UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Mille Lacs Band of Ojibwe, et al., Plaintiffs, v. County of Mille Lacs, Minnesota, et al., Defendants.	Case No. 17-cv-05155-SRN-LIB **DEFENDANTS WALSH AND LORGE'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON STANDING, RIPENESS AND MOOTNESS**

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Plaintiffs have filed a procedurally unusual motion, seeking summary judgment to establish this Court's Article III jurisdiction over their claimed injuries. Ordinarily, it is defendants who seek to defeat a federal court's jurisdiction, as Defendants seek to do with their July 8 motion with respect to the claims against the County Attorney, Joseph Walsh, and the Sheriff, Don Lorge. But here, Plaintiffs want this Court to conclude, notwithstanding the Rule 56 presumption favoring the non-movant, there is no way the "trier of fact could *not* conclude that Rice and Naumann suffered *no* injury to their ability to practice their profession." (Pls'. Mem. 30-31.) (emphasis in original.)

The evidence Plaintiffs marshal in support is replete with hearsay, innuendo, and third-party documents and relies in no small part on the testimony of previously undisclosed witnesses.[1] Plaintiffs Rice and Naumann are virtually absent, neither providing a declaration with their motion, only snippets of their deposition testimony, some elicited by leading questions of the Band's own counsel. More fatal is the assumption of the individual Plaintiffs that they had the right to use *state* law enforcement authority *without* an agreement with Mille Lacs County to employ that authority within the County. But, there can be no interference with an authority they did *not* have, and the

[1] Defendants are moving separately to strike these witnesses.

documents they rely on to justify their claims of interference did not apply to any inherent tribal or federally-delegated law enforcement authority.

To find now, as a matter of law, that the County Attorney and Sheriff interfered with Plaintiffs' right to use state law enforcement authority will require this Court to construe what state law provides regarding the use of the State's own police powers. The Court should decline to do so and instead focus further proceedings on the central issue in this case—whether a reservation created in 1855 continues to exist.

FACTUAL BACKGROUND

A. The County Attorney sought to provide clarity through his Opinion and Protocol

Plaintiffs' claims against the County Attorney are based on a legal opinion and a protocol the County Attorney drafted in response to a decision the County Board of Commissioners made on June 21, 2016, to terminate a 2008 law enforcement cooperative agreement between the County, the Sheriff, and the Band. (Second Declaration of Joseph Walsh [Walsh Dec2] ¶4, July 29, 2020.) It was the County Attorney's opinion that a cooperative agreement between the Sheriff and the Band was required under Minn. Stat. § 626.90 in order for the Band's police department to have the powers of a state law enforcement agency. (Walsh Dec2 ¶¶7-8 and Ex. 4 at 3-6.) Those powers, the County Attorney concluded, were necessary for tribal police to investigate

violations of state law within the boundaries of the reservation created for the Band in Article 2 of the 1855 Treaty with the Chippewa, 10 Stat. 1165. (*Id*. ¶7, Ex. 4 at 8-9.) In the absence of a cooperative agreement, the County Attorney believed that within Mille Lacs County the Band retained only its inherent tribal law enforcement authority, which tribal police could reliably exercise only on trust lands, located primarily in the three northern townships that border on Lake Mille Lacs. (*Id*. ¶8, Ex. 4 at 14 and Ex. 5.)

Once revocation became effective on July 22, 2016, the Sheriff's Office and the Band's police department needed some clarity on what the respective agencies could and could not do within the limits of the 1855 boundaries. (Walsh Dec2 ¶9; Second Declaration of Scott M. Flaherty, Ex. 11, Walsh Dep 229:3-13.) The County Attorney requested an opinion from the Minnesota Attorney General pursuant to Minn. Stat. § 8.07, (Walsh Dec2 ¶5 and Ex. 2), but her office rebuffed his request, saying "you should advise the County as you deem appropriate." (Walsh Dec2 ¶6 and Ex. 3.) The County Attorney's legal opinion explained his reasons for the conclusions he reached about the effect revoking the cooperative agreement had on the scope of the Band police's state law enforcement authority. (Walsh Dec2 ¶7.) The County Attorney drafted the Protocol to provide guidance to the County's and Band's law enforcement agencies. (Walsh Dec2 at ¶9 and Ex. 5.) Plaintiffs' claims against the Sheriff

are apparently based on the actions of the Sheriff's predecessor and his deputies took in following the Protocol.[2]

Promptly after the Board's decision to terminate the cooperative agreement, the County Attorney reached out to the Band's Solicitor General, Todd Matha, who was the Band's chief legal officer, and the tribal Chief of Police, Jared Rosati, to initiate a dialog over a new cooperative agreement. Indeed, the very day the Board voted to terminate the cooperative agreement, the County Attorney wrote to the Band's Chief of Police and its Solicitor General:

> Chief Rosati and Solicitor General Matha,
>
> Please accept this e-mail as an attempt to reach out and determine whether you wish to meet in a good faith attempt to negotiate a new cooperative agreement pursuant to Minn. Stat. §626.90.
>
> Notwithstanding my court commitments, I will make every attempt to clear my calendar and meet whenever and wherever with any Mille Lacs Band representatives to try to put together a new cooperative agreement. Please let me know.

(Walsh Dec2 ¶11 and Ex. 6.) On June 23, the County Attorney proposed meeting on June 28; on June 30 he urged Rosati and Matha to start the process for a new agreement "without further delay." (*Id*. Ex.6.) Throughout July 2016, the County Attorney pressed for negotiations:

---

[2] The County will address Plaintiffs' standing to bring their claims against the County in its separate brief.

- July 1 ("Given the breakdown in communication that has occurred, it is crucial to begin speaking and meeting again if the goal is the formation of a new cooperative agreement.")
- July 6 ("We must be able to sit down together and discuss the many issues that have arisen relating to that agreement, including law enforcement issues. The inability or unwillingness to talk to one another openly is a significant reason why we are where we are today.")
- July 8 (responding to the Band's demand for a written proposal by suggesting a collaborative problem solving approach instead and stating that "any future cooperative agreement will necessarily have to be cooperative, not adversarial.")

(Walsh Dec2 ¶11; Ex.6.) Nothing came of the County Attorney's overtures. (*Id.* ¶11.) There was only deafening silence from the other side.

The County Attorney prepared his Opinion and Protocol as part of his role as a prosecutor. (Walsh Dec2 at ¶¶12-14.) If, after revocation, the Band's police lost their state law enforcement authority within Mille Lacs County,[3] then the tribal police needed to work cooperatively with County deputies to avoid producing evidence that a state court would deem inadmissible. (*Id.* ¶¶13-14 and Exs. 4, 5.) The County Attorney was also concerned that a conviction based on evidence obtained by tribal officers acting outside of their jurisdiction could be overturned on appeal. (Walsh Dec2 ¶¶18-19; Flaherty Ex. 11, Walsh Dep. 238:4-12, 293:15-21, 331:17-23.)

[3] Because the Band had a cooperative agreement with Pine County, its police maintained their state law enforcement authority in that County. (Walsh Ex. 4 at 6; Flaherty Ex. 11, Walsh Dep. 229:14-23.)

Because the parameters of inherent tribal law enforcement authority in state courts was unclear, the County Attorney took a conservative approach to manage his office's resources.[4] (Walsh Dec2 ¶19.) Had there been state appellate court guidance on point, however, he would have followed that guidance. (*Id*.)

On July 18, 2016, the County Attorney sent his Opinion and Protocol to Solicitor General Matha and Police Chief Rosati. In transmitting these documents, the County Attorney said:

> I look forward to discussions about the inherent tribal criminal authority the Mille Lacs Band will seek to assert on July 22, 2016 and thereafter.[5]

(Walsh Dec2 ¶11 and Ex. 6.) Solicitor General Matha was very involved in analyzing the implications of the Opinion and Protocol and advised the tribal

---

[4] The County Attorney's conservative approach to tribal inherent investigatory authority was borne out by the recent Ninth Circuit decision in *United States v. Cooley*, 947 F.3d 1215 (9th Cir. 2020). In *Cooley*, the Ninth Circuit held that the case cited for the proposition that tribes have inherent authority to investigate violations of state law by non-Indians within Indian country, *Ortiz-Barraza v. United States*, 512 F.2d 1176 (1975), "is plainly no longer good law" following the Supreme Court's clear holding to the contrary in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). 947 F.3d at 1217, 1219.

[5] The County Attorney's desire for clarity on the issue of inherent tribal criminal authority remains unfulfilled. While he was the Solicitor General, Matha never responded to the County Attorney's invitation for discussions on this issue. (Walsh Dec. ¶¶17, 19.)

police to follow the Protocol, even if he disagreed with it.[6] Likewise, then Chief Rosati directed the tribal police officers to follow the Protocol.[7]

After revocation became effective, in the main, the tribal police adhered to the Protocol, even if they did not like it. If asked, the County Attorney explained the need to follow the Protocol to ensure a successful prosecution. (Walsh Dec 2 ¶14 and Exs. 7-10.) In no case did the County Attorney refuse to prosecute a case simply because a tribal police officer was involved. (Walsh Dec. ¶18.)

B. Law enforcement presence in the affected townships continued and even increased

In a communication to Band membership shortly after the County Board decision, Band Chief Executive Melanie Benjamin said:

> There are a number of things to keep in mind. First, under the laws of Minnesota and Public Law 83-280, the State and the County have a legal obligation to provide law enforcement services to all Minnesotans within their jurisdiction – this includes all parts of the Mille Lacs Reservation. Second, the Tribal Police Department will continue to protect Band members under the inherent sovereign powers of the Band. Third, because of our agreement with Pine County and several provisions of state law, our officers will continue to be a recognized law enforcement entity in Minnesota. Fourth, the Federal Tribal Law and Order Act will become effective at the beginning of next year. This means for certain major crimes, persons accused of crimes might be tried in Federal court and face a Federal prison sentence. This will be a

---

[6] Flaherty Ex. 12, Matha Dep. 207:2-12; Flaherty Ex. 13, Rosati Dep. 92:9-25.

[7] *Id.*

> limited number of crimes – and was put in place to curtail the gangs, the violence and the drug problem on the Reservation.
>
> The meaning of all this is that Band members will continue to have police protection.

(Flaherty Ex. 14.) In line with the Chief Executive's comments, tribal police continued patrolling in the northern three townships. Tribal police responded to calls for service the Sheriff's office or Band dispatch referred to them. (Declaration of Brent Lindgren ¶11.)

Post-revocation, tribal police continued to have access to the Sheriff Office's main radio channel, both to transmit and receive calls.[8] (Lindgren Dec. ¶7.) They also had 119 other channels. (*Id.*) The ability of law enforcement officers between Tribal police and Sheriff's Deputies remained in place:

> Q. Okay. Was your ability to communicate with tribal officers via radio or car-to-car communications impacted by the revocation?
>
> A. No. We still had -- we still had communications by radio. We were just on different channels. They'd just switch it over and talk to them.
>
> Q: And that worked?
>
> A: Yeah.

(Flaherty Ex. 15, Mott Dep. 20:20-21:3; *see* Lindgren Dec. ¶¶7-8.)

[8] Contrary to what former Assistant County Attorney Gardner said in her testimony, there is no 911 channel. (Lindgren Dec. ¶7.)

As the County Attorney concluded, tribal police retained and exercised law enforcement powers on trust lands over Band members. (Walsh Dec2 Ex. 4 at 14, Ex. 5.) They could work up investigations for prosecutions in tribal court if they chose.[9] (Walsh Dec2 Ex. 4 at 14; Flaherty Ex. 11, Walsh Dep. 359:2-360:1.) Tribal police could detain someone until deputies could arrive. (Flaherty Ex. 11, Walsh Dep. 330:22-25; 343:21-24.) And in discovery, Plaintiffs produced over 3,000 police reports for the period from revocation until this lawsuit, so obviously, the tribal police were busy during the period there was no cooperative agreement with the County. (Lindgren Dec. ¶11.)

The Sheriff also did not sit idly by after revocation. He hired eight additional deputies to patrol the northern three townships (the "north end"), with the net result being more law enforcement officers than prior to

---

[9] As Chief Rice testified:

> Q. So tribal officers were in fact undertaking law enforcement period; correct?
> A. Yes.
> Q. They were using tribal inherent; correct?
> A. Yes.

Flaherty Ex. 16, Rice Dep. 179:13-18.

revocation,[10] which ensured that call response time remained immediate and without delays.[11]

Several Deputies also had experience within this area, and initially after revocation, deputies with such experience were assigned to patrol there.[12] In fact, some of the Sheriff's deputies assigned to the north end were former tribal police.

The Sheriff's Office had the capacity and ability to respond promptly to calls for service in this area, sometimes having multiple law enforcement show up for one call.[13] The requirement for Tribal police to conduct a cooperative investigation may have duplicated some work, but in fact, there was greater law enforcement presence in the north end, not less. (Lindgren Dec. ¶10; Flaherty Ex. 15, Mott 17:20-18:3, 55:16-25.) In direct conflict with what the Band claims was a perception that the north end of the County had become a playground for gangs and riddled with lawlessness and rampant crime, Deputy

[10] Flaherty Ex. 15, Mott Dep. 16:2-10; Lindgren Dec. ¶10.

[11] Flaherty Ex. 15, Mott Dep. 17:11-19.

[12] Flaherty Ex. 17, Holada Dep. 41:9-19; *see also* Flaherty Ex. 15. Mott Dep. 17:8-19; Lindgren Dec. ¶10.

[13] Flaherty Ex. 15, Mott Dep. 16:2-10.

Dan Mott deposition testimony paints a very different picture as to the public perception:

> Q. Did you experience a perception from the public that there was reduced law enforcement on the reservation as a result of revocation?
> A. No. It was the opposite.
>
> . . . .
>
> Q. During that revocation period did you experience any changes in crime levels activity on the reservation?
> A. No.

(Flaherty Ex. 15, Mott Dep. 17:20-23; 18:4-7.) The north end was by no means a "police free zone." (Lindgren Dec. ¶10.)

C. In January 2017 the Tribal police obtained federal law enforcement authority

For several months after revocation, when operating in Mille Lacs County, the tribal police relied on the Band's inherent law enforcement authority. The Band has a criminal code and has used that code to prosecute Band members. Deputy Solicitor General Elizabeth Murphy, who is currently the Band's prosecutor, testified:

> Q. Do you know how long the Band's tribal court has been prosecuting Band members for criminal violations
> A. I don't have a specific year, but at least over a decade.
> Q. So at least back to 2008, and maybe even earlier further back in time; is that right?
> A. I believe so. We've had criminal prosecution over Band members since time immemorial, but particularly since we have enacted our tribal criminal causes of action, and since I took the position to

> prosecute the tribal criminal cases, those criminal cases have been continuously prosecuted within our tribal court.

(Flaherty Dec. Ex. 18, Murphy Dep. 75:5-18.)

The Tribal police obtained federal law enforcement powers in January 2017, when the Department of Justice began exercising concurrent jurisdiction in the former reservation,[14] and most Tribal police officers received special law enforcement commissions (SLECs) from the Bureau of Indian Affairs. These SLECs were issued pursuant to a deputation agreement between the Bureau of Indian Affairs and the Band, which authorized tribal officers to investigate all crimes covered by the General Crimes Act, 18 U.S.C. 1152, and the Major Crimes Act, 18 U.S.C. § 1153. (Flaherty Ex. 19 at ¶3(A).) And, indeed, tribal officers with SLECs used that federally-delegated law enforcement authority. The Band's Solicitor General referred numerous cases to the United States Attorney's Office for prosecution. (Walsh Dec. ¶15; Flaherty Ex. 12, Matha Dep. 122:25-123:10; Flaherty Ex. 20.) If that office declined to prosecute, it

[14] Ordinarily, the federal government prosecutes crimes in Indian Country, not states. But in enacting Public Law 280, Congress provided several states with criminal jurisdiction. Minnesota is one such state. Under the Tribal Law and Order Act, tribes could ask the federal government to exercise federal criminal jurisdiction in Public Law 280 states like Minnesota, which the Band did.

was required to report its declination to an office in the Justice Department called the Native American Issues Coordinator.[15]

With the advent of concurrent federal jurisdiction, counsel for the Band proposed a new operating protocol to address practical matters, like call center dispatching, field communications and what police activities Tribal police could undertake. (Flaherty Ex. 11, Draft Interim Operation Protocol.) The Band's proposed protocol limited the Band's police activities *solely* to trust lands, i.e., where there was no dispute over whether those lands were Indian country. (*Id.*) The Band's proposal was never finalized.

---

[15] The office was created in §214(b) of the Tribal Law and Order Act, 124 Stat. 2271, and is codified at 25 U.S.C. §2811, which reads:

Native American Issues Coordinator

(a) Establishment

There is established in the Executive Office for United States Attorneys of the Department of Justice a position to be known as the "Native American Issues Coordinator".

(b) Duties

The Native American Issues Coordinator shall—

(1) coordinate with the United States Attorneys that have authority to prosecute crimes in Indian country;

(2) coordinate prosecutions of crimes of national significance in Indian country, as determined by the Attorney General;

(3) coordinate as necessary with other components of the Department of Justice and any relevant advisory groups to the Attorney General or the Deputy Attorney General; and

(4) carry out such other duties as the Attorney General may prescribe.

The County Attorney also considered whether to revise his Protocol after the Band entered into the deputation agreement with the BIA. (Walsh Dec2 ¶16.) He ultimately concluded, based on his review of BIA materials and the deputation agreement, that because the BIA wanted its federally-delegated authority to be used cooperatively with local law enforcement, and that the SLECS were not to be used to invoke state authority, no changes to the Protocol were needed. (Walsh Dec2 ¶16 and Ex.11; Flaherty Ex. 11, Walsh Dep. 384:11-20.) He also believed that the U.S. Attorney's office should be the one advising the Band's police officers on how to exercise their new federal law enforcement powers. (Walsh Dec2 ¶16; Flaherty Ex. 11, Walsh Dep. 383:18-23.)

Tellingly, Plaintiffs have offered no admissible evidence of either the County Attorney or the Sheriff interfering with Plaintiff Rice's or Naumann's federally-delegated law enforcement authority. To start, Rice had no federal authority personally, for she failed the exam to receive a SLEC. (Flaherty Ex. 16, Rice Dep. 89:21-90:20; Flaherty Ex. 21.) She could, as Chief of Police, supervise those on her staff who did, but nothing in her moving papers show that her supervision was impaired. Naumann has also offered nothing that shows in the slightest that either the County Attorney or the Sheriff, or any

Sheriff's deputy for that matter, interfered in any way with the exercise of Naumann's federally delegated law enforcement authority.[16]

The very fact that the USAO had concurrent jurisdiction with the State in the County's northern three townships makes the Wade Lennox testimony immaterial. Lennox testified about an open air drug market he observed in 2017—after tribal police had federal law enforcement powers. The Grand Market is next to the Band's casino adjacent to Highway 169 and is on trust land. (Michelle McPherson Dec. ¶5.) Hence, if Tribal officers had been proactively policing trust lands (which they claim they in fact were (Flaherty Ex. 16, Rice Dep. 179:13-20)) they could have stopped such flagrant activity. If, in so doing, a Tribal officer detained a Band member, the officer could have arrested that person for prosecution in Tribal court. (Walsh Dec2 Ex. 4 at 9, Ex 5.) If the person detained was not a Band member, the officer could hold the person for a deputy to arrive, (Flaherty Ex. 11, Walsh Dep. 28:6-12, 293:11-14) or use federally-delegated authority to arrest the suspect and conduct a lawful search incident to arrest, with prosecution by the USAO. (Flaherty Ex.

[16] Plaintiff Naumann believes he has state law enforcement powers in Mille Lacs County by virtue of being licensed as a peace officer by a state agency, the Board of Peace Officer Standards and Training (POST). (Flaherty Ex. 22, Naumann Dep. 31:24-32:12). That claim ignores the plain language of Minn. Stat. § 626.90, which requires the Band to have a cooperative agreement with the Sheriff. A POST license is a necessary, but not sufficient, requirement for Naumann to exercise state law enforcement powers in Mille Lacs County. *See* Minn. Stat. § 626.84 (defining who is a peace officer under state law).

19 at 2, 7.) Plaintiffs have offered no evidence that the County Attorney, Sheriff, or any Sheriff's deputy would have interfered with the exercise of that federal authority.

D. The Opinion and Protocol did not affect the ability of Tribal police to respond to criminal activity within trust lands

Plaintiffs also claim the Opinion and Protocol impaired their ability to prevent and respond to criminal activity (including drug dealing and overdoses) within the 1855 area. (Pls'. Mem. 3-4.) But neither the Opinion nor the Protocol affected tribal police authority on trust land. *Supra* at 9. And, after the United States accepted concurrent jurisdiction, Tribal officers with SLECs could respond to drug dealing on trust lands and anywhere within Indian Country. (Flaherty Ex. 19 p.1, ¶3(A).) Moreover, tribal police did not need state law enforcement authority to respond to a service call request for a drug overdose.

Plaintiff's brief paints a distressing picture of rampant criminal activity and drug abuse in the northern townships and lays the blame on the County Attorney and Sheriff. This is frank *post hoc ergo propter hoc* reasoning. Plaintiffs, moreover, have offered no evidence, statistical or otherwise, that

criminal activity or overdoses actually increased post-revocation, let alone that it increased because of Defendants' actions.[17]

In fact, the Band has no data for the three years prior to the revocation period (or any period) on *any* crime data specific to Band trust lands, fee lands or the 61,000 acres. In the Band's 30(b)(6) testimony on this topic, Deputy Chief James West testified:

> Q. Can you tell me what the crimes statistics are for criminal activity between 2013 and 2019 specifically on trust lands?
> A. No.
> Q. You're not prepared to answer that?
> A. I can't give you an answer to that just because there are crimes that happen, for instance in Pine County, that may occur off trust properties in the fee property, and I can't distinguish if it happened on fee or trust based on our agency reporting numbers.
> Q. So just to be clear, you can't tell me which crimes --
> A. Exactly.
> Q. -- were committed on trust lands?
> A. Correct.
> Q. Similar question. So are you prepared to tell me what the crime statistics are for criminal activity between 2013 and 2019 that occurred on Band member fee lands in Mille Lacs County specifically?
> A. Again, the numbers aren't broken down for that type of format. I can't give you an accurate number for what you're asking.
> Q. Same question. Are you prepared to provide crime statistics for criminal activity from 2013 to 2019 that occurred on non-Band member fee lands in Mille Lacs County?

[17] What is known is that overdose deaths went up and down during revocation and increased after a new cooperative agreement was implemented. The impact of fentanyl on overdoses and deaths, a variable unrelated to anything in this case, is undoubtedly a significant factor. *See infra* at 20.

A. Again, the data that we submit to the state and federal government doesn't include a geographic location. So I'm not able to give you a precise figure on what you're asking.
Q. I think I understand. Same question, different area. Are you prepared to provide crime statistics for criminal activity between 2013 and 2019 that occurred within the 1855 treaty area in Mille Lacs County specifically?
A. Again, I can't break down the numbers with the numbers that we report.

(Flaherty Ex. 23, West 30(b)(6) Dep. 220:9-221:22.)

The Band notes that in 2017, "six Native Americans including Reservation four Band members died of overdoses on the Reservation in 2017," arguing the County Attorney himself "acknowledged was an increase over prior years and could be considered a crisis." (Pls. Mem. 16.) Yet what the Band fails to share with this Court is what happened in the following years:

- 2018; one (1) fatal overdose on trust land before the new cooperative agreement was in place, and one after the new agreement was signed.

- 2019; eight (8) fatal overdoses on trust lands.

(Flaherty Ex. 16, Rice 30(b)(6) Dep. Ex. 132.)

What's more, the Band has no data to support its claim that non-fatal overdoses were on the rise because of Defendants' actions. In its 30(b)(6) deposition for which Plaintiff Rice was the designee, she admitted the Band had no data for comparison:

Q. How could the Band tell how many overdoses, non-fatal overdoses there were prior to this first ICR in 2016?
A. How can we tell?
Q. How would you be able to come up with a number?

A. We wouldn't be able to.

. . .

Q. So I'm trying to think of how somebody from the Band would make an accurate claim of how many overdose -- non-fatal overdoses there were prior to October 2016.
A. I don't know how to answer that.
Q. I'm going to ask you some questions year-by-year like we did with the fatal overdoses. More quickly. So 2013. Do you know how many Band members suffered non-fatal overdoses?
A. No I don't.
Q. Why not?
A. I don't have that information available to me.
Q. You're not prepared to testify how many non-fatal overdose there were by Band members for 2013?
A. No.
Q. 2014. Can you tell me, same question, how many non-fatal overdoses by Band members there were?
A. No.
Q. Not prepared to testify to that, 2014?
A. True.
Q. In 2015, same question, can you tell me how many non-fatal overdoses there were by Band members?
A. No.
Q. Not prepared to testify to 2015?
A. True.
Q. In 2016, can you tell me how many non-fatal overdoses there were by Band members?
A. I can tell you from this sheet from October to present.

. . .

Q. But just looking back at 2016, since you don't have the data before October, how could compare between 2017 and 2016?
A. I guess I couldn't. Obviously.

(Flaherty Ex. 16, 30(b)(6) Rice Dep. 247:5-10; 249:1-25; 250:1-4, 13-16.)

The Band cites a document Sheriff Lindgren prepared for all of Mille Lacs County documenting 14 overdoses, but critical information about 2015 and 2016 prior to revocation are conspicuously absent. Yet, what is known about drug activity and use was that beginning in 2016 and 2017, fentanyl was increasingly mixed with heroin, and may have been a cause of increasing overdoses:

Q. Has heroin and its purity changed over the years?
A. I don't know if the purity has changed, but the makeup of it has. What we've been seeing from BCA lab reports is a mixture of heroin and fentanyl.
Q. What is fentanyl?
A. A synthetic opioid.
Q. Tell me more about fentanyl.
A. It's stronger than had heroin. It's a -- takes less of a dose.
Q. So fentanyl is being mixed with pure heroin?
A. I don't know if it's pure or not, but yes.
Q. How is that mixture affecting the people who are using these drugs?
A. How is the fentanyl affecting them?
Q. Yes.
A. I don't know.
Q. Do you not understand my question?
A. I don't.
Q. When a person uses straight heroin, there's an effect on them, and can they overdose?
A. Yes.
Q. Can they die?
A. Yes.
Q. How has fentanyl, when being mixed with heroin, affected the impact on a person in terms of their reaction to it?
A. Fentanyl is more potent. So it could have -- and I say could increase the risk of overdosing. However there's no real way to tell what you're taking. So if they are using heroin, there might be fentanyl in it, or there might be a cutting agent in it. So for me to say that this fentanyl is going to

> make this person overdose, I can't do that. I have no way of knowing what is in that.
> Q. Is it fair to say that fentanyl would increase the likelihood or risk of an overdose given it's more potent?
> A. It could. Again, it depends on what the dealer is cutting it with. If they are cutting it at all. Hard to say.
> Q. When did fentanyl come onto the scene?
> A. 2017 or 2016. We're seeing a lot -- during that 2016 into 2017, I was seeing more reports that were showing mixtures of fentanyl with heroin.

(Flaherty Ex. 24, Dieter Dep. 54:14-56:8.)

Moreover, while the Band shares data from 2017 of 61 overdoses, it fails to share the overdose numbers for 2018 (with the 2018 Agreement signed on September 18, 2018) or 2019:

2018: 36 non-fatal overdoses on trust lands and two on fee lands

2019: 56 non-fatal overdoses on trust lands and two on fee lands.

(Baldwin Dec. Ex. RR.)

The Band and Chief Rice conveniently overlook their own conduct in any alleged increase in criminal activity. By 2017, the Band's public narrative had changed 180 degrees. Chief Executive Benjamin claimed in a November 2017 CITY PAGES article:

> "We've experienced this crisis where people now show up on our reservation because they believe it's a police-free zone," Benjamin says. "Not only are they bringing the drugs in, the gang members are showing up. We have young girls violated. We're not going to let this happen anymore."

Chief Rice echoed a similar sentiment in the same article:

> "It's not a good thing when criminals know and have seen for themselves that nothing's happening."

(Flaherty Ex. 25.) The newspaper CITY PAGES circulates in the Twin Cities market. The two statements were a virtual invitation to drug dealers to drive up Highway 169 to Vineland. Former Band police Chief Dwight Reed characterized these type of statements as "irresponsible."[18]

E. No Tribal officers were ever arrested or even directly threatened with arrest for attempting to assert state law enforcement authority

In a meeting with Band police Chief Rosati and then Deputy Chief Rice, Sheriff Lindgren made it plain, no tribal officer would be arrested for not following the Protocol. (Lindgren Dec. ¶6.) The Sheriff made it plain at a July 16, 2016, meeting of command staff that "WE WILL NOT BE ARRESTING OR CITING THE OFFICERS AS SHERIFF'S DEPUTIES." (Lindgren Dec. ¶3, Ex. 1)(all caps in original.) The County Attorney also never said to any Tribal officer, or anyone else, that he would be prosecuting Tribal officers for Protocol breaches. (Walsh Dec2 ¶18; *see* Lindgren Dec. ¶5.) In fact, he made it plain in his Opinion that he would be exercising his prosecutorial discretion "to determine what crimes are charged in the interests of justice" to allay concerns

[18] Flaherty Ex. 26, Reed Dep 105:6-18.

over consequences of not following the Protocol. (Walsh Dec2 Ex 4 at 13; Flaherty Ex. 11, Walsh Dep. 298:19-299:5.)[19]

The tribal police officers also testified that, regardless of however they viewed the Protocol's reference to impersonating a peace officer if they attempted to act as an officer outside of trust lands, tribal police officers were never verbally threatened with arrest or prosecution:

Plaintiff Rice

Q. Did Sheriff Lindgren ever threaten you or Band officers with arrest and prosecution?
A. Not directly. No. (Flaherty Ex. 16, Rice Dep. 151:20-22.)
Q. Did Sheriff Lorge ever threaten you or Band officers with arrest or prosecution?
A. Never.
Q. Did Joe Walsh ever directly threaten Band officers or you with arrest and prosecution aside from what you say is via the Northern Protocol?
A. Not that I'm aware of. (Flaherty Ex. 16, Rice Dep. 154:8-14.)
Q. Sheriff Lindgren -- I just want to make sure I understand your testimony. When you expressed concern about arrest and prosecution, Sheriff Lindgren's response was what?
A. That wouldn't happen. (Flaherty Ex. 16, Rice Dep. 157:20-24.)

[19] While Plaintiffs cite to some testimony of Kali Gardner that "other officers were advised that they could arrest tribal police officers," (Pls' Mem. at 6.n.11) this statement in no way refutes the direct statements of the Sheriff and the County Attorney, the principals involved. Gardner's testimony is also unfounded—it provides no names or when or where this so-called advice was given.

Plaintiff Naumann

Q. Aside from Northern Protocol; there were no direct threats?
A. I did not hear anything directly to me. Can we take five again? (Flaherty Ex. 22, Naumann Dep. 92:23-93:1.)

Q. Did you ever ask someone if you were going to be arrested, either somebody in the sheriff's department or county attorney's office; anyone?
A. I may have discussed it with deputies, like, are you guys going to arrest us, and they didn't know.
Q. Did you ask the sheriff?
A. No.
Q. Did you ask the county attorney?
A. No.
Q. Did you ask Chief Rice to find out that answer for you? (Flaherty Ex. 22, Naumann Dep 104:25-105:10)

Officer Dieter

Q. So you weren't threatened by the sheriff, or the county attorney, or other deputies to be arrested for impersonating a peace officer?
A. Not personally. No.
Q. Did you hear of any other officers being threatened with arrest or prosecution?
A. I don't recall that. No. (Flaherty Ex. 24, Dieter Dep. 82:24-83:2, 11-13.)

Officer Nguyen

Q. Anything else come to mind about impersonating a peace officer --
A. The Northern Protocol being issued to all of our officers as a whole, and all of their deputies in and of itself is a threat by itself saying that they are to arrest -- they are to -- basically Mille Lacs Band police officers may not impersonate a peace officer and cannot authorize somebody impersonating a peace officer. So this being submitted countywide in and of itself is a threat. (Flaherty Ex. 27, Nguyen Dep. 57:24-58:9.)

Deputy Chief West

Q. Before we took the short break, we were talking about whether there had been any direct threats in the county attorney's office, and your answer was no direct threats, just the protocol itself?
A. Yes. Most of our officers didn't have direct contact with Joe Walsh.
Q. So same line of question, but we'll talk about the sheriff's office. Were there any -- did anybody from the sheriff's office ever say that tribal officers would be arrested if they didn't follow the protocol?
A. I didn't hear that. It was assumed by our officers, and we -- when our officers were reminded of the Northern Protocol or to follow the Northern Protocol. (Flaherty Ex. 28, West Dep. 40:10-25.)

Former Chief Rosati

Q. Did anybody from the County Attorney's Office tell you that you would be arrested for impersonating a police officer?
A. Not face-to-face. I never had a face-to-face discussion with Joe Walsh about his opinion.
Q. What about anybody from the Sheriff's Office? Did anybody from the Sheriff's Office tell you that you might be arrested for impersonating a police officer for violating the protocol?
A. Not that I remember, no. Not on a face-to-face. I mean obviously, like I said, the rumor mill is flying, these are coming out, grave concerns by everyone. There's a lot of stuff that's being floated, pushed out, and a lot of questions.
Q. But no direct --
A. Other than what they put in writing, no.
Q. Okay. And when you say, "in writing," you mean the protocol and the County Attorney's opinion?
A. Absolutely. (Flaherty Ex. 13, Rosati Dep. 118:2-119:2.)

In sum, any allegation of interference based on arrest derives solely from the Protocol.

F. Plaintiffs Rice and Naumann also implied deterrence from the Protocol

The individual Plaintiffs' claims of being deterred from doing their jobs also rest on the Protocol:

Plaintiff Rice

Q. In the complaint that you filed against the county, and the county attorney, and the county sheriff, you allege that you were deterred from exercising your law enforcement authority; correct?
A. Yes.
Q. What do you mean by deterred?
A. I think all the things that I've described the Northern Protocol is one of them. (Flaherty Ex. 16, Rice Dep. 186:12-20.)

Q. So I'm just trying to understand. When you say you were deterred, what do you mean when you say that you were deterred?
A. That I was deterred from doing my job?
Q. Yes.
A. Like the Northern Protocol states, I couldn't do my job. It deterred me from doing my job completely. (Flaherty Ex. 16, Rice Dep. 187:12-19.)

Q. We were talking about deterrence in the allegations and your complaints that you were deterred from exercising your law enforcement authority. Do you remember that?
A. Yes.
Q. Did you direct your officers not to respond to calls during the revocation period?
A. No I did not.
Q. Did you respond to calls during the revocation period?
A. Yes I did. (Flaherty Ex. 16, Rice Dep. 188:16-189:1.)

Plaintiff Naumann

Q. Now, Sergeant Naumann, you allege in the complaint that you were deterred from exercising your federal law

> enforcement authority on non trust lands within the reservation or with respect to non-Band members because the county attorney threatened you. Can you tell me more about when the county attorney threatened you?
>
> A. Well, based on the Northern Protocol, it was implied that through his restrictions that he gave to tribal police, through his opinion and protocol that if we did our jobs we would be impersonating a police officer, which is a crime. So you have officers interpreting that as that's a threat that you could be prosecuted.
>
> Q. Did anyone ever get arrested for impersonating a police officer?
>
> A. Not that I'm aware of.
>
> Q. Did anyone ever get prosecuted for impersonating a police officer?
>
> A. Not that I'm aware of. (Flaherty Ex. 22, Naumann Dep. 85:19-86:14.)

***

The preceding narrative contrasts dramatically with the tale of woe the Band fashioned in its brief. Crime may have increased, but Plaintiffs are not sure. Fatal drug overdoses may have increased, but maybe not, and continued even after tribal police had federal law enforcement powers and even after a new cooperative agreement became effective. The Band's political narrative to its members and its outside constituency in 2016 was not to worry, only the other residents of the County will suffer. By the next year, however, the Band was singing another tune, lobbying the Governor and throwing brickbats at the County in the media. But as the testimony of the County Attorney and the Sheriff show, no one was directly threatened with arrest, must less arrested, for not following the County Attorney's Opinion or Protocol. No one in fact testifies otherwise. And, as the individual Defendant's legal analysis below will

show, Plaintiffs have not shown the Court that it has subject matter jurisdiction over them.

ARGUMENT

I. Summary Judgment Standard

Summary judgment is proper when the record, viewed in the light most favorable to the nonmoving party and giving that party the benefit of all reasonable inferences, shows there is no genuine issue of material fact and the moving party is therefore entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994). A disputed issue is "genuine" when the evidence produced "is such that a reasonable jury could return a verdict for the nonmoving party." *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is considered "material" if it "might affect the outcome of the suit under the governing law." *See id.* "[T]he substantive law will identify which facts are material .... Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

Courts do not decide whether to grant a motion for summary judgment by conducting a paper trial. Rather, a "district court's role in deciding the motion is not to sift through the evidence, pondering the nuances and inconsistencies, and decide whom to believe." *Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994). In considering a motion for summary

judgment, the court's task is merely to decide, based on the evidentiary record that accompanies the filings of the parties, whether there really is any genuine issue concerning a material fact that still requires a trial. *See id*. (citing *Anderson*, 477 U.S. at 249, 10 Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 2712 (3d ed. 1998)); *see also* Fed. R. Civ. P. 56(c)(3). "Summary judgment in favor of parties who have the burden of proof are rare, and rightly so." *Turner v. Ferguson*, 149 F.3d 821, 824 (8th Cir. 1998).

II. Plaintiffs cannot show any concrete injury-in-fact to establish their standing to assert claims against the County Attorney and Sheriff

Plaintiffs bear the burden of pleading and proving standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Because standing is Plaintiffs' requirement to plead and prove, it is not an affirmative defense as Plaintiffs argue in their papers (Pls' Mem. at 26.)

Plaintiffs argue that they have standing based solely upon the Opinion and Protocol issued by the County Attorney, and the actions taken under it by the former county Sheriff, who is no longer a party. (Pls' Mem. 3.) Plaintiffs also assert that these actions were taken on behalf of Mille Lacs County. (*Id.*)

Plaintiffs' motion identifies three injuries that they contend flow from the Opinion and Protocol. First, the Band contends that the Opinion and Protocol impaired the Band's sovereignty. Second, Plaintiffs Rice and Naumann argue that the Opinion and Protocol and former Sheriff's compliance

with it limited their ability to pursue their chosen professions; the Band itself argues that the opinion protocol drove down morale of Band police. Third, Plaintiffs argue that their ability to prevent and respond to criminal activity was impaired by the Opinion and Protocol and the former sheriff's compliance with it. (Pls' Mem. 3- 4.)

The plaintiff has the burden of establishing subject matter jurisdiction, *Hoekel v. Plumbing Planning Corp.*, 20 F.3d 839, 840 (8th Cir. 1994) (per curiam), for which standing is one prerequisite, *Faibisch v. University of Minn.*, 304 F.3d 797, 801 (8th Cir. 2002). Standing cannot be established merely by consent of the parties.[20]

To establish standing, a plaintiff is required to show that he or she had "suffered an injury in fact, meaning that the injury is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, the injury must be traceable to the defendant's challenged action. Third, it must be likely rather than speculative that a favorable decision will redress the injury." *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 591 (8th Cir. 2003) (internal quotations omitted, quoting *Lujan*, 504 U.S. 555, 560-61).

---

[20] Plaintiffs argue that the Defendants' answers did not contest standing (Pls' Mem. 2). Of course, subject matter cannot be established by agreement of parties. Fed. R. Civ. P. 12(h)(3); *Bueford v. Resolution Trust Corp.*, 991 F.2d 481, 485 (8th Cir. 1993).

Plaintiffs' summary judgment motion should be denied because they failed to satisfy the injury-in-fact requirement of standing and because the harms described in Plaintiffs' complaint are not redressable by judicial relief.

1. The promulgation of the Opinion and Protocol is not an invasion of the Band's sovereignty

Plaintiffs' do not assert cognizable injuries that support their legal claims. The Opinion and Protocol upon which Plaintiffs so heavily rely do not constitute actual infringements of Plaintiffs' sovereignty. "Although Article III's standing requirement is not satisfied by mere assertions of trespass to tribal sovereignty, actual infringements on a tribe's sovereignty constitute a concrete injury sufficient to confer standing." *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 463 (2d Cir. 2013).

In *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, the Supreme Court concluded the tribe had standing to contest Montana's assessment of personal property taxes against tribal members residing on the tribe's reservation because those taxes (and the members' payment of those taxes) undermined tribal self-government. 425 U.S. 463, 468 n.7 (1976). Several courts of appeals similarly have found tribes to have standing to challenge state action or regulation. *E.g.*, *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 463-64 (2d Cir. 2013) (where the court reasoned that the tax was a real and measurable interference with "[PN]'s

ability to regulate its affairs and be the sole governmental organ influencing activities…on its reservation."); *Miccosukee Tribe of Indians of Fla. v. Fla. State Athletic Comm'n*, 226 F.3d 1226, 1230-31 (11th Cir. 2000) (concluding tribe had standing to challenge state taxes assessed on non-member activities within its tribal land); *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1238, 1242 (10th Cir. 2001) (holding tribe had standing to challenge Kansas' refusal to recognize tribally-issued motor vehicle registrations).

Moe and its progeny, however, did not displace the constitutional requirements of Article III. In each of these cases, there was an "actual infringement[] on a tribe's sovereignty" that "constitute[d] a concrete injury sufficient to confer standing." *Pequot*, 722 F.3d at 463. In *Moe* and *Pequot*, the states had assessed taxes on personal property that was located within the tribe's reservation, *Moe*, 425 U.S. at 468 n.7; *Pequot*, 722 F.3d at 462. And in *Miccosukee*, Florida sought to assess taxes upon the on-reservation activities of non-tribal entities, 226 F.3d at 1230-31. Kansas had ticketed several tribal members with valid tribal vehicle registrations for lacking state vehicle registrations. *Prairie Band*, 253 F.3d at 1238. In all these cases, the tribe and state had adverse positions on the scope of state versus tribal authority, and the state had asserted or actually sought to assert its authority—circumstances reflecting real disputes over state conduct. *Driehaus*, 573 U.S. at 158-60.

But the present action is different, as the Plaintiffs here do not challenge any state *conduct*—they challenge the Opinion and Protocol, essentially a viewpoint. These Plaintiffs challenge the promulgation of a discretionary legal opinion in which the County Attorney explained his reasons for the conclusions he reached about the effect revoking the cooperative agreement had on the scope of the Band police's state law enforcement authority. (Walsh Dec. at ¶¶7-8 and Ex. 4.) While the exercise of reviewing and interpreting state law are necessarily discretionary, the providing of the opinion was mandatory for the County Attorney. Minn. Stat. § 388.051(1)(2)("The County Attorney shall…give opinions and advice, upon the request of…any county officer…in relation to the official duties of the officer.") The County Attorney could not have lawfully refused to provide an opinion. These Plaintiffs also challenge the promulgation of an accompanying protocol drafted to provide guidance to law enforcement. (Walsh Dec. at ¶9 and Ex. 5.)

The closest that these Plaintiffs come to challenging state action are their claims against the Sheriff, apparently based on the actions of the Sheriff's predecessor and his deputies took in following the Protocol. But none of the protocol compliance efforts rise to the level of taxation or ticketing that precedent recognizes as a concrete injury sufficient to confer standing.

Plaintiffs are simply incorrect when they argue 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." (Pls'. Mem. 30.) Rather, on the advice of its own counsel, the Band chose to cooperate with the County Attorneys Opinion and Protocol. (*Supra* at 7 n.6.) No taxes were imposed, no tickets given, no arrests made, nor threats of prosecution. Accordingly, no standing.

The Band does not have a sovereign right to control the state-law prosecutorial discretion of an elected county attorney. Accordingly, it is immaterial that Plaintiffs highlight the fact that a former employee of the County Attorney testified that he would not would not charge cases where Band police acted outside Opinion and Protocol. (Pls' Mem. 7)

2. Subjective fear of arrest and prosecution for violating the Opinion and Protocol is not an injury in fact

Had the County Attorney prosecuted tribal agents for violating state law, or had the former sheriff arrested tribal agents for state-law violations, those arrested might have standing. *Younger v. Harris*, 401 U.S. 37, 42 (1971). But none of the three Plaintiffs here allege that the County Attorney threatened to prosecute them, or that the former sheriff threatened to arrest them.

Rather, these Plaintiffs feel inhibited because the County Attorney issued an Opinion and Protocol that caused "fear" of arrest or prosecution under the Opinion and Protocol. The Band's deputy chief of police

West had fears (Pls' Mem. at 12), Rice stated Band police had fears too. (Pls' Mem. at 18 n.44.)

Despite the Plaintiffs' voluminous summary judgment submissions, they have no affidavit or declaration from any person who was threatened with prosecution by Walsh. Sheriff Lindgren was unequivocal in his instructions to his employees and his statements to Plaintiff Rice and former Chief Rosati that tribal officers would not be arrested for violating the Opinion or Protocol. (Lindgren Dec. ¶¶4-6.)[21] Plaintiffs rely on three decisions, each of which undercut their own argument.

First Plaintiffs cite *Steffel v. Thompson*, 415 U.S. 452, 459 (1974), but in that case the petitioner had twice been told to stop handbilling and was told that if he did not stop he would he will likely be prosecuted. *Id.* No admissible evidence in this record has testified that the County Attorney or the Sheriff repeatedly told them to stop doing something, nor told them that they would likely be prosecuted.[22]

---

[21] The sole instance of an alleged threat of arrest is contradicted. (Broberg Dec. ¶6.)

[22] The closest Plaintiffs are able to come to meeting this standard is hearsay from an unidentified declarant to unknown recipients to the effect that "other officers were advised that they could arrest tribal police officers" for violations." *Supra* at 23, n.19. Plaintiffs rely on inadmissible hearsay at page 6 n.11 of their brief when they cite the testimony of former employee of the County Attorney's office who testified that one or more unidentified declarants told "other officers" that "they could arrest tribal police officers if they were to do

Next, Plaintiffs cite *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 485 (8th Cir. 2006), asserting that a "plaintiff who alleges a threat of prosecution that 'is not imaginary or wholly speculative' has standing." That case involved a First Amendment challenge to a statute prohibiting certain types of corporate contributions to candidates for political office. Here, in contrast, the County Attorney's Opinion and Protocol does not have the force of law. The County Attorney's Opinion and Protocol is a policy statement by an elected county attorney about his opinion of state law that he was legally mandated to provide to the Sheriff. Violations of the Opinion and Protocol are not crimes; violations of state criminal law are crimes. An "injury-in-fact" is "a realistic danger of sustaining a direct injury as a result of *the statute's* operation or enforcement." *Gaertner*, 439 F.3d at 485 (footnote omitted). A party need not expose itself to arrest or prosecution under a criminal *statute* to challenge it in federal court. *Arkansas Right to Life State Political Action Comm. v. Butler*, 146 F.3d 558, 560 (8th Cir. 1998). But a threat of prosecution must not be "wholly speculative." *Gaertner*, 439 F.3d at 485, 487 (citation omitted). A party "must face a credible threat of present or future prosecution under the statute for a claimed chilling effect to confer standing to challenge

---

some of those things." Of similar ilk was her testimony cited at page 11, n.22, about an unnamed person or persons telling unnamed officers they could arrest tribal police.

the constitutionality of a statute that both provides for criminal penalties and abridges First Amendment rights." *Zanders v. Swanson*, 573 F.3d 591, 593 (8th Cir. 2009). *Rodgers v. Bryant*, 942 F.3d 451, 455 (8th Cir. 2019), also relied upon by Plaintiffs is similar—a First Amendment challenge to a loitering statute. Plaintiffs' complaint challenges no statute whatsoever, and thus these cases are inapposite.

It is no accident that Plaintiffs rely heavily on First Amendment case law in a case that does not involve their speech. The Supreme Court "has altered its traditional rules of standing to permit—in the First Amendment area—attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (citations and quotations omitted). First Amendment litigants, therefore, may challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression. *Id.* The Supreme Court has referred to this as "our departure from traditional rules of standing in the First Amendment area." *Id.* at 613. The law of standing regarding when speech has been chilled has not been extended to where, as here, law enforcement enthusiasm has allegedly been chilled.

Plaintiffs do not, and cannot, cite any state criminal law they believe is unconstitutional. For example, they do not seek declaratory relief for immunity from Minn. Stat. § 609.4751 ("Whoever falsely impersonates a peace officer with intent to mislead another into believing that the impersonator is actually an officer is guilty of a misdemeanor."). The County Attorney's legal opinion regarding the application of state laws following termination of a cooperative agreement does not constitute non-speculative threat of prosecution. Plaintiffs' complaint identified no state criminal law whose constitutionality they challenge.

Admittedly, injury in fact, at least in the First Amendment context, can also be satisfied through "the threatened enforcement of a law" by the government, provided there is "a credible threat of prosecution thereunder" that is based on "an actual and well-founded fear that the law will be enforced against them." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-60 (2014). None of these three Plaintiffs have shown an actual, well-founded fear on this summary judgment record.

Plaintiffs Naumann and Rice advance an injury in fact different from the Band's and personal to them: the right "to fully practice their chosen profession." (Pls' Mem. 30.) But this right is not legally cognizable insofar as it supports no claim made by Plaintiffs, and their cited authority proves this point.

An asserted "right to practice one's chosen profession" is legally cognizable only if it supports a claim for the violation of a plaintiff's Fourteenth Amendment liberty interests. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 (1976); *id* at n.23 ("[T]he right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure…."); *Sammon v. New Jersey Bd. of Med. Examiners*, 66 F.3d 639, 641 (3d Cir. 1995) (finding an "assertion of a right to practice [one's] chosen profession is a legally cognizable one" when asserted to support a substantive-due-process-violation claim under 42 U.S.C. § 1983). Of course, there is no § 1983 claim here.

Here, whatever injuries Plaintiffs' Naumann and Rice felt in practicing their chosen professions is legally cognizable only insofar as it supports a claim for the deprivation of their due process rights. But Plaintiffs do not assert nor claim that Defendants violated their substantive due process rights; such an assertion is found nowhere in the Complaint or elsewhere, and the deadline for Plaintiffs to amend their Complaint has long since passed. Thus, Plaintiffs' asserted injuries are not legally cognizable because the violation of their asserted interests could establish injury-in-fact only to support a claim they do not make.

The suggestion that the County Attorney and the Sheriff can be sued in federal court based on hurting the feelings of the employees of others is a legally breathtaking proposition. Nonetheless, Plaintiffs argue that "[a]dverse effects on employee morale are also cognizable injuries for standing purposes." (Pls' Mem. 31.) Plaintiff's argument is legally incorrect, and the sole case they cite for legal support for that proposition, *Viceroy Gold Corp. v. Aubry*, 858 F. Supp. 1007, 1014 (N.D. Cal. 1994), appears to have been overruled on the very point for which Plaintiffs rely. *See Viceroy Gold Corp. v. Aubry*, 75 F.3d 482, 488-89 (1996) (holding that employer's standing to sue on behalf of its employees was not predicated on employee morale, but was limited to employer's desire to schedule longer workdays which was "inextricably bound up with" employee's desire to work those hours). Reduced morale is not a legally cognizable right sufficient to establish injury in fact. *See American Federation of Government Employees v.* Styles, 123 Fed. Appx. 51, 52 (3d Cir. 2004) ("[A]ny damage that has occurred to the union members' morale and welfare is not a legally cognizable interest.").

3. Plaintiffs' argument under *parens patriae* does not create an injury in fact

Plaintiffs' motion for summary judgment alleges for the first time in this lawsuit that the Band seeks relief on behalf of the rights and interests of its community under *parens patriae* doctrine. Plaintiffs do not allege to assert the rights and interests of its community members in the Complaint; and the amending deadline has long since passed.

Plaintiffs' cited authority demonstrates they have not properly pleaded any claims under *parens patriae*, and summary judgment is not the place to attempt to raise such a claim. In support they cite *Oglala Sioux Tribe v. Van Hunnik*, 993 F. Supp. 2d 1017, 1027 (D.S.D. 2014). But that case, like *Viceroy Gold*, was reversed on appeal, *see Oglala Sioux Tribe v. Fleming*, 904 F.3d 603, 607 (8th Cir. 2018) (reversing because district court should have abstained from exercising jurisdiction under principles of federal-state comity).

Even if the Band could assert the interests of its citizens here, the purported interests of those citizens are not legally cognizable and thus could not establish an injury-in-fact. Plaintiffs assert that a less effective police force and a reduction in public safety injured the rights of its citizens, which the Band wishes to vindicate in federal court pursuant to *parens patriae* doctrine. (Pls' Mem. at 31-32). But rights to an effective police force and to personal protection from private acts of violence and crime are not cognizable interests

that the law recognizes. *See, e.g.*, *DeShaney v. Winnebago County Dept. of Soc. Services*, 489 U.S. 189 (1989) (concluding that "a State's failure to protect an individual against private violence simply does not constitute a violation" of any legally cognizable right under the Due Process Clause); *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 755 (2005) (explaining that to have a legal "interest in a benefit, a person clearly must have more than an abstract need or desire and more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it," which is only created and "defined by existing rules or understandings that stem from an independent source such as state law").

Here, Plaintiffs point to no source of law which confers on Band members an entitlement to have the Sheriff's Deputies provide a police force commensurate to the tribal police force—and let alone point to the source of law to properly hale the County Attorney or Sheriff into federal court over such issues. Nor do Plaintiffs point to any source conferring on them an entitlement to a certain level of public safety. To the contrary, Public Law 280 reflects Congress's considered policy judgment that the State of Minnesota should have criminal jurisdiction over Band members in Indian Country. Insofar as the doctrine of *parens patriae* applies to this case at all, for criminal matters Congress has decided that the State, not the tribe, is the proper guardian. If

the Band believed the State was failing in this regard, the proper course was to be an action in state court for declaratory relief.

B. Plaintiffs have not shown redressability

As explained in Defendants Walsh and Lorge's opening summary judgment brief (ECF No. 164), a favorable decision cannot be rendered for Plaintiffs that will afford them relief. The Tenth Amendment and the Eleventh Amendment preclude this action, as do principles of federalism.

The Plaintiffs' request for injunctive relief would be a significant, permanent intrusion upon state law enforcement power in Mille Lacs County. This type of systematic intrusion by federal courts is not allowed. The lack of redressability due to the requirement to abstain is closely related. "But when both standing and abstention are at issue, we may consider either one first." *Oglala Sioux*, 904 F.3d at 609.

For example, in *O'Shea v. Littleton*, 414 U.S. 488 (1974), the Supreme Court directed that abstention is warranted when plaintiffs seek "an injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials." *Id.* at 500. Even though the plaintiffs did not seek to invalidate any statute or enjoin any prosecution, the Court recognized that the plaintiffs sought "nothing less than an ongoing federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that *Younger v. Harris* ... and related cases sought to

prevent." *Id.* at 500. The Court explained that "because an injunction against acts which might occur in the course of future criminal proceedings would necessarily impose continuing obligations of compliance," alleged noncompliance with the injunction would give rise to contempt proceedings in federal court. *Id.* at 501-02. But "such a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state criminal proceedings is in sharp conflict with the principles of equitable restraint" that the Court recognized in *Younger* and its progeny. *Id*. at 502. And the same principles of federalism may prevent the injunction by a federal court of a state civil proceeding once begun. *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *Oglala Sioux*, 904 F.3d at 607.

For example in *Rizzo v. Goode*, 423 U.S. 362, 380 (1976) the Court reversed an injunction that regulated municipal police misconduct writing:

> Thus the principles of federalism which play such an important part in governing the relationship between federal courts and state governments, though initially expounded and perhaps entitled to their greatest weight in cases where it was sought to enjoin a criminal prosecution in progress, have not been limited either to that situation or indeed to a criminal proceeding itself. We think these principles likewise have applicability where injunctive relief is sought, not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments such as petitioners here.

Accord Bonner v. Circuit Court of City of St. Louis, 526 F.2d 1331, 1335 (8th Cir. 1975) (prisoners did not "challenge their present incarceration or the legality of their sentences," but sought declaratory and injunctive relief directed at "possible future recurrences of the alleged illegal acts."); *Luckey v. Miller*, 976 F.2d 673, 676-79 (11th Cir. 1992) (even though plaintiffs' injunctive relief did not "seek to contest any criminal conviction, nor to restrain any criminal prosecution" "a decree of the sort requested by the plaintiffs would, inevitably, interfere with every state criminal proceeding"); *Wallace v. Kern*, 520 F.2d 400, 404-09 (2d Cir. 1975) (in challenge to state-court bail procedures, noting "the *Younger* doctrine is based not only on a reluctance to interfere with state court processes, but also on the refusal to afford equitable relief when adequate remedies at law exist").

The availability of state-court relief to these Plaintiffs precludes redressing Plaintiffs' claims in federal court. Minnesota courts can and do resolve questions of Indian law and questions of state-tribal jurisdiction. *E.g.*, *State v. Thompson*, 937 N.W.2d 418 (Minn. 2020); *Swenson v. Nickaboine*, 793 N.W.2d 738 (Minn. 2011); *State v. RMH*, 617 N.W. 2d 55 (Minn. 2000); *State v. Stone*, 572 N.W.2d 725 (Minn. 1997); *State v. Roy*, 920 N.W.2d 227 (Minn. App. 2018). These Plaintiffs' present challenge to a state prosecutor's and state sheriff's interpretations and implementation of state law belong in state court. *See* Minn. Stat. § 555.01 (authoring declaratory judgments).

III. Plaintiffs' claims against the County Attorney and Sheriff are not ripe

As discussed above, Plaintiffs fail to establish injury-in-fact and their claims are otherwise non-redressable. Plaintiffs' claims are also not ripe for adjudication. "Ripeness is demonstrated by a showing that a live controversy exists such that the plaintiffs will sustain immediate injury from the operation of the challenged provisions, and that the injury would be redressed by the relief requested." *Employers Ass'n, Inc. v. United Steelworkers of Am., AFL-CIO-CLC*, 32 F.3d 1297, 1299 (8th Cir. 1994) (citation omitted); *e.g. North Dakota v. Heydinger*, 15 F. Supp. 3d 891, 904 (D. Minn. 2014), *aff'd*, 825 F.3d 912 (8th Cir. 2016). "The classic example of a ripeness concern involves the plaintiff who wishes to challenge the validity of a governmental policy that has not yet been enforced against [the plaintiff] and may never be." HART AND WECHSLER'S: THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 213 (7th ed. 2015).

"A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300-301 (1998) (quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 580–581 (1985)). However, "'[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough.'" *Babbitt*

v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979) (quotation omitted).

Plaintiffs' ripeness section is four sentences long (Pls' Mem. 35), and contains three arguments: (1) the Opinion and Protocol resulted in a concrete injury; (2) Defendants' admitted this case is ripe for adjudication; and (3) Defendants' actions limited Tribal police's law enforcement authority on trust lands. Similar to Plaintiffs' standing arguments, their ripeness arguments are conjectural. Plaintiffs face no immediate or impending harm, and they never suffered any injury-in-fact.

1. The effect of the Opinion and Protocol did not cause immediate or impending harm

Plaintiffs did not suffer a legally cognizable injury as a result of the Opinion and Protocol. As discussed *supra* at Section II, Plaintiffs fail to assert legally cognizable injuries traceable to the Opinion and Protocol. The purported harm from these documents is not redressable.

Plaintiffs cite *Steffel v. Thompson,* 415 U.S. 452 (1974), for the proposition that "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." (Pls' Mem. 33 (emphasis added).) Contrary to Plaintiffs' assertion

of immateriality, *Steffel* and other courts have found actual arrests and prosecutions material.

In *Steffel*, the plaintiff claimed he was deterred from exercising his First Amendment rights for fear of arrest. 415 U.S. at 459. Key to the Supreme Court's reasoning was that the plaintiff's handbilling companion had been arrested and prosecuted for the same activity complained of by the plaintiff. *Id*. This established the plaintiff's fear of arrest was credible and not "chimerical." *Id*.; *see also Susan B. Anthony List v. Direhaus*, 573 U.S. 149, 164 (2014)("Past enforcement against the same conduct is good evidence that the threat of enforcement is not 'chimerical.'")(quoting *Steffel*, 415 U.S. at 459).

Similarly, in another case cited by Plaintiffs, the Ninth Circuit held the Plaintiffs' claimed injury was ripe because the "Tribe ha[d] already seen one of its officers arrested and prosecuted based on Defendants' interpretation of the Tribe's lawful authority …. 'thereby eliminating any concerns that Plaintiffs' fear of enforcement is purely speculative.'" *Bishop Paiute Tribe v. Inyo County*, 863 F.3d 1144, 1153–54 (9th Cir. 2017) The court also considered material the fact that the plaintiff tribe received a "cease and desist" order from the Sheriffs' Office stating: "If Tribal Police does not comply with this cease and desist order within this time period, be advised that Tribal Police employees will be subjected to **arrest and criminal prosecution** for applicable charges." *Id*. at

1149 (emphasis in original); *id.* at 1154. Thus, actual arrests and prosecutions are important to the ripeness analysis.

Here, the Opinion and Protocol do not state that tribal officers would be arrested or prosecuted for violations. The Sheriff explicitly told Plaintiffs that tribal officers would never be arrested for such violation, and no tribal officer was ever arrested or prosecuted for such violation. Plaintiffs' subjective fear of arrest or prosecution is unreasonable and conjectural. The only incident purporting a threat of arrest is vehemently disputed.[23] The County Attorney and Sheriff's position that they would not arrest or prosecute tribal officers never changed during the revocation period, is consistent with Defendants' deposition testimony, and the record does not suggest their positions will change. *Cf. United Food and Com. Workers Intern. Union, AFL-CIO, v. IBP, Inc.*, 857 F.2d 422, 429 (8th Cir. 1988)("evidence...showing 'no more than a hesitant, qualified, equivocal and discretionary present intention not to prosecute,...[is a] clear implication...that the state's position could well change.'"). In contrast, the County Attorney and Sheriff's statements were unequivocal, what could happen in the future, with a changing political climate and new officials is pure speculation.

[23] *See supra* at 35 n.21.

2. Defendants' limited admissions do not establish ripeness

Like standing, ripeness is an issue of subject matter jurisdiction. The parties cannot establish subject matter jurisdiction by agreement. *See Mitchell v. Maurer*, 293 U.S. 237, 244 (1934). Plaintiffs' erroneously assert Defendants admitted this case is ripe for adjudication. (Pls' Mem 3.) Their assertion grossly overstates Defendants' limited admissions and ignores basic tenets of subject matter jurisdiction.

Paragraph 5.V of the Complaint alleges that, "Defendants' assertions, threats of prosecution and instructions . . . create a concrete and particularized dispute over the scope of law enforcement authority possessed by Band police officers under federal law, which is ripe for adjudication by this Court." Defendants admitted *only* that the scope of law enforcement authority possessed by tribal police officers outside trust lands in Mille Lacs County was ripe. (ECF No. 17 at ¶ 5.V; ECF No. 21 at ¶ 5.V; ECF No. 19 at ¶ 5.V.) Defendants denied the remaining portions of paragraph 5.V which bear on ripeness. Defendants denied the remaining portions of the Complaint that purport to establish an immediate or impending injury. Defendants' limited admissions do not establish ripeness.

3. There is a genuine issue of material fact whether Defendants limited Plaintiffs' law enforcement authority on trust lands

Plaintiffs claim this case is ripe because Defendants limited their law enforcement authority on trust lands. They are wrong. The Opinion and Protocol do not "limit" tribal police's law enforcement authority *on* Trust lands. (Walsh Dec2 Ex. 4 at 13-15; Ex. 5). Instead, these documents describe the legal effect of revocation on the tribal police's state law enforcement authority, but do not abridge its remaining law enforcement authority on Trust lands. The County Attorney's testimony and the Opinion itself confirm this. (Walsh Dec2 ¶13 and Ex. 4 at 14.) Plaintiffs' subjective belief that their law enforcement authority on trust lands was unlawfully curtailed is conjectural and contradicted by the Record. Thus, Plaintiffs are not entitled to summary judgment based on this claim.

For all these reasons, Plaintiffs fail to demonstrate the absence of a genuine issue of material fact or that they are entitled to summary judgment as a matter of law that this case is ripe for adjudication.

IV. The claims against the County Attorney and Sheriff are moot

"To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (internal citation

and quotations omitted)). Generally, "a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

One recognized exception to the mootness doctrine is voluntary cessation. "Generally, the 'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot.'" *United States v. Mercy Health Servs.*, 107 F.3d 632, 636 (8th Cir. 1997) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)).

Another closely related exception is "capable of repetition, yet evading review." The Supreme Court has limited the "capable of repetition, yet evading review" exception to situations where: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration; and (2) there was a *reasonable expectation* that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 148 (1975)(emphasis added). The first prong is not met merely because a case becomes moot. *See Iowa Protec. and Advoc. Services v. Tanager, Inc.*, 427 F.3d 541, 544 (8th Cir. 2005)(requiring an "apparent reason why a similar future action could not be fully litigated before the case becomes moot."); *Neighborhood Transp. Network, Inc. v. Pena*, 42 F.3d 1169, 1173 (8th Cir. 1994) (explaining although case "was mooted before this appeal could be addressed[,]

[i]t does not follow, however, that similar future cases will evade review."). Plaintiffs bear the burden of establishing a "reasonable expectation" by "show[ing] a demonstrated probability of recurrence; a theoretical possibility is insufficient." *Beck by Beck v. Missouri State High Sch. Activities Ass'n*, 18 F.3d 604, 605 (8th Cir. 1994)(citing *McFarlin v. Newport Special Sch. Dist.*, 980 F.2d 1208, 1211 (8th Cir. 1992)).

As a preliminary issue, Plaintiffs erroneously assert that Defendants bear the "heavy burden" of establishing its mootness defense at this stage of the proceedings. (Pls' Mem. at 36.) Plaintiffs misapprehend the procedural posture. This is Plaintiffs' motion and they bear the burden of establishing they are entitled to summary judgment on Defendants' mootness defense. Fed. R. Civ. P. 56.[24]

[24] Plaintiffs rely on *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.* 528 U.S. 167 (2000), for the proposition that Defendants bear the "heavy burden" of establishing their mootness defense upon Plaintiffs' summary judgment motion. (Pls' Mem. 36.) *Friends of the Earth* is distinguishable. In that case, the defendant moved for summary judgment on mootness and the Supreme Court opined the defendant carried the "heavy burden" of establishing mootness. *Id.* at 189. The cases that *Friends of the Earth* relies on for this proposition all involve defendants moving for dispositive relief on their mootness defenses. *See United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968) (defendant bore "heavy burden" on motion to dismiss for mootness); *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953) (same). Here, the procedural posture is reversed, and Plaintiffs bear the burden of production under Fed. R. Civ. P. 56.

Plaintiffs invoke the voluntary-cessation exception for the proposition that the 2018 Cooperative Agreement[25] between the parties did not moot this lawsuit, arguing that:

> The agreement on which [Defendants'] 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 . . . . 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.

(Pls' Mem. 36.)[26] Plaintiffs also reference the "capable of repetition, yet evading review" exception to mootness in a parenthetical. (Pls' Mem. 37). These arguments fail for two overarching reasons.

First, this is not a voluntary cessation case. The parties voluntarily negotiated and entered into the 2018 Cooperative Agreement. And, unlike the usual voluntary cessation case, Plaintiffs cannot and have not shown Defendants entered into this agreement for the purpose of mooting the lawsuit.

---

[25] The use of the 2018 Agreement in the lawsuit is improper and prohibited by agreement. "This Agreement is made for law enforcement and public safety issues only, and the parties agree that it may not be used by any party for any purpose in any current or future lawsuit determining reservation boundaries." Baldwin Declaration, Ex. AAA, ¶18.

[26] Plaintiffs cite "Doc. 50 at 5" for the assertion that Defendants will insist on additional provisions related to the boundary dispute. Defendants assume this is ECF No. 50, Defendants' Joint Statement of the Case. This document does not support Plaintiffs' assertion.

Without waiving our objection, Defendants note that one of the negotiated provisions in the agreement provides that the agreement will automatically terminate 90 days after final disposition of this lawsuit, including appeals. The 2018 Cooperative Agreement provides a 90-day window for the parties to consider the impact of the Court's opinion and negotiate a new agreement. It is purely speculative that the parties will not reach a new agreement—perhaps identical to the 2018 Cooperative Agreement—within the 90-day grace period. It is also duplicitous for Plaintiffs to claim this negotiated provision will harm them in future. Plaintiffs would be equally at fault for any alleged harm.

Second, Plaintiffs fail to demonstrate a reasonable probability that the complained of harm will recur. Plaintiffs speculate that the County Attorney will re-implement his Opinion and Protocol *if* the parties cannot reach a new agreement during the 90-day grace period. This assumes many things: the parties will not reach a new cooperative agreement during the 90-day grace period; that the County Attorney's Opinion and Protocol are contrary to law; that judicial guidance from other cases or legislative enactments will not alter the legal landscape; and whoever is County Attorney years from now when all appeals are exhausted will implement the same legal opinion if the cooperative agreement is ever terminated. This also assumes that if another revocation occurs in the future, the Minnesota Attorney General—a different party—will refuse to issue an opinion to the County Attorney if requested again. These

assumptions render Plaintiffs' arguments too speculative to establish a demonstrated probability of recurrence to overcome mootness.

Plaintiffs fail to demonstrate that there is no genuine issue of material fact that the complained of harm is reasonably expected or demonstrably probable to recur. Such harm is only a theoretical possibility. For all these reasons, the Court should deny summary judgment on mootness.

V. Plaintiffs' requested relief goes beyond what is needed to establish subject matter jurisdiction

Plaintiffs' proposed Order goes beyond what is required for a determination on standing, proposing an Order that involves the "Reservation." Plaintiffs' proposed Order at Paragraphs 1, 2 and 3. This effort to insert the 1855 reservation status into the standing determination is contrary to the parties' agreement to hear only standing, ripeness and mootness, plus the motions brought by the Sheriff and County Attorney, while reserving the reservation boundary issue for subsequent summary judgment motions and/or trial. The merits of the reservation boundary dispute has not been briefed by either side. This issue is far too important for an ad hoc determination. The parties have, through their experts, developed extensive expert reports and historical evidence regarding the reservation boundary issue. Expert depositions are currently scheduled for September and October

2020, assuming the pandemic allows the depositions to go forward as currently scheduled.

CONCLUSION

For the foregoing reasons, the claims against the County Attorney and the Sheriff should be dismissed with prejudice.

Respectfully submitted,

TAFT STETTINIUS & HOLLISTER LLP

Dated: July 29, 2020

By: *s/ Scott G. Knudson*

Scott G. Knudson (#141987)
Scott M. Flaherty (#388354)
2200 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
(612) 977-8400
Email: sknudson@briggs.com
sflaherty@briggs.com

Attorneys for Defendant Joseph Walsh

KELLEY, WOLTER & SCOTT, P.A.

Dated: July 29, 2020

By: *s/ Douglas A. Kelley*

Douglas A. Kelley (#54525)
Steven E. Wolter (#170707)
Brett D. Kelley (#397526)
Stacy L. Bettison (#315886)
Centre Village Offices, Suite 2530
431 South Seventh Street
Minneapolis, MN 55415
Tel: (612) 371-9090
Fax: (612) 371-0574
Email: dkelley@kelleywolter.com
swolter@kelleywolter.com
bkelley@kelleywolter.com
sbettison@kelleywolter.com

Attorneys for Defendant Don Lorge