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 REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs' opening narrative makes plain this Court must address state-law questions to reach the merits of their interference claims. Plaintiffs' requested relief requires this Court to determine what that state law authority is, what constitutes interference with it and how the County Attorney and Sheriff should do their jobs. Those state-law questions could have been asserted in state court and do not confer subject matter jurisdiction here.

The County Attorney and Sheriff moved for summary judgment believing this case was truly only about the extent of Indian Country in the North End of the County. If no federal cause of action exists against them, this Court has no subject matter jurisdiction to rule on Plaintiffs' claims of interference with their inherent tribal or federally-delegated authority. The Tenth and Eleventh Amendments and *Younger* arguments underlie and inform the absolute immunity defense, which is why they are raised now. None of these arguments overlaps with the boundary issue, further counseling this Court to hear them now.[1]

[1] It is unnecessary to reply to how Plaintiffs mischaracterize the arguments of the individual Defendants, but the County Attorney must address the assertion that he said something untrue in his declaration. The document Plaintiffs cite to support that charge is a letter from Plaintiffs' counsel, and nowhere in that letter is there an offer to engage in a reasoned discussion about the need for a cooperative agreement, merely counsel's opinion regarding case law and tribal law enforcement authority. (Baldwin Decl. Ex. G (ECF 150-7).)

ARGUMENT

I. The Band's inherent *tribal* authority is not a creature of federal law.

Plaintiffs do not dispute that the Band's inherent law enforcement authority is not based on federal law. If the Band possesses inherent law enforcement power, it is because of its retained sovereignty to govern itself. But as a component of tribal sovereignty, the extent of inherent law enforcement authority depends on tribal law, which is not federal law for §1331 purposes. *Longie v. Spirit Lake Tribe*, 400 F.3d 586, 590-91 (8th Cir. 2005).

II. This Court should decline the Band's invitation to fashion a federal common law remedy.

To side step *Longie*, Plaintiffs argue that §1331 jurisdiction exists over their claims as a matter of federal common law. (Pls.' Resp. 13-15.) As previously stated, no federal common law of Indian affairs exists to support the type of claim the Band asserts against the individual Defendants. (Defs.' Mem. 21)(citing *Inyo Cnty. v. Paiute-Shoshone Indians of the Bishop Cmty.*, 538 U.S. 701, 712 (2005)). Plaintiffs cite to a Ninth Circuit case that assumes, without analysis of governing legal principles, that the tribe asserted a federal common law claim conferring jurisdiction under §1331. (Pls.' Resp. 15.) The Ninth Circuit decision ignored the Court's concerns expressed in *Paiute-Shoshone* and should not be followed here.

Plaintiffs cite to several cases for the proposition that federal courts will develop a common law remedy where Congress has not spoken. These cases, like *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226 (1985), involved land rights, a long-standing area of Supreme Court activity. *See e.g.*, *Lewis v. Marshall*, 30 U.S. 470 (1831). *United States v. Lara*, involved application of a congressional act, the so-called *Duro* fix. *Strate*, *Duro*, *Terry* and *National Farmers* all involved assertions of tribal authority over a non-member. Plaintiffs also cite *McGirt* for good measure, but that case does not involve application or creation of federal common law.

Plaintiffs' reliance on a federal common law remedy raises a separation of powers issue this Court should avoid. Federal courts "do not possess a general power to develop and apply their own rules of decision." *Milwaukee v. Ill. and Mich.*, 451 U.S. 34, 312 (1981). Under Article I, Congress has plenary power over Indian affairs, and that branch should provide any remedy. As discussed below, Congress specifically fashioned a private remedy in Public Law 111-211, Title I, but chose not to in Title II (the source of concurrent federal jurisdiction and on which Plaintiffs federal law enforcement authority depends). This Court should not fashion a common law remedy here, "no matter how desirable that might be as a policy matter, or how compatible with the statute." *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001). That task is for Congress alone.

III. No treaty provision provides a cause of action against the individual Defendants.

Plaintiffs assert they "have a direct right of action to enforce the Band's treaty rights." (Pls.' Resp. 18.) Plaintiffs generally cite the 1855 Treaty, which created a reservation for the Band, and the 1863 and 1864 Treaties. Plaintiffs cite no specific provision of those treaties that addresses the Band's "inherent law enforcement authority within the [1855] Reservation's boundaries." (Pls.' Resp. 19.)[2] But in nearly identical language, the 1863 and 1864 Treaties ceded that reservation:

> Article I. The reservations known as Gull Lake, Mille Lac, Sandy Lake, Rabbit Lake, Pokagomin Lake, and Rice Lake, as described in the second clause of the second article of the treaty with the Chippewas of the 22d February, 1855, are hereby ceded to the United States, …

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[2] In contrast, the 1856 Treaty with the Creeks and Seminoles, 11 Stat. 700, had a provision that arguably included some form of enforcement:

ARTICLE XIII.
***

Members of each tribe shall have the right to institute and prosecute suits in the courts of the other, under such regulations as may, from time to time, be prescribed by their respective legislatures.

As noted in the individual Defendants' opening brief (ECF-164 n.9), the 1867 treaty with the Chippewa provided for potential state criminal jurisdiction over Band members.

12 Stat. 1249. While ceding the 1855 reservations, these treaties had a proviso in Article XII that the Mille Lac Band "shall not be compelled to remove [to a new reservation created in Article II] so long as they do not interfere with persons or property of the whites." Plaintiffs' treaty-based argument ignores the negative inference of this proviso, that the Band's 1855 treaty rights were reduced to nothing more than the right to be free from compelled removal—something quite different than the Band now alleges, that those treaties confer inherent law enforcement authority within the boundaries of the ceded reservation.

Plaintiffs assert a "legion" of cases provide tribes a right to sue federally to enforce a treaty right, starting with the usufructuary rights case involving the Treaty of 1837 with the Chippewa, 7 Stat. 537. But critically, and unlike the 1855, 1863 or 1864 Treaties, Article V of the 1837 Treaty specifically reserved usufructuary rights in the territory that was ceded to the United States. The issue before this Court and on appeal was whether that right had been extinguished. *See Minn. v. Mille Lacs Band*, 526 U.S. 172 (1999).

The Band also mentions that Indian treaty rights are "self-enforcing." Individual Defendants agree tribes may generally sue to enforce treaty rights. But the treaty at issue must have a *specific* provision to be enforced, not something nebulous like "inherent tribal law enforcement authority" that is not expressly addressed in a treaty. Plaintiffs' cited Ninth Circuit cases (Pls.'

Resp. 16-17) all involved treaties with various tribes, each having a specific provision reserving off-reservation usufructuary rights. Plaintiffs' cited Tenth Circuit case also involved express hunting-and-fishing rights.[3]

Plaintiffs reliance on *Venetie I.R.A. Council v. Alaska*, 944 F.2d 548 (9th Cir. 1991), is misplaced. That case considered whether the Indian Child Welfare Act required an Alaskan state court to give full faith and credit to tribal court custody determinations. The court held that 25 U.S.C. §1911(d) required such recognition and provided a tribal village with a right to compel recognition of its custody orders. That holding has no application here. *See Navajo Nation v. Superior Court for Yakima Cnty.*, 47 F. Supp. 2d 1233, 1243 (E.D. Wash. 1999)(discussing *Venetie's* limited holding and declining to imply a private right of action under 25 U.S.C. §1915).[4]

IV. Plaintiffs cannot show any statutory basis to sue the individual Defendants.

Plaintiffs implicitly concede that Pub. Law 280 does not provide a basis to sue the County Attorney. Their only statutory argument is based on the

[3] In the absence of any specific treaty right addressing law enforcement, neither Rice nor Naumann have standing to assert a treaty claim. Naumann is also not a Band member.

[4] *Chilkat Indian Village v. Johnson*, 870 F.2d 1469 (9th Cir. 1989) involved a tribe's effort to enforce a tribal ordinance against a non-Indian and is best viewed as analogous to *National Farmers,* where a federal forum was needed to determine whether the tribe could assert such authority.

Tribal Law and Order Act, which is Title II of Pub. Law 111-211. But the text and structure of Pub. Law 111-211 preclude that argument.

In Title I, Congress chose to provide a private right of action; in Title II, enacted at *the same time*, Congress chose not to. This is quintessential *expressio unius est exclusio alterius.* On that basis alone, this Court can hold the Band has no private right of action under any provision of Title II of Pub. Law 111-211.

Plaintiffs argue this Court should imply a right to enforce their federally-delegated law enforcement authority under 25 U.S.C. §2804, citing *Venetie* to argue Congress can be presumed to have intended a tribal right to enforce Title II rights. (Pls.' Resp. 22.) The deputation agreement does not allow tribal officers to enforce it, and by extension, the Band itself, which could only seek to enforce the officers' rights. Although neither the deputation agreement nor Title II requires the Band seek redress through the local United States Attorney's Office, neither prevents the Band from doing so. Plaintiffs argue canons of construction of Indian law militate in their favor. But *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462-63, 2465 (2020) teaches that congressional language controls. Here, Congress used no language creating a private right of action in Pub. Law 111-211, Title II, while it expressly did in Title I of the very *same* act. *Alexander*, 532 U.S. at 290 ("[E]xpress provision of one method

of enforcing a substantive rule suggests that Congress intended to preclude others.").

V. The Tenth Amendment bars Plaintiffs' claims because Plaintiffs seek to interfere with State prosecutorial powers.

Plaintiffs misstate their requested relief when arguing the Tenth Amendment does not bar their claims. They want this Court to declare the County Attorney's Opinion regarding state law invalid and an order precluding him from making prosecutorial decisions consistent with his understanding of state law. Plaintiffs characterize the Opinion and Protocol as "limitations" on Plaintiffs. (Pls.' Resp. 25.) But those purported limitations are nothing more than a difference of opinion of state law.

The record itself contradicts Plaintiffs' characterization of the Opinion and Protocol. The Band's lead lawyer, Todd Matha, considered the County Attorney's position and instructed tribal officers to follow it. (ECF-176 at 7, n. 6-7.) In substance, Plaintiffs seek declaratory judgment that the County Attorney's Opinion about state law was incorrect, and an order preventing him from acting upon that state-law interpretation.

VI. *Younger* abstention is appropriate.

Plaintiffs argue *Younger* abstention is inappropriate, but their cited cases show otherwise. To be sure, where a federal court is asked to enforce treaty rights, *Younger* abstention may be inappropriate, as in the case relied

upon by Plaintiffs, *Mille Lacs Band*, 835 F. Supp. 1118 (D. Minn. 1994). But here there is no federal treaty granting the Band law-enforcement powers. Plaintiffs themselves describe those powers as "inherent." If they are inherent, their content is a question of tribal law, not federal law. *See Longie*, 400 F.3d at 590-91.

VII. *Ex parte Young* does not apply because the County Attorney and Sheriff act for the State in their law-enforcement capacities.

Arguing the Eleventh Amendment does not apply, Plaintiffs rely on cases involving rights granted by treaties. (Pls.' Resp. 39-40.) But fatal to Plaintiffs' claims, the 1855, 1863 and 1864 treaties contain no provision granting *any* law-enforcement powers. The 1855, 1863 and 1864 Treaties simply have no language guaranteeing the exercise of law enforcement power. Because no treaty provision describes Plaintiffs' purported inherent law enforcement authority, any such authority is tribal, not federal law. (ECF-164 at 19.)

VIII. Prosecutorial immunity protects the individual Defendants because Plaintiffs do not assert a §1983 claim.

Plaintiffs cite a not-yet-appealed state court order for the proposition that the County Attorney and Sheriff do not act for the State. (Pls.' Resp. 38.) But Plaintiffs ignore the decision in *State v. House*, where the court concluded a "criminal proceeding is brought by the State of Minnesota against the

individual charged." 192 N.W.2d 93, 95 (Minn. 1971). Defendants cited *House* in their opening brief (ECF-164 at 47), and that case remains good law.

Plaintiffs' cases are inapposite because, with one exception, they are §1983 cases, and Plaintiffs make no §1983 claim. The exception is the non-precedential case, *Bishop Paiute Tribe v. Inyo County*, 15-cv-00367-DAD-JLT, 2018 U.S. Dist. LEXIS 4643 at *22-27 (E.D. Cal. Jan. 10, 2018). (Pls.' Resp. 44.) That exception is, in substance, not an exception because the precedent upon which it relies are §1983 cases. Whatever Plaintiffs' cause of action is, if any, is not based on §1983.

Plaintiffs argue that prosecutorial immunity does not apply because the County Attorney was giving legal advice, and in a §1983 context, such advice would not trigger absolute immunity. (Pls.' Resp. 45-46.) Again, Plaintiffs have no §1983 claim. The Band's own chief executive's testimony contradicts the argument that the County Attorney was sued for giving legal advice: she testified that the County Attorney was not prosecuting cases as she would like. (ECF-164 34). And though Plaintiffs repeatedly emphasize they do not seek damages, prosecutorial immunity is an immunity *from suit*, not simply from damages. (ECF-164 at 43.) That Congress can abrogate immunity under the

Fourteenth Amendment does not mean Congress can do so using its Article I powers. (ECF-164 at 45.)

IX. Plaintiffs' official-capacity claims against the County Attorney and Sheriff are redundant.

Defendants provided on-point legal authority for three well-established rules: official-capacity lawsuits are effectively lawsuits against the government entity; when an individual is sued in an official capacity and the government entity is also sued, the individual should be dismissed as redundant; and any injunctive relief against the County would bind the County Attorney and Sheriff even if they are dismissed from the lawsuit. (ECF-164 at 46-48.) Plaintiffs cite no factual or legal authority divesting the Court of the ability to dismiss official-capacity claims as redundant and cite no case law relevant to a Rule 65(d) analysis.

Plaintiffs argue the County Attorney and Sheriff are not "employees" and are "free of County supervision or control." (Pls.' Resp. 48-51.) This purportedly means Plaintiffs' claims are not redundant because an injunction against the County will not bind the County Attorney or Sheriff. Plaintiffs are wrong.

It is undisputed that the County Attorney and Sheriff share a relationship with the County such that an injunction against the County would bind them. "[A] decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented

by them or subject to their control." *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945).

Plaintiffs' contention that the County Attorney and Sheriff are "elected officials" and not "employees" is a semantics game.[5] The critical inquiry is this: whether the County Attorney and Sheriff fall within any of the four types of relationships outlined in *Regal Knitwear*. Plaintiffs' reliance solely on the last type of relationship—not subject to County control—plainly ignores *Regal Knitwear's* reference to the relationships that bind a nonparty to an injunction.[6]

Plaintiffs make much of the fact that in limited instances Defendants have undertaken certain litigation activities separately. This, however, is the commonsense outcome of the individual Defendants having distinct offices, staff and responsibilities. Plaintiffs ignore that most of Defendants' activities have been joint (*e.g.*, discovery requests, depositions, motions and communications with Plaintiffs' counsel).

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[5] Plaintiffs cite *Spaulding v. Board of County Comm'rs*, 238 N.W.2d 602, 603 (Minn. 1976), for the proposition that the Sheriff is not an employee. That case, however, has no Rule 65(d) analysis and it concerned the narrow question of a sheriff's access to a sick leave policy.

[6] If the inquiry is solely on semantics, the County Attorney and Sheriff still come squarely within the scope of Rule 65(d) as "officers." *See* Fed. R. Civ. P. 65(d).

The Complaint is replete with blanket claims against all Defendants (*see* Compl. ¶¶ M, N, R-V) and seeks the same injunctive relief against all Defendants. (*See* Compl. at 8, ¶2.) Plaintiffs cannot on the one hand make these same claims and requested relief and on the other hand argue the claims are not redundant.

X. Plaintiffs' individual-capacity claims and demand for fees and costs against the County Attorney and Sheriff are meritless.

The individual-capacity claims against the individual Defendants are based the erroneous "belief" that these claims might be "necessary" to trigger *Ex parte Young*. (Pls.' Resp. 51-52.) However, *Ex parte Young* requires only official-capacity claims against state officials.[7] This being true, Plaintiffs "have no objection to dismissal of the individual-capacity claims[.]" (Pls.' Resp. 52.) This also moots the County Attorney and Sheriff's alternative request for immunity from attorney's fees and costs.

[7] *Ex parte Young*, 209 U.S. 123, 197–98 (1908) (Harlan, J., dissenting)("The plaintiffs … did not proceed in their suit upon the ground that [defendant Young] was individually liable. They sued him only as attorney general, and sought a decree against him in his official capacity, not otherwise."); *see*, *e.g.*, *Verizon Maryland, Inc. v. Pub. Serv. Comm'n. of Maryland*, 535 U.S. 635, 648 (2002)(no individual-capacity claims asserted).

CONCLUSION

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

Respectfully submitted,

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