threat of prosecution was not imaginary or wholly speculative; it was expressly stated in the Opinion and Protocol and subsequent communications (including written statements made *after* the Sheriff's informal disclaimer). *See id*. ("'fear of prosecution is not imaginary or speculative' when the law 'on [its] face' prohibits the plaintiffs' conduct") (quoting *St. Paul Area*, 439 F.3d at 485). Moreover, Band officers were induced to comply with the Opinion and Protocol not only by the potential for

[64] Ex. JJ at 1.

criminal and civil liability (and the consequences of such liability on their law enforcement careers),[65] but also by the County Attorney's statements that he would not prosecute suspects apprehended by Band officers and by the actions of deputies, who had been instructed to follow the Opinion and Protocol and were asserting control over crime scenes.

This case is unlike the County's 2002 lawsuit, in which the County and its co-plaintiff, the First National Bank of Milaca, were unable to show the Band had threatened to enforce its ordinances in a way that injured them. *See County of Mille Lacs v. Benjamin*, 262 F. Supp. 2d 990, 995-97 (D. Minn. 2003), *aff'd*, 361 F.3d 460 (8th Cir. 2004). In that case, the Band "never directly contacted either plaintiff" to threaten enforcement of its laws against them, *id.* at 996, and took "no actions which adversely affect[ed] the County's ability to enforce state or county law." *Id*. at 997. In this case, defendants took direct actions that restricted the exercise of the Band's law enforcement authority and *took credit for doing so*. Because, on the record as a whole, a trier of fact could *not* conclude that defendants' actions did not contribute *at all* to plaintiffs' injuries, plaintiffs are entitled to summary judgment on the causation element of standing. *See, e.g.*, *City of Wyoming*, 210 F. Supp. 3d at 1151-52 ("plaintiff is not deprived of standing merely because he or she alleges a defendant's actions were a contributing cause instead of the lone cause of the plaintiff's injury").

[65] The potential for civil liability or loss of an officer's license was not dependent on further action by the County Attorney or Sheriff. For example, a suspect apprehended by a Band officer or subjected to use of force by the officer could sue the officer or seek revocation of the officer's license for exceeding his or her authority under the Opinion and Protocol.

4. Remedy.

There is a substantial likelihood the declaratory and injunctive relief plaintiffs seek will redress their injuries. Plaintiffs' injuries arise from specific restrictions on the Band's inherent and federally delegated law enforcement authority prescribed in the Opinion and Protocol. By declaring the scope of the Band's inherent and federally delegated law enforcement authority, and enjoining defendants from taking actions that interfere with that authority in the future, the relief requested will remedy plaintiffs' injuries.

B. Plaintiffs' Claims Are Ripe.

Plaintiffs' claims are ripe. The County Attorney issued a formal Opinion and Protocol, the effects of which were felt in a concrete way by plaintiffs for 16 months (from July 2016 until November 2017) before they commenced suit. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967) (ripeness requires that challenged action has been "formalized and its effects felt in a concrete way"), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99, 105 (1977). The County admits plaintiffs' claims are ripe, and the County Attorney and Sheriff admit plaintiffs' claims regarding Band police authority on non-trust lands within the Reservation are ripe.[66] Because defendants' actions limited the Band's law enforcement authority on trust lands as well as non-trust lands, plaintiffs' claims regarding law enforcement authority on trust lands are also ripe.[67]

[66] *See* note 5, *supra*.

[67] *See* Parts II.B-D and note 10, *supra*.

C. Plaintiffs' Claims Are Not Moot.

Defendants' Joint Statement of the Case asserts "certain matters complained of were the result of the termination of the [2008] Agreement, which has currently been reinstated," and that the new agreement "has mooted the claims against the County Attorney and Sheriff."[68] "It is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Friends of the Earth v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000) (quoting *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 (1982)). To demonstrate mootness, defendants have "[t]he 'heavy burden of persuading' the court that the challenged conduct cannot reasonably be expected to start up again'" and that "'subsequent events [have] made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id*. (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)).

Defendants cannot meet this burden. The agreement on which their mootness claim rests provides that it will terminate automatically if this case is dismissed and that the County would then insist on additional provisions relating to the Reservation boundary. As noted in Part II.G, *supra*, the County Attorney's position remains that the Band has no inherent or federally delegated law enforcement authority on non-trust lands or over state-law violations.

[68] Doc. 50 at 5.

Under these circumstances, it is *not* "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 189. Rather, it is probable that, if this case were dismissed as moot, the same dispute regarding the Reservation boundary and the scope of the Band's inherent and federally delegated law enforcement authority would arise again. Accordingly, plaintiffs' claims are not moot. *See also id.* at 190-91 (discussing exception to mootness doctrine for allegedly unlawful conduct capable of repetition yet evading review).

IV. CONCLUSION.

For the foregoing reasons, the Court should grant plaintiffs' motion for summary judgment that they have standing and their claims are ripe and not moot.

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Respectfully submitted,

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