UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Mille Lacs Band of Ojibwe, et al., Appellees, v. Erica Madore, County of Mille Lacs, Kyle Burton, Appellants.	Nos. 23-1257 23-1261 23-1265 **APPELLEES' MOTION TO DISMISS APPEALS AS MOOT**

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I. INTRODUCTION

Plaintiffs-Appellees the Mille Lacs Band of Ojibwe ("Band") and two Band police officers move to dismiss these consolidated appeals as moot. Plaintiffs' claims have been mooted by a recent amendment to Minn. Stat. § 626.90, which confers the powers of a law enforcement agency on the Band. The amendment eliminates the former requirement that the Band enter into a cooperative agreement with the Mille Lacs County Sheriff and provides that the Band has jurisdiction over all persons within the original boundaries of the Mille Lacs Indian Reservation. Plaintiffs' claims arose after Mille Lacs County terminated a cooperative agreement with the Band and the Mille Lacs County Attorney held that the Band could only exercise law enforcement authority on trust lands and could not exercise such authority over non-Indians or investigate violations of state law—restrictions that the County Sheriff enforced. By eliminating the requirement of a cooperative agreement and providing that the Band has law enforcement authority over all persons within the original reservation boundaries, the recent amendment to § 626.90 moots the dispute that gave rise to this case.

II. FACTUAL AND PROCEDURAL BACKGROUND

In June 2016, Mille Lacs County terminated a cooperative law enforcement agreement with the Band. *See* Memorandum Opinion and Order at 4 (Dec. 21, 2020)

(Dist. Ct. Doc. 217) (Ex. A).[1] Mille Lacs County Attorney Joseph Walsh then issued an Opinion and Protocol holding that: (1) the cooperative agreement's termination deprived the Band of state law enforcement authority under Minn. Stat. § 626.90; (2) the Band's inherent law enforcement authority was limited to approximately 3,600 acres of trust lands within more than 61,000 acres comprising the original Mille Lacs Indian Reservation and did not include the authority to investigate non-Indians or violations of state law; and (3) Band officers who exceeded the limitations of the Opinion and Protocol could be subject to criminal and civil liability. *Id.* at 3-7. Mille Lacs County Sheriff Brent Lindgren enforced the limitations in the Opinion and Protocol by, among other things, monitoring compliance by Band police officers, taking over investigations from Band police officers, and treating Band police officers as civilians. *Id.* at 7-12. Band officers complied with the limitations in the County Attorney's Opinion and Protocol due to fears of criminal and civil liability and adverse consequences for their careers. *Id.* at 12-14. The inability to exercise full law enforcement authority led to a decline in morale among Band officers, several resignations, and a decline in public safety. *Id.* at 14-21.

In December 2016, the Band entered into a deputation agreement with the United States Bureau of Indians Affairs. *Id.* at 21. The Bureau issued Special Law

[1] All exhibits cited in this Motion are attached to the Declaration of Beth Baldwin in Support of Appellees' Motion to Dismiss Appeals as Moot, filed herewith.

Enforcement Commissions to certain Band officers authorizing them to enforce federal law within the Band's Indian country. *Id.* The County Attorney advised Band officers that his Opinion and Protocol remained in effect and that they should limit enforcement activity to trust lands. *Id.* Also in December 2016, the County Attorney confirmed that the County Sheriff had taken over all responsibility for law enforcement on non-trust lands within the original reservation boundaries and all investigations of state law violations on trust lands pursuant to his Opinion and Protocol. *Id.* at 14.

In November 2017, Plaintiffs sued Mille Lacs County and then-County Attorney Walsh and then-Sheriff Lindgren to prevent ongoing interference with the Band's inherent and federally delegated law enforcement authority. *Id.* at 22-23; *see also* Complaint at 6-8 (Nov. 17, 2017) (Dist. Ct. Doc. 1) (Ex. B). Plaintiffs named the County as a defendant because the actions taken by the County Attorney and Sheriff were taken on behalf of the County. Ex. B at 6 ¶ R. Plaintiffs claimed that the Band's inherent and federally delegated authority extended throughout the original Mille Lacs Indian Reservation and that the Band's inherent authority included the authority to investigate state law violations, *id.* at 4-5 ¶¶ H, K, and that Defendants' actions unlawfully interfered with that authority. *Id.* at 6-7 ¶¶ S-V. Apart from fees and costs, Plaintiffs sought only prospective declaratory and injunctive relief to prevent ongoing interference with that authority. *Id.* at 7-8.

The County's Answer included a counterclaim seeking a declaratory judgment that the original Mille Lacs Indian Reservation had been disestablished or diminished. Answer and Counterclaim of Defendant County of Mille Lacs, Minnesota, etc. at 13-34 (Dec. 21, 2017) (Dist. Ct. Doc. 17) (Ex. C). In September 2018, the District Court granted Plaintiffs' motion to dismiss the County's counterclaim because the County lacked standing. Memorandum Opinion and Order at 2-3 (Sept. 19, 2018) (Dist. Ct. Doc. 46) (Ex. D). The District Court relied in part on this Court's previous holding that the County lacked standing to seek a determination of the Reservation's status because the County could not demonstrate an injury in fact. *Id*. at 5-7, 13-21 (citing *Cty. of Mille Lacs v. Benjamin*, 361 F.3d 460, 464 (8th Cir. 2004)).

In September 2018, the Band, the County and the County Sheriff entered into a new cooperative agreement under Minn. Stat. § 626.90 (the 2018 Agreement). Ex. A at 22. As insisted by the County and the County Sheriff, the 2018 Agreement was and remains a temporary agreement that expires 90 days after the conclusion of this litigation. *Id.* Specifically, paragraph 25(c) of the Agreement provides:

> This Agreement shall automatically terminate ninety (90) days after the final resolution, including the exhaustion of all appeals and any proceedings on remand, of the [present lawsuit]. The County and the Sheriff are entering into this Agreement in reliance on the Court's determination of the issues raised in the lawsuit, including the existence and extent of Indian country in Mille Lacs County, and have not insisted

> upon the inclusion of provisions in this Agreement that would be essential to them in the absence of the lawsuit.

Id.

In November 2018, and on multiple occasions since then (both in the District Court and in an interlocutory appeal in this Court), Defendants argued that the 2018 Agreement mooted the Band's claims against the County Attorney and Sheriff.[2] *See* Defendants' Joint Statement of the Case at 6 (Nov. 6, 2018) (Dist. Ct. Doc. 50) (Ex. F); Defendants Walsh and Lorge's[3] Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment on Standing, Ripeness and Mootness at 51-56 (July 29, 2020) (Dist. Ct. Doc. 176) (Ex. G)[4]; Appellants' Motion to Dismiss on Grounds of Mootness, etc. at 6-9 (Aug. 31, 2021) (8th Cir. No. 21-1138, Entry

[2] As Plaintiffs pointed out, Plaintiffs' claims against the County "arise from the same acts as Plaintiffs' claims against the [County Attorney and Sheriff] (official actions by the County Attorney and County Sheriff that interfered with the Band's inherent and federally delegated law enforcement authority) and seek the same relief (declaratory and injunctive relief defining and preventing interference with that authority). Thus, if Plaintiffs' claims against [the County Attorney and Sheriff] are moot so too are Plaintiffs' claims against the County, requiring dismissal of the entire case." Plaintiffs' Response to Walsh and Lorge's Supplemental Memorandum of Law on Mootness at 1 (Dec. 30, 2021) (Dist. Ct. Doc. 308) (Ex. E) (internal citation omitted).

[3] Then-County Sheriff Don Lorge substituted for former County Sheriff Brent Lindgren after taking office as County Sheriff.

[4] The County joined in Walsh and Lorge's mootness argument. *See* Defendant County of Mille Lacs, Minnesota's Response Memorandum to Plaintiffs' Motion for Summary Judgment at 1 (July 29, 2020) (Dist. Ct. Doc. 175) (Ex. H).

ID 5071475) (Ex. I); Defendants Walsh and Lorge's Supplemental Memorandum of Law on Mootness at 1, 10-14 (Dec. 13, 2021) (Dist. Ct. Doc. 305) (Ex. J). Defendants explained that the "2018 agreement satisfied the requirement in Minn. Stat. § 626.90 for such an agreement and granted the Band's police department state law enforcement authority." Ex. J at 11. Because this authority extended throughout the 1855 Reservation, at least under certain circumstances, and included the authority to investigate violations of state law, it "alleviated" the County Attorney's concerns regarding the Band's law enforcement authority and led him to revoke his Opinion and Protocol. *Id*. at 10-11. According to Defendants, while the 2018 Agreement remained in effect and the Band retained law enforcement authority under Minn. Stat. § 626.90, Plaintiffs' claims regarding the Band's inherent and federally delegated authority presented only "a hypothetical legal question." *Id.* at 16.

The District Court rejected Defendants' mootness argument—not because the 2018 Agreement did not resolve the law enforcement dispute while it remained in effect, but because the 2018 Agreement was a temporary agreement. Ex. A at 35-36. The Court reasoned that, if the case were dismissed as moot, the 2018 Agreement would terminate, the Band would again lack law enforcement authority under Defendants' interpretation of Minn. Stat. § 626.90 due to the lack of a cooperative agreement, and the parties would continue to dispute the scope of the

Band's inherent and federally delegated law enforcement authority. *Id*. In the same order, the District Court held that it had subject matter jurisdiction over Plaintiffs' claims and that Plaintiffs' claims were justiciable, *id.* at 24-36, and rejected various immunity defenses advanced by the County Attorney and Sheriff. *Id.* at 36-46.

The District Court's order paved the way for it to address Plaintiffs' claims on the merits. The parties had proposed, and the Court had agreed, to address the merits in two phases. *See* Joint Motion to Defer Dispositive Motions Regarding the Scope of the Band's Law Enforcement Authority (Nov. 11, 2020) (Dist. Ct. Doc. 206) (Ex. K); Memorandum of Law in Support of Joint Motion to Defer Dispositive Motions, etc. (Nov. 11, 2020) (Dist. Ct. Doc. 208) (Ex. L); Order (Nov. 16, 2020) (Dist. Ct. Doc. 211) (Ex. M). In the first phase, the Court would determine whether the Mille Lacs Indian Reservation had been disestablished or diminished, because the geographic scope of the Band's inherent and federally delegated law enforcement authority was largely dependent on the Reservation's status. Ex. L at 3-4. In the second phase, the Court would determine the scope of the Band's inherent and federally delegated law enforcement authority within the current reservation boundaries and whether Defendants' actions had unlawfully interfered with that authority. *Id*.

However, before the District Court could address the merits, the County Attorney and Sheriff filed an interlocutory appeal challenging the District Court's

subject matter jurisdiction and the denial of their immunity defenses, leading the District Court to stay further proceedings pending resolution of the appeal. Order (Apr. 14, 2021) (Dist. Ct. Doc. 290) (Ex. N). After the appeal was briefed but before oral argument, the County Attorney and Sheriff filed a motion to dismiss the appeal on mootness grounds. Ex. I. They argued that a recent United States Supreme Court decision addressing tribal law enforcement authority mooted Plaintiffs' claims because, under that decision, a "key part of [the County Attorney's] 2016 opinion is no longer good law and he would not reissue his opinion and protocol should the 2018 agreement terminate." *Id.* at 5-6 (citing *United States v. Cooley*, 141 S. Ct. 1638 (2021)). The County Attorney and Sheriff continued to argue that, while it remained in effect, the 2018 Agreement itself mooted Plaintiffs' claims. *Id.* at 6-7. This Court treated the motion as a motion for voluntary dismissal under Fed. R. App. P. 42(b) and dismissed the appeal without addressing mootness. Judgment (Sept. 10, 2021) (8th Cir. No. 21-1138, Entry ID 5074847) (Ex. O); *see also* Order at 9-10 (Mar. 3, 2022) (Dist. Ct. Doc. 312) (Ex. P).

When the case returned to the District Court, the County Attorney and Sheriff renewed their mootness argument based on the 2018 Agreement and *Cooley*. Ex. J. at 2, 10. The District Court disagreed, adhering to its decision that the 2018 Agreement did not moot Plaintiffs' claims because it was a temporary agreement and holding that *Cooley* did not moot Plaintiffs' claims because, *inter alia*, it did not

address the geographic scope of Plaintiffs' law enforcement authority. Ex. P at 12-19.

The District Court then turned to the merits. In accordance with the procedure previously proposed by the parties and adopted by the Court, it first addressed the status of the Reservation and held that the original Mille Lacs Indian Reservation, as established in the Treaty of February 22, 1855, 10 Stat. 1165, had not been disestablished or diminished. Memorandum Opinion and Order (Mar. 4, 2022) (Dist. Ct. Doc. 313) (Ex. Q). The District Court then found that Defendants had unlawfully interfered with the Band's law enforcement authority by prohibiting the exercise of such authority on non-trust lands within the original Reservation and the investigation of state-law violations (even on trust lands). Order on Cross-Motions for Summary Judgment at 37-38, 69-70 (Jan. 10, 2023) (Dist. Ct. Doc. 349) (Ex. R). The Court's declaratory judgment confirmed that the Band's inherent and federally delegated law enforcement authority extends to all lands in the Reservation and that the Band's inherent authority includes authority to investigate state-law violations. *Id.* at 71-72; Judgment at 1-2 (Jan. 10, 2023) (Dist. Ct. Doc. 350) (Ex. S). The Court declined to enter injunctive relief. Ex. R at 72-73.

The County, County Attorney and Sheriff filed notices of appeal, which were consolidated for briefing and submission to this Court. Docketing Letter (Feb. 9, 2023) (Entry ID No. 5244355). On appeal, Defendants contend: (1) the District

Court lacked subject matter jurisdiction over Plaintiffs' claims that Defendants interfered with Plaintiffs' inherent and federally delegated law enforcement authority; (2) the District Court erred in holding that the Mille Lacs Reservation had not been disestablished; and (3) the District Court's declaration of the scope of the Band's inherent law enforcement authority was erroneous. *See* Brief of Appellant County of Mille Lacs, Minnesota (May 1, 2023) (Entry ID 5271574); Brief of Erica Madore and Kyle Burton (May 1, 2023) (Entry ID 5271577).[5]

During the pendency of this appeal, the Minnesota Legislature amended Minn. Stat. §§ 626.90 through 626.93. *See* Minn. Laws 2023, ch. 52, art. 10 §§ 26-32 (Ex. T). The amendments eliminate the requirement that federally recognized tribes in Minnesota enter into cooperative agreements with a local sheriff as a condition for exercising law enforcement authority under state law, making any such agreements optional. *Id.* With respect to Minn. Stat. § 626.90, the amendments replace the former provision in subdivision 2, paragraph b, that the "band shall enter into mutual aid/cooperative agreements with the Mille Lacs County sheriff" with the new provision that the "band may enter into mutual aid/cooperative agreements with the Mille Lacs County sheriff"). *Id*. § 26 (emphases added). In addition, as

[5] Erica Madore is the current County Attorney and Kyle Burton is the current County Sheriff. They substituted for former County Attorney Walsh and former County Sheriff Lorge, respectively, during the pendency of this appeal.

amended, § 626.90 provides that, if the Band satisfies four remaining requirements in subdivision 2, paragraph a, the Band "shall have concurrent jurisdictional authority under this section with the Mille Lacs County Sheriff's Department over all persons in the geographical boundaries of the Treaty of February 22, 1855, 10 Stat. 1165, in Mille Lacs County, Minnesota." *Id*. The Minnesota Senate Counsel, Research and Fiscal Analysis Office described the Senate bill amending §§ 626.90-93 as follows:

> The bill provides that Tribal law enforcement agencies are not required to enter cooperative agreements with the local sheriff as a condition of exercising concurrent jurisdiction within the boundaries of their reservations. It also expands the law enforcement jurisdiction of the Mille Lacs band to include all persons within the geographical boundaries of the Treaty of 1855, as opposed to all persons on land held in trust by the United States for the band.

S.F. No 2251 – Modifying Law Enforcement of Mille Lacs Band of Chippewa Indians, etc. (Mar. 16, 2023) (Ex. U). The amendments take effect on August 1, 2023. *See* https://www.revisor.mn.gov/laws/info (if no specific effective date is provided, act takes effect on August 1 following enactment).

The Band, along with other federally recognized tribes in Minnesota, supported the bills amending §§ 626.90-93 to place tribal law enforcement agencies on an equal footing with all other municipal and state law enforcement agencies in the State, none of which is required to enter into a cooperative agreement with a local sheriff to exercise law enforcement authority. *See* Declaration of Caleb

Dogeagle, ¶ 9 (filed herewith). The Mille Lacs Band also supported the bills to prevent a repeat of the law enforcement crisis it faced when the County terminated the previous cooperative agreement in 2016. *Id.*

After the Legislature amended § 626.90, the Band confirmed its continuing compliance with the four remaining conditions in subdivision 2, paragraph a, of the statute. Dogeagle Decl., ¶¶ 3, 11. Therefore, even if the current (2018) cooperative agreement expires 90 days after this litigation concludes, the Band will have, as a matter of state law, law enforcement authority over all persons throughout the 1855 Reservation, including the authority to investigate violations of state law. That authority will not be contingent upon the existence of a cooperative agreement and thus will remain whether or not the 2018 Agreement is terminated.

The amendment to § 626.90 resolves the disputes that gave rise to this litigation, namely, the dispute over the geographic scope of the Band's law enforcement authority and the dispute over the authority of Band officers to investigate state-law violations. Although the parties may continue to dispute the scope of the Band's inherent and federally delegated authority, that dispute will have no practical effect on the Band's law enforcement authority because of the authority conferred on the Band under Minn. Stat. § 626.90. As Defendants put it, that dispute now presents only "a hypothetical legal question." Ex. J. at 16.

III. ARGUMENT

The Constitution limits federal courts' jurisdiction to actual "Cases" or "Controversies." U.S. Const. art. III, § 2, cl. 1. If "'the issues presented are no longer live' … a case or controversy under Article III no longer exists because the litigation has become moot." *Brazil v. Ark. Dep't of Human Servs.*, 892 F.3d 957, 959 (8th Cir. 2018) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)). In general, a case becomes moot "when 'changed circumstances already provide the requested relief and eliminate the need for court action.'" *Hillesheim v. Holiday Stationstores, Inc.*, 903 F.3d 786, 791 (8th Cir. 2018) (quoting *McCarthy v. Ozark Sch. Dist.*, 359 F.3d 1029, 1035 (8th Cir. 2004)). If an action becomes moot, the court "must dismiss it for lack of jurisdiction." *Ali v. Cangemi*, 419 F.3d 722, 724 (8th Cir. 2005).

"'When a law has been amended or repealed, actions seeking declaratory or injunctive relief for earlier versions are generally moot unless the problems are capable of repetition yet evading review.'" *Libertarian Party of Ark. v. Martin*, 876 F.3d 948, 951 (8th Cir. 2017) (quoting *Phelps-Roper v. City of Manchester*, 697 F.3d 678, 687 (8th Cir. 2012) (en banc)); *accord SD Voice v. Noem*, 987 F.3d 1186, 1189 (8th Cir. 2021). In this case, Plaintiffs' claims arose because Defendants interpreted Minn. Stat. § 626.90 to require a cooperative agreement as a condition for the Band to exercise law enforcement authority under that statute. When the County revoked

the pre-existing cooperative agreement with the Band in 2016, the County Attorney issued an opinion and protocol stating that the Band no longer possessed law enforcement authority under § 626.90, limited the exercise of the Band's inherent and federally delegated authority to trust lands, and prohibited Band officers from investigating non-Indians or violations of state law. The County Sheriff enforced these limitations, giving rise to Plaintiffs' claims in this case.

When the Band, the County and the County Sheriff entered into a new cooperative agreement in 2018, the County Attorney revoked his Opinion and Protocol and the Sheriff's interference with the exercise of the Band's law enforcement authority stopped. At the time, Defendants argued that the new agreement mooted Plaintiffs' claims by restoring the Band's law enforcement authority under § 626.90, as reflected by the fact that the County Attorney had revoked his Opinion and Protocol. The difficulty with Defendants' argument was that the 2018 Agreement was (and remains) a temporary agreement, which terminates 90 days after the end of this litigation. However, that problem has been resolved with the amendment to § 626.90. By eliminating the requirement for a cooperative agreement, the amendment confers law enforcement authority on the Band regardless of termination of the 2018 Agreement. Under these circumstances,

there is no reason to expect that Defendants' interference with Plaintiffs' law enforcement authority will resume when this case ends.[6]

Moreover, the amendment expands the law enforcement authority that § 626.90 confers on the Band to include authority to enforce violations of state law by all persons throughout the 1855 Reservation boundaries. Together with its elimination of the cooperative agreement requirement, the amendment fully addresses and resolves the problems that gave rise to this case and "'eliminate[s] the need for court action.'" *Hillesheim*, 903 F.3d at 791 (quoting *McCarthy*, 359 F.3d at 1035).[7] Because there is no longer a live controversy with any practical consequences, this Court should dismiss the pending appeals. *Ali*, 419 F.3d at 724.

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[6] The Legislature's power to further amend § 626.90 in the future does not avoid or cure mootness. This Court has "expressed [its] agreement with the Fourth Circuit's position 'that statutory changes that discontinue a challenged practice are usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed.'" *Libertarian Party*, 876 F.3d at 951 (quoting *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 116 (4th Cir. 2000)). "Exceptions to this position are rare and 'typically involve situations where it is virtually certain that the repealed law will be reenacted.'" *Id*. (quoting *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994)).

[7] If, as Defendants repeatedly argued, the authority *previously* conferred by § 626.90 mooted Plaintiffs' claims once the parties entered into the 2018 Agreement, the *broader* authority conferred on the Band by the amendment to § 626.90, when coupled with the elimination of the cooperative agreement requirement, even more clearly moots Plaintiffs' claims.

As noted above, Defendants argued that the 2018 Agreement mooted Plaintiffs' claims against the County Attorney and Sheriff but did not address its effect on Plaintiffs' claims against the County. However, Plaintiffs' claims against the County are identical to their claims against the County Attorney and Sheriff and arise solely from the actions of the County Attorney and Sheriff. Thus, because Plaintiffs' claims against the County Attorney and Sheriff are moot, so too are Plaintiffs' claims against the County. *See* n.2 *supra*.

There is, to be sure, an ongoing dispute among the parties regarding the status of the Mille Lacs Indian Reservation. However, the federal courts have no power to resolve that dispute in the absence of an Article III case or controversy. Thus, this Court previously dismissed the County's effort to obtain a ruling on that issue because it lacked standing, *Cty. of Mille Lacs*, 361 F.3d 460, and the District Court in this case again rejected the County's attempt to seek a ruling on that issue because the County still lacked standing, *see* Ex. D, a ruling that the County has not challenged in this appeal. *See* Brief of Appellant County of Mille Lacs, Minnesota (May 1, 2023) (Entry ID 5271574).

The District Court addressed the status of the Reservation in this case only because it was necessary to resolve Plaintiffs' claims regarding the scope of Plaintiffs' inherent and federally delegated law enforcement authority, claims that Plaintiffs had standing to pursue and that were otherwise justiciable. *See* Ex. A at

24-36. However, because the amendment to Minn. Stat. § 626.90 has rendered those claims moot, appellate resolution of the issue regarding the Reservation's status will have to wait for another day.

IV. THE COURT SHOULD NOT VACATE THE DISTRICT COURT'S RULINGS.

When a case becomes moot on appeal, this Court has the power to vacate the District Court's rulings. *SD Voice*, 987 F.3d at 1190. However, "'vacatur is an equitable remedy, not an automatic right.'" *Id.* (quoting *Moore v. Thurston*, 928 F.3d 753, 758 (8th Cir. 2019) (alteration omitted)). If Defendants seek vacatur, they will "bear the of burden of showing an 'entitlement to this extraordinary remedy.'" *Id*. (quoting *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994) (internal modification normalized)).

In evaluating whether to exercise its discretion to vacate a district court's ruling when a case becomes moot on appeal, this Court typically considers fault and the public interest. *Id*. "In evaluating fault, [the Court] distinguish[es] between situations where a party's own actions moot a case, and situations where mootness arises from mere 'happenstance.'" *Id*. (quoting *Moore*, 928 F.3d at 758). "Considering the public interest, 'judicial precedents are 'presumptively correct and valuable to the legal community as a whole' and generally should be permitted to

stand.'" *Id*. (quoting *Moore*, 928 F.3d at 758 (in turn quoting *U.S. Bancorp*, 513 U.S. at 26)).

In *SD Voice*, the Court held the public interest in the value of the district court's judgment "alone defeat[ed] vacatur" such that it was unnecessary to "wade into … murky waters" to determine whether a state governor was at 'fault' for legislation that rendered a case moot. *Id*. The Court explained that was "particularly true" in *SD Voice* because the district court's decision "work[ed] to protect petition circulation, which the Supreme Court has described as 'core political speech' where 'First Amendment protection is at its zenith.'" *Id*. at 1191 (quoting *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 186-87 (1999)); *accord Moore*, 928 F.3d at 758-59 (declining to vacate judgment after legislation mooted case due to public interest). A precedent may be "particularly valuable" when "it might bear on future … policies respecting a similar subject, and any related disputes." *Freedom From Religion Found. v. Abbott*, 58 F.4th 824, 837 (5th Cir. 2023).

This case was triggered by the County's 2016 termination of its cooperative agreement with the Band under the former version of Minn. Stat. § 626.90. *See* Ex. R at 5-6 (finding that termination was prompted by concerns regarding the status of the Reservation). The case remained alive because the County and the County Sheriff insisted that any new agreement automatically terminate upon the resolution of this case—in effect holding the new agreement hostage to judicial resolution of

the issue regarding the status of the Reservation. To the extent "fault" is to be assigned here, a significant measure of fault rests with the Defendants' use of the cooperative agreement to force litigation over the status of the Reservation.

When the Minnesota Legislature amended Minn. Stat. §§ 626.90-93, it did so not to moot this case but to put tribal law enforcement agencies on an equal footing with all other law enforcement agencies in the State. And while the Band, along with other federally recognized Indian tribes in the State, supported the amendment of § 626.90, *see* Dogeagle Decl. ¶ 9, the Band did so for the same reason and to prevent the law enforcement crisis that it experienced in from 2016 to 2018 – not to render this case moot.

Ultimately, the decision to amend § 626.90 rested with the Minnesota Legislature and Governor, not the Band. As in *SD Voice*, it is not necessary to "wade into these murky waters" to assign fault because "the public interest alone defeats vacatur." 987 F.3d at 1190. The District Court's rulings are presumptively correct and valuable to the public and the legal community as a whole. They address longstanding issues regarding the status of the Mille Lacs Reservation and other Minnesota reservations that were subject to the Nelson Act, issues that the County sought to litigate in its 2002 lawsuit and in its counterclaim in this case. *See* Ex. Q at 74-87. They also address issues regarding tribal law enforcement authority potentially affecting every federally recognized Indian tribe. *See* Ex. R at 38-67.

The District Court's rulings in this case are "particularly valuable" because they may well "bear on future … policies respecting a similar subject, and any related disputes." *Freedom from Religion Found.*, 58 F.4th at 837. For example, as the State of Minnesota explained in an amicus brief filed in the District Court:

> [S]tate agencies with missions that overlap with federal agencies will benefit from the clarity provided by a federal court decision on the reservation boundaries. For example, federal agencies like the U.S. Environmental Protection Agency and the Federal Highway Administration already recognize the 1855 reservation boundaries. In the past, the Minnesota Pollution Control Agency and Minnesota Department of Transportation had to navigate boundary-related issues in working with the federal agencies, although more recently—after the State acknowledged it agrees with the federal government regarding the reservation boundaries—state agencies have been able to work with their federal partner agencies more efficiently. A decision from [the District] Court, recognizing the 1855 treaty boundaries and at long last ending the dispute between Mille Lacs County and the Band, will allow state and federal agencies to work unimpeded in their shared missions.

Amicus Curiae Brief of the State of Minnesota at 11-12 (Feb. 9, 2021) (Dist. Ct. Doc. 250) (Ex. V). Because Defendants will not be bound by decisions from which they were unable to appeal, the District Court's decision will not necessarily end the dispute between the County and the Band. Nevertheless, for the reasons illustrated by the State, preserving the District Court's rulings will provide important guidance for future federal, State and County policies regarding the status of the Mille Lacs Reservation and tribal law enforcement authority. The District Court's rulings thus have substantial independent value that should be preserved.

V. CONCLUSION

For the above reasons, this Court should dismiss the pending appeals as moot.

Dated: June 5, 2023

Respectfully submitted,

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CERTIFICATE OF WORD COUNT COMPLIANCE

The undersigned certify that Appellees' foregoing Motion to Dismiss Appeals as Moot complies with the length and type-size limitations under Federal Rules of Appellate Procedure 27(d)(2) and 32(a). The Motion contains 4,989 words set in Times New Roman, a proportional font, and the type-size is 14 point. The undersigned certify that the word-count stated above was generated by the word-count function of Microsoft Word for Office 365 as specifically applied to include all text, inclusive of footnotes, but exclusive of the caption, signature block and certificate of compliance.

Dated: June 5, 2023

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CERTIFICATES OF SERVICE
FOR DOCUMENTS FILED USING CM/ECF

Certificate of Service When All Case Participants Are CM/ECF Participants

I hereby certify that on June 5, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Cara Hazzard

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Mille Lacs Band of Ojibwe, et al., Appellees, v. Erica Madore, County of Mille Lacs, Kyle Burton, Appellants.	Nos. 23-1257 23-1261 23-1265 **DECLARATION OF BETH BALDWIN IN SUPPORT OF APPELLEES' MOTION TO DISMISS APPEALS AS MOOT**

I, Beth Baldwin, declare:

1. I am counsel of record for the Plaintiffs-Appellees in this case. I make this declaration on personal knowledge.

2. Attached to this declaration are true and correct copies of the following documents:

   a. The District Court's December 21, 2020 memorandum opinion and order in this case (D. Minn. ECF No. 217) (marked **Exhibit A**).

   b. The plaintiffs' Complaint, filed in the District Court on Nov. 17, 2017 as D. Minn. ECF No. 1 (marked **Exhibit B**);

c. Answer and Counterclaim of Defendant County of Mille Lacs, Minnesota, etc., filed in the District Court on Dec. 21, 2017 as D. Minn. ECF No. 17 (marked **Exhibit C**);

d. The District Court's Sept. 19, 2018 memorandum opinion and order in this case (D. Minn. ECF No. 46) (marked **Exhibit D**);

e. Plaintiffs' Response to Walsh and Lorge's Supplemental Memorandum of Law on Mootness, filed in the District Court on Dec. 30, 2021 as D. Minn. ECF No. 308 (marked **Exhibit E**);

f. Defendants' Joint Statement of the Case, filed in the District Court on Nov. 6, 2018 as D. Minn. ECF No. 50 (marked **Exhibit F**);

g. Defendants Walsh and Lorge's Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment on Standing, Ripeness and Mootness, filed in the District Court on July 29, 2020 as D. Minn. ECF No. 176 (marked **Exhibit G**);

h. Defendant County of Mille Lacs, Minnesota's Response Memorandum to Plaintiffs' Motion for Summary Judgment, filed in the District Court on July 29, 2020 as D. Minn. ECF No. 175 (marked **Exhibit H**);

i. Appellants' Motion to Dismiss on Grounds of Mootness, etc., filed in this Court on Aug. 31, 2021 in 8th Cir. No. 21-1138 as Entry ID 5071475 (marked **Exhibit I**);

j. Defendants Walsh and Lorge's Supplemental Memorandum of Law on Mootness, filed in the District Court on Dec. 13, 2021 as D. Minn. ECF No. 305 (marked **Exhibit J**);

k. Joint Motion to Defer Dispositive Motions Regarding the Scope of the Band's Law Enforcement Authority, filed in the District Court on Nov. 11, 2020 as D. Minn. ECF No. 206 (marked **Exhibit K**);

l. Memorandum of Law in Support of Joint Motion to Defer Dispositive Motions, etc., filed in the District Court on Nov. 11, 2020 as D. Minn. ECF No. 208 (marked **Exhibit L**);

m. The District Court's Nov. 16, 2020 Order (D. Minn. ECF No. 211) (marked **Exhibit M**);

n. The District Court's Apr. 14, 2021 Order (D. Minn. ECF No. 290) (marked **Exhibit N**);

o. This Court's Sept. 10, 2021 Judgment (8th Cir. No. 21-1138, Entry ID 5074847) (marked **Exhibit O**);

p. The District Court's Mar. 3, 2022 Order (D. Minn. ECF No. 312) (marked **Exhibit P**);

q. The District Court's Mar. 4, 2022 Memorandum Opinion and Order (D. Minn. ECF No. 313) (marked **Exhibit Q**);

r. The District Court's Jan. 10, 2023 Order on Cross-Motions for Summary Judgment (D. Minn. ECF No. 349) (marked **Exhibit R**);

s. The District Court's Judgment (Jan. 10, 2023) (D. Minn. ECF No. 350) (marked **Exhibit S**);

t. Minn. Laws 2023, ch. 52, art. 10 §§ 26-32 (marked **Exhibit T**);

u. Minnesota Senate Counsel, Research, and Fiscal Analysis Report on S.F. No 2251 – Modifying Law Enforcement of Mille Lacs Band of Chippewa Indians, etc. (Mar. 16, 2023) (marked **Exhibit U**); and

v. Amicus Curiae Brief of the State of Minnesota, filed in the District Court on Feb. 9, 2021 as D. Minn. ECF No. 250 (marked **Exhibit V**).

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed June 5, 2023.

Beth Baldwin

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Mille Lacs Band of Ojibwe, a federally recognized Indian Tribe; Sara Rice, in her official capacity as the Mille Lacs Band Chief of Police; and Derrick Naumann, in his official capacity as Sergeant of the Mille Lacs Police Department, Plaintiffs, v. County of Mille Lacs, Minnesota; Joseph Walsh, individually and in his official capacity as County Attorney for Mille Lacs County; and Don Lorge, individually and in his official capacity as Sheriff of Mille Lacs County, Defendants.	Case No. 17-cv-5155 (SRN/LIB) **MEMORANDUM OPINION AND ORDER**

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Scott M. Flaherty and Scott G. Knudson, Taft Stettinius & Hollister LLP, 80 S. 8th St., Ste. 2200, Minneapolis, MN 55402, for Defendant Joseph Walsh

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SUSAN RICHARD NELSON, United States District Judge

This matter comes before the Court on Plaintiffs' Motion for Summary Judgment on Standing, Ripeness, and Mootness [Doc. No. 146], Defendants Joseph Walsh and Donald Lorge's Motion for Summary Judgment [Doc. No. 162], and Defendants County of Mille Lacs, Walsh, and Lorge's Motion to Strike and for Sanctions [Doc. No. 182]. For the reasons set forth below, Plaintiffs' Motion for Summary Judgment on Standing, Ripeness, and Mootness is **GRANTED**; Defendants Walsh and Lorge's Motion for Summary Judgment is **DENIED**; and Defendants County of Mille Lacs, Walsh, and Lorge's Motion to Strike and for Sanctions is **DENIED**.

I. BACKGROUND

This case involves important and complex issues regarding the boundaries of the Mille Lacs Indian Reservation and, consequently, the extent of the Mille Lacs Band's sovereign law enforcement authority within those boundaries. The present motions before the Court, however, do not seek to resolve these issues at this time. Rather, the present motions address: (1) this Court's subject matter jurisdiction; (2) threshold justiciability issues, including standing, ripeness, and mootness; and (3) certain defenses of immunity. Accordingly, the Court will limit its discussion of the facts to only those necessary to explain its rulings.

A. The Parties and the Mille Lacs Indian Reservation

The Plaintiffs are the Mille Lacs Band of Ojibwe (the "Band"), a federally recognized Indian tribe; Sara Rice, the Chief of Police of the Band; and Derrick Naumann,

a Sergeant in the Band's Police Department (collectively, "Plaintiffs"). (Compl. [Doc. No. 1]; *see* 85 Fed. Reg. 5462, 5464 (Jan. 30, 2020); Baldwin Decl. [Doc. No. 150] Ex. A at 7, Ex. B at 6, Ex. C at 6.) The Defendants are the County of Mille Lacs (the "County"); Joseph Walsh, the Mille Lacs County Attorney; and Don Lorge, the Mille Lacs County Sheriff (collectively, "Defendants"). (*See* Compl. [Doc. No. 1].) In March 2019, Magistrate Judge Brisbois substituted Lorge for Brent Lindgren, a former County Sheriff, after Lindgren left his position and Lorge became the new Sheriff. (Order on Stipulation [Doc. No. 63].)

Article 2 of the 1855 Treaty between the Minnesota Chippewa Tribe and the United States established the Mille Lacs Indian Reservation, which comprises about 61,000 acres of land. (10 Stat. 1165 (Feb. 22, 1855); Quist Decl. [Doc. No. 160] ¶ 3.) In Plaintiffs' view, the Reservation established by the 1855 Treaty has never been diminished or disestablished. (*See generally* Compl. [Doc. No. 1].) Within the Reservation, there are approximately 3,600 acres that the United States holds in trust for the benefit of the Band, the Minnesota Chippewa Tribe, or individual Band members. (Quist Decl. [Doc. No. 160] ¶ 4.) The Band owns in fee simple about 6,000 acres of the Reservation, and individual Band members own in fee simple about 100 acres of the Reservation. (*Id.* ¶¶ 5-6.) In Defendants' view, the Reservation established by the 1855 Treaty was diminished or disestablished by way of subsequent federal treaties, statutes, and agreements. (*See generally* County Answer [Doc. No. 17]; Walsh Answer [Doc. No. 18]; Lindgren Answer [Doc. No. 19].) Although the Court does not wade into this core issue today, it is important to recognize that this case rests on this boundary dispute.

B. The Opinion and Protocol

On June 21, 2016, the County terminated the 2008 law enforcement agreement ("2008 Agreement") it had with the Band and County Sheriff. (Baldwin Decl. [Doc. No. 150] Ex. H.) The 2008 Agreement allowed Band officers to exercise concurrent jurisdiction with the Mille Lacs County Sheriff's Department to enforce Minnesota state law, as provided in Minn. Stat. § 626.90. (*Id.*)

On July 18, 2016, County Attorney Walsh issued the "Mille Lacs County Attorney's Office Opinion on the Mille Lacs Band's Law Enforcement Authority." (Baldwin Decl. [Doc. No. 150] Ex. I (hereafter, "Opinion").) In general, the Opinion outlines Walsh's views regarding the scope of the Band's law enforcement authority after the termination of the 2008 Agreement. (*Id.*) The Opinion concludes, *inter alia*, that the Band's "[i]nherent tribal jurisdiction is limited to 'Indian Country,'" which "is limited to tribal trust lands." (*Id.* at 14.) Moreover, the Opinion concludes that investigations conducted by Band officers outside Pine County are unlikely to be admissible in state court. (*Id.* at 8.) The Opinion explains that:

> As all investigations of state law violations must be completed by a peace officer within his or her state law jurisdiction, either the Mille Lacs County Sheriff's Office or the police department of a municipality must take possession of all evidence gathered regarding that investigation to ensure its admissibility in state court.

(*Id.* at 9.)

The "Northern Mille Lacs County Protocol" further clarifies Walsh's position on Band officers' sovereign law enforcement authority and "is intended to guide law enforcement officers regarding the lawful authority of law enforcement officers" within

the Reservation. (Baldwin Decl. [Doc. No. 150] Ex. J (hereafter, "Protocol").) According to the Protocol, the Band's "inherent tribal criminal authority doesn't extend (1) outside of trust lands or (2) to non-members of the Mille Lacs Band." (*Id.* (emphasis omitted).) The Protocol provides that Band officers "are peace officers of the State of Minnesota with state law enforcement jurisdiction within Pine County only." (*Id.* (emphasis omitted).) Under the Protocol, in Mille Lacs County, Band officers have certain arrest powers, but "must turn over arrested persons without delay to a Mille Lacs County peace officer so an investigation admissible in state court may be conducted." (*Id.* (emphasis omitted).)

Further, the Protocol provides that Band officers "[m]ay [n]ot [l]awfully … [c]onduct investigations regarding violations of state law including statements, investigative stops, traffic stops, and gathering evidence." (*Id.* (emphasis omitted).) Moreover, the Protocol provides that Band officers "[m]ay [n]ot [l]awfully … [i]mpersonate a state peace officer, obstruct justice, or engage in the unauthorized practice of a peace officer, primarily by interfering with investigations within Mille Lacs County." (*Id.*) In a footnote, the Protocol clarifies that Band officers "may conduct investigations where they have tribal jurisdiction (e.g., civil/regulatory citations to Band members and investigations related to inherent tribal criminal authority)." (*Id.*) And the Protocol warns that "State Peace Officers [m]ay [n]ot [l]awfully … [a]uthorize or knowingly allow the unauthorized practice of a peace officer." (*Id.*)

C. Alleged Interference By Defendants with the Band's Sovereign Law Enforcement Authority In Response to the Opinion and Protocol

The record evidence makes clear that Walsh fully expected Band officers to comply with the Opinion and Protocol. The record is also replete with evidence that, pursuant to the Opinion and Protocol, County law enforcement officers repeatedly interfered with law enforcement measures undertaken by Band officers. In fact, Walsh testified that he never "suggested [compliance with the Protocol] was voluntary." (Baldwin Decl. [Doc. No. 150] Ex. K, Walsh Dep. at 305.) In an email to the Band's former Chief of Police Jared Rosati on July 25, 2016, Walsh stated he "trust[s] that [the Protocol] has been provided to all of your officers and that they have been directed to follow it." (*Id.*, Ex. M.) In an August 23, 2016, email to Rosati, after quoting the Protocol, Walsh stated that a Band officer did not have "inherent tribal criminal authority" to investigate a non-Native suspect on the Reservation. (*Id.*, Ex. P at 5.) In an August 25, 2016, letter to Rosati, Walsh wrote that Band officers' conduct in violation of the Opinion and Protocol "could … constitute obstruction of justice and the unauthorized practice of a law enforcement officer." (*Id.*, Ex. N at 2; *see id.*, Ex. K, Walsh Dep. at 297-98 (stating that Band officers' violations of the Opinion and Protocol could constitute violations of state criminal law).)

There is no evidence in the record that compliance with the Opinion and Protocol was voluntary. In a September 20, 2016, letter to Band Police Officer Kintop, Walsh wrote that he "expect[s] all tribal police officers to follow the [Opinion and Protocol] for as long as [they are] in place." (*Id.*, Ex. O at 1.) He told Officer Kintop that "[i]f you wish for controlled substance offenders to be prosecuted in Minnesota District Court in the future, … please comply with the Opinion and Protocol as long as [they are] in effect to ensure that the investigations conducted will be admissible in state court." (*Id.* at 2.) Kali Gardner,

a former Assistant County Attorney under Walsh, testified that she understood that Walsh expected Band officers "to adhere to the prohibitions and the opinion in the [P]rotocol," and that "other officers were advised that they could arrest tribal police officers if they" violated the Protocol. (*Id.*, Ex. L, Gardner Dep. at 60.)

After Walsh issued the Opinion and Protocol, then-Sheriff Lindgren "instructed [his] staff and deputies to follow the County Attorney's Opinion and Protocol." (Lindgren Decl. [Doc. No. 180] ¶ 3.) Indeed, Lindgren's employees all received the Opinion and Protocol and, according to Lindgren, began to follow them. (Baldwin Decl. [Doc. No. 150] Ex. P at 2.) Further, the Sheriffs' deputies monitored Band officers' compliance with the Protocol and tracked violations. (*See id.*, Ex. U (email from County Sergeant Daniel Holada to Lindgren summarizing interactions with Band police over a weekend and listing alleged violations of the Protocol); Ex. V (email from Lindgren instructing Sheriff's deputies to "continue to keep your direct supervisors apprised of day to day operations involving cooperation of Band Officers following County Attorney Opinion and Protocol").) In a June 21, 2016, letter, Lindgren wrote that, when the 2008 Agreement was terminated, "previously dispatched calls for service to the … Band Police Department will be handled by the … County Sheriff's Office." (*Id.*, Ex. W.)

Lindgren made clear that the Opinion and Protocol would be enforced. In an August 22, 2016, email, Lindgren told Band Chief of Police Rosati that the "Sheriff's deputy in charge of the Sheriff's office has the ultimate discretion to control any designated crime scene" and that Lindgren appreciated Rosati's "willingness to undertake [a deputy's] direction and control" on a particular evening. (*Id.*, Ex. P at 6.) In an August 26, 2016,

email, Lindgren directed Sheriff's deputies "to complete independent investigations consistent with the … Opinion and Protocol" and advised that "Band Police are to notify [deputies] before any investigation takes place regarding evidence of criminal activity." (*Id.*, Ex. X.) Lindgren also stated that if Band officers are conducting a civil or regulatory stop of a Band member on trust lands, Band officers' "role in any joint investigation is over" once the civil or regulatory stop is completed, "unless and until [Band officers] are given direction by [Sheriff's deputies] to provide assistance." (*Id.*) In a November 21, 2016, email, a Sheriff's Captain told a Sheriff's deputy that he must take a recorded statement from a Band officer "every time a [B]and officer becomes involved in a criminal investigation and either handles evidence or collects information needed during a criminal investigation." (*Id.*, Ex. Y.)

Sheriff's deputies at times took control of crime scenes from Band officers and repeated investigations that Band officers had completed. Ashley Burton, a former Band officer, described an encounter with a Sheriff's deputy on August 24, 2016, after an arrest of a Band member. (A. Burton Decl. [Doc. No. 154] at ¶¶ 12-16.)[1] She arrested a Band

[1] Defendants move the Court to strike the declarations of Ashley Burton (formerly "Stavish"), Bradley Gadbois, and Scott Heidt, on the grounds that Plaintiffs violated Rules 26(a)(1)(A)(i), 26(e)(1)(A), and 33(b) of the Federal Rules of Civil Procedure. Defendants seek to exclude consideration of these declarations on the grounds that the declarants' identities were not disclosed in Plaintiffs' Rule 26(a) disclosure or in any supplemental disclosure. Plaintiffs respond by noting that the identities of these declarants were in fact disclosed several times during discovery. (*See* Baldwin Decl. [Doc. No. 191] Exs. 1, 2; Kelley Decl. [Doc. No. 185] Ex. 2.) Moreover, Plaintiffs note that Defendants received notice of the incidents described in these declarations and the exhibits attached to the declarations in discovery.

member on trust lands, found drugs and drug paraphernalia on the member, and planned to send that evidence to the Band Solicitor General's office, but the Sheriff's deputy demanded that she turn over the evidence, and she complied. (*Id.*) Moreover, on August 9, 2016, Burton responded to a call involving a domestic dispute on trust lands. (*Id.* ¶¶ 8-11.) After Burton arrived on the scene, a Sheriff's deputy arrived, informed Burton that she was a civilian, and requested a statement from her so that he could arrest the suspect. (*Id.*) Burton declined to give the deputy a statement, and the deputy allowed the suspect to leave. (*Id.*)

A current Band officer, Dusty Burton, stated in his declaration that, on September 2, 2016, he was assisting Crow Wing County deputies with a vehicle pursuit that ended on trust lands. (D. Burton Decl. [Doc. No. 155] ¶¶ 8-10.) While at the scene, he began to interview a passenger in the suspect vehicle, who was providing information about the location of another person with a felony warrant. (*Id.*) In the middle of the interview, a Sheriff's deputy arrived and directed the passenger away from Burton, leaving him unable to complete the investigation. (*Id.*) On November 20, 2016, after Burton responded to a call involving a recent death at a home on Band-owned fee land, a Sheriff's deputy arrived on the scene and told Burton not to search anything and to leave the scene until Sheriff's Office investigators arrived. (*Id.* ¶¶ 15-20.)

The Court denies Defendants' Motion to Strike. On a number of occasions, not only were the identities of these declarants disclosed to Defendants in discovery, evidence of these incidents was also disclosed.

A former Band officer, Scott Heidt, described a further incident on September 8, 2016, when he and another Band officer were investigating a stabbing on trust lands. (Heidt Decl. [Doc. No. 159] ¶¶ 8-11.) During their investigation, they took a taped statement from a witness, but a Sheriff's deputy asked the other Band officer to "hold off on taking the statement." (*Id.*) Heidt allowed the other Band officer to finish taking his statement, and then the Sheriff's deputy took his own taped statement. (*Id.*)

Plaintiff Sergeant Naumann testified about an incident that occurred during the revocation period[2] when he and other Band officers initiated a traffic stop, located a Department of Corrections fugitive, removed noncompliant passengers from the vehicle, and found a firearm within the vehicle. (Baldwin Decl. [Doc. No. 150] Ex. Z, Naumann Dep. at 82.) While Band officers were searching the vehicle, a Sheriff's deputy arrived and "was yelling at us telling us to stop searching the vehicle and basically getting in the way of my investigation, preventing me from conducting a thorough investigation." (*Id.*) In a subsequent email on October 24, 2017 to then-Sheriff Lindgren, the Sheriff's deputy involved stated that he "took control of the scene." (*Id.*, Ex. AA.)

Bradley Gadbois, a current Band investigator who worked as a Band officer in 2017, described an incident on September 29, 2017, when he investigated a car and suspect on the Reservation. (Gadbois Decl. [Doc. No. 158] ¶¶ 10-18.) After Gadbois searched the car and interviewed the driver, a Sheriff's deputy arrived on the scene and conducted his own

[2] The Court uses the term "revocation period" to refer to the period of time from the County's termination of the 2008 Agreement until the time the Band, County, and Sheriff entered into the 2018 Agreement, discussed *infra*.

search and interview. (*Id.*) On another occasion, on November 3, 2017, Gadbois was investigating a parked vehicle containing a driver and a passenger, who was showing signs of an opioid overdose. (*Id.* ¶¶ 20-25.) After Gadbois administered Narcan to the passenger, which revived him, two Sheriff's deputies arrived on the scene, and a methamphetamine pipe was found in the vehicle. (*Id.*) Gadbois wanted to conduct a drug investigation of the vehicle, but was prevented from doing so under the Protocol without the cooperation of the Sheriff's deputies. (*Id.*) The deputies neither arrested the driver nor took custody of the vehicle. (*Id.*)

James West, the Band's Deputy Police Chief, testified that "there was an interruption in [Band] officers' investigations" and that "[w]hen [Band officers] show up on a scene, domestic or whatever it might be, they start talking to a victim or holding a suspect, and a sheriff's deputy arrives and butt right in and take over the interview, or take possession of somebody that's technically not under arrest." (Baldwin Decl. [Doc. No. 150] Ex. BB, West Dep. at 47-48.) Moreover, Band Sergeant Naumann testified that Band officers "had to just stand by and let [Sheriff's deputies] take over our scene." (*Id.*, Ex. Z, Naumann Dep. at 94.)

At the Band's Rule 30(b)(6) deposition, Michael Dieter, a Sergeant in the Band's Police Department, testified that "[o]ften times county deputies would try to take statements from officers as witnesses rather than just relying on our reports. They would often take multiple statements. If we took a statement from a witness, they might take a second statement from the same witness." (*Id.*, Ex. CC, Rule 30(b)(6) Band Dep. at 182-83.) Former Assistant County Attorney Gardner testified that Band police "were treated as

witnesses and not as law enforcement officers" and that Sheriff's "deputies were instructed to take statements from" Band officers. (*Id.*, Ex. L, Gardner Dep. at 42, 61-62.)

D. The Band's Compliance with the Opinion and Protocol

Todd Matha, as the Band's Solicitor General, supervised the Band's police department. (Baldwin Decl. [Doc. No. 150] Ex. DD, Matha Dep. at 205-09.) Matha disagreed with Walsh's mandates, as set forth in the Opinion and Protocol, but Matha nonetheless directed Band officers to follow them, out of fear that Band officers would face criminal and civil penalties if they disobeyed them. (Baldwin Decl. [Doc. No. 150] Ex. DD, Matha Dep. at 205.) Matha also wanted to avoid disputes between the Band and the County that might serve to undermine law enforcement in the area. (*Id.* at 205-09.) Similarly, Band Chief of Police Rosati directed Band officers to follow the Opinion and Protocol in light of the potential imposition of criminal and civil penalties on them and to avoid endangering the prosecutions of any suspects that Band officers investigated. (*Id.*, Ex. EE, Rosati Dep. at 92-93, 102, 116-17, 211.)

After Rice became the Band's Police Chief, she continued to ensure that Band officers followed the Protocol because she did not want to jeopardize the career of any Band officer and feared that Band officers would "go to jail." (*Id.*, Ex. GG, Rice Dep. at 150-51.) Rice was especially concerned about the restrictions that the Protocol imposed on Band officers' ability to use force: "What if we were to have to arrest somebody or something happened, or use of force issue, or even deadly force? That was my concern. So I just didn't—we just made sure we abided by [the Protocol]." (*Id.* at 151.) Band Sergeant Craig Nguyen testified to a similar concern: "There are circumstances when it comes to

officers' personal safety when officers need to use a fire[arm], not to discharge it but to gain control of certain subjects involving crimes that are high violence in nature involving weapons, drugs, gangs, so on and so forth. [The Protocol] restrict[s] us not being able to do that." (*Id.*, Ex. HH, Nguyen Dep. at 46.)

Rice testified that, although County Sheriff Lindgren told her informally that Band officers would not be arrested or prosecuted, she did not trust his assurances because he was committed to following the mandates of the Protocol. (*Id.*, Ex. GG, Rice Dep. at 157, 204-05.) Rice acknowledged that no one had yet been arrested but she believed that was so "[b]ecause we followed the [P]rotocol." (*Id.* at 205.) Assistant County Attorney Gardner testified that County "officers were advised that they could arrest tribal police officers if they" violated the Protocol. (*Id.*, Ex. L, Gardner Dep. at 60.) The Band's Deputy Police Chief West testified that "[t]here was a lot of fear within the officers regarding getting arrested for impersonating officers" under the Protocol. (*Id.*, Ex. BB, West Dep. at 37-38.) West confirmed that "[o]fficers followed the [P]rotocol." (*Id.* at 42.)

According to Band Sergeant Naumann, "[the Protocol] caused [Band officers] to not be able to effectively do [their] jobs because guys were afraid to proactively patrol and initiate traffic stops." (*Id.*, Ex. Z, Naumann Dep. at 92.) Naumann elaborated that "your career is potentially in jeopardy if someone decides to prosecute you for doing your job that you've done for years, and we weren't able to do our jobs." (*Id.*) Accordingly, Naumann concluded that "[b]ased on the Northern Protocol trying to restrict our ability to do our job … the only thing that we felt safe without being charged with a crime or prosecuted for doing our jobs was arrest people on warrants." (*Id.* at 84-86.)

In a December 2016 letter to the United States Attorney's Office in Minnesota and the Department of Justice in D.C., Walsh wrote that "the Mille Lacs County Sheriff's Office has taken on all state law enforcement services provided in the entirety of Mille Lacs County" and that a "tenuous status quo has been followed by the Mille Lacs County Sheriff's Office and the Mille Lacs Band Police Department based on my Opinion and Protocol." (*Id.*, Ex. JJ; *see id.*, Ex. KK, Walsh Dep. at 378.) In his deposition, Walsh conceded that the letter was not in fact entirely accurate, notably failing to advise federal officials that the County Sheriff's Office had taken on the role of investigating all violations of state law on trust lands and had assumed responsibility for responding to all calls and investigating all violations of state law on non-trust lands. (Baldwin Decl. [Doc. No. 150] Ex. KK, Walsh Dep. at 377-78.)

E. The Decline in Morale in the Mille Lacs Band Police Department and the Resignations of Several Band Officers

Band Solicitor General Matha testified that "[Band officers] took offense at … being relegated to essentially witnesses at a scene that had no more authority in relation to a criminal action than would often times just a bystander," and that this contributed to "a decrease in morale and just this lack of understanding as to how it was that they were to perform their job." (Baldwin Decl. [Doc. No. 150] Ex. DD, Matha Dep. at 201-02.)

According to Naumann, the Opinion "in not so many words [said Walsh] was going to threaten to arrest and prosecute our officers for doing our jobs. It was insulting, demeaning, threatening …. [and] terrible." (*Id.*, Ex. Z, Naumann Dep. at 20.) He testified that Band officers "were deterred from protecting our community," "[could]n't do

anything," and were "[n]othing more than glorified security guards." (*Id.* at 92, 98.) Moreover, he testified that during the revocation period "[w]e lost officers because of not having a cooperative agreement. We had officers leaving. Morale went down. It was pretty terrible for the most part. It was the worst two and a half years of law enforcement in my career." (*Id.* at 101.) Rice testified that she was injured "[p]rofessionally because of the Northern Protocol" and that the Protocol "deterred [her] from doing [her] job completely." (*Id.*, Ex. GG, Rice Dep. at 11-12, 187.)

Former Band Officer Dusty Burton stated that the Sheriff's deputies' interference with his investigations "undermined [his] credibility as a police officer within the community and negatively affected my morale and that of my fellow Tribal Police officers." (D. Burton Decl. [Doc. No. 155] ¶ 21.) Similarly, Band Officer Gadbois noted that the Sheriff's Office's practice of repeating investigations completed by Band officers in front of criminal suspects "undermined the credibility, authority and morale" of Band officers. (Gadbois Decl. [Doc. No. 158] ¶ 19.)

Several Band officers consequently resigned from their jobs. Heidt explained that "[o]ne of the reasons why I left the Tribal Police Department was because of the restrictions that the County Attorney's Protocol placed on me as a licensed peace officer." (Heidt Decl. [Doc. No. 159] ¶ 13.) Similarly, Ashley Burton stated she "left the Tribal Police Department because of the restrictions that the County Attorney's Northern Protocol placed on me as a licensed peace officer. I wanted to exercise my full authority as a Tribal Police Officer and serve the Mille Lacs Reservation communities to the fullest." (A. Burton Decl. [Doc. No. 154] ¶ 25.) Gardner testified that "[s]everal [Band] officers left their department.

I know of at least a handful that went to completely different agencies because they were not allowed to be police officers, and that's what they wanted their career to be." (Baldwin Decl. [Doc. No. 150] Ex. L, Gardner Dep. at 46-47.)

F. Lack of County Law Enforcement Response to Criminal Activity on the Reservation

Band Chief of Police Rosati testified that, after Walsh issued the Opinion and Protocol, "life as a patrol cop ceased to exist. We didn't feel we had the authority to go out and do our jobs, like make arrests. Like if we rolled up on a DWI, we wouldn't be able to make that arrest. Our protocol was to have the county come deal with it." (Baldwin Decl. [Doc. No. 150] Ex. EE, Rosati Dep. at 101.) Rosati explained that "[o]nce … the criminal element on the reservation found out that we no longer had authority, they knew it. And they would blatantly say it to our officers, 'You can't even arrest me.'" (*Id.* at 103; *see* Gadbois Decl. [Doc. No. 158] ¶¶ 26-29 (describing encounter on March 21, 2018, where suspect refused to comply with Band officer's instruction because, according to suspect, Band officer was "not a cop").)

Rosati further testified that the termination of the 2008 Agreement made it more difficult for Band officers to address drug crimes and overdoses: "[t]he people know when you're not making arrests or doing what we normally did, that word traveled pretty quick, so it made it pretty difficult for my officers to continue our normal course of action, as far as combatting those overdoses." (Baldwin Decl. [Doc. No. 150] Ex. EE, Rosati Dep. at 197.) He testified that Band officers "[m]ade every effort to attempt or tried to follow the

[P]rotocol," which "limit[ed] their ability to investigate crime on non-trust land" and "limit[ed] their ability to investigate crime on trust lands." (*Id.* at 211.)

Band Chief of Police Rice testified that:

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

(*Id.*, Ex. GG, Rice Dep. at 176.)

Band Sergeant Nguyen testified that Band officers "driving around and being present" was no longer a deterrent to criminal activity because people "knew we didn't have law enforcement authority when they saw a tribal cop." (*Id.*, Ex. HH, Nguyen Dep. at 76.) And that, in Ngyuen's view, "increased the drug availability, and people from out of town, people who we did not know came and with them they brought drugs, and the gang activity also increased." (*Id.*)

Similarly, former Assistant County Attorney Gardner testified that Band officers' "credibility amongst the community deteriorated very quickly, because the community members knew that they, [Band] officers, were not allowed to do anything." (*Id.*, Ex. L, Gardner Dep. at 46.)

According to Rosati, after the County terminated the 2008 Agreement, he did not believe the Sheriff's deputies stationed "within [the Band] community knew the people

like [Band officers] knew our people." (*Id.*, Ex. EE, Rosati Dep. at 123.) He noted that Band officers "actually understand the family trees within the community." (*Id.* at 213.) Naumann testified that "statements [were] being taken from victims twice and from people that aren't familiar with the community that don't know the community, the community members, and the family structure." (*Id.*, Ex. Z, Naumann Dep. at 100.)

In the view of former Assistant County Attorney Gardner, Band officers' knowledge of and connections in the Band community were "absolutely important and priceless" from a law enforcement perspective. (*Id.*, Ex. L, Gardner Dep. at 23-24; *cf id.* at 27 (explaining that some Sheriff's deputies had some knowledge of the Band community, but they had less knowledge than Band officers).) According to Band member Colin Cash, Band officers "know the Band community and they care about the community. They also know who belongs in the community and who is an outsider. … When Sheriff's deputies took over for Band police, they did not know the people or the area. It became free [rein] for people using drugs and committing crimes. … The Sheriff's deputies didn't know the drug houses or the dealers. It was an open market for drugs." (Cash Decl. [Doc. No. 156] ¶¶ 8-9, 11.)

Several witnesses noted a decline in police work after the revocation of the 2008 Agreement. Rosati testified that Band officers engaged in very proactive policing before the 2008 Agreement was revoked, but he did not observe Sheriff's deputies engaging in proactive policing after the revocation. (Baldwin Decl. [Doc. No. 150] Ex. EE, Rosati Dep. at 213.) Gardner testified that "deputies, when they were on the north end during the revocation, did not proactively patrol the reservation. Instead, they waited at the north end sheriff's station for a call to come in." (*Id.*, Ex. L, Gardner Dep. at 69.) According to

Naumann, the Protocol "caused us to not be able to effectively do our jobs because guys were afraid to proactively patrol and initiate traffic stops," and Sheriff's deputies "weren't conducting proactive patrols." (*Id.*, Ex. Z, Naumann Dep. at 92, 101.) During the Band's Rule 30(b)(6) deposition, Band Sergeant Dieter testified that the Protocol deterred patrol officers "from wanting to go out and be proactive under the idea if they were proactive and violated the Northern Protocol that they could be arrested for it." (*Id.*, Ex. CC, Rule 30(b)(6) Band Dep. at 210-11.)

After the termination of the 2008 Agreement, the Sheriff's Office hired additional deputies. (Flaherty Decl. [Doc. No. 178] Ex. 15, Mott Dep. at 16-17; Lindgren Decl. [Doc. No. 180] ¶ 10.) Rice testified that, although the Sheriff's Office hired more deputies during the revocation period, "there was nothing being done" because "tribal police were proactive" while Sheriff's deputies were "all reactive." (Baldwin Decl. [Doc. No. 150] Ex. GG, Rice Dep. at 180-81.) Rice elaborated that the Reservation became a "police free zone" when "people saw the traffic stops and nothing happened. There [weren't] any search warrants being executed on the reservation. There was police presence, but they knew we were limited. You had deputies running around telling them we're not cops." (*Id.* at 182.)

G. Impact on Public Safety

Wade Lennox, a State Corrections Officer who works with felony offenders on the Reservation, testified regarding the impact of the Opinion and Protocol on public safety. (*See* Baldwin Decl. [Doc. No. 150] Ex. SS, Lennox Dep.) Lennox testified that he saw Band officers "out interacting with the community members. It was clear that part of their

mission work was to be available, regardless of the need." (*Id.* at 17.) However, Lennox observed several changes that he noted in an April 4, 2017, email to Rice:

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

(Baldwin Decl. [Doc. No. 150] Ex. TT.) Former Assistant County Attorney Gardner testified that Lennox's observations in this email were accurate. (*Id.*, Ex. L, Gardner Dep. at 67-68.)

In an October 10, 2017, email to Walsh, Lennox wrote that "there simply is not the law enforcement presence on the Reservation there had been and that has dramatically impacted our probationary work" and that he "see[s] County [Sheriff's deputies] patrolling, but not even remotely close to what was being done." (*Id.*, Ex. UU.) According to Lennox, after the termination of the 2008 Agreement, "[t]he general perception from the offenders we were working with at the time was [kind of] free rein." (*Id.*, Ex. SS, Lennox Dep. at 15.) "[T]here was a general sense that [the Reservation] became almost a safe haven [for drug trafficking]." (*Id.* at 27-28.)

In November 2017, then United States Secretary of the Interior, Ryan Zinke, traveled to the Reservation. (Dieter Decl. [Doc No. 157] ¶ 7.) Because of the high levels

of drug trafficking, use, and overdoses on the Reservation, the Office of Justice Services in the Bureau of Indian Affairs ("BIA") "temporarily assigned BIA Special Agents to conduct saturation patrols and work with Band police officers to help address these problems." (*Id.*) The BIA Special Agents and Band officers carried out joint drug investigations in 2018. (*Id.* ¶ 9.) Band officers notified Sheriff's deputies of these investigations before they occurred. (*Id.* ¶ 10.)

H. Special Law Enforcement Commissions ("SLECs")

On January 8, 2016, under the Tribal Law and Order Act of 2010 ("TLOA"), Pub. L. No. 111-211, 124 Stat. 2258, the United States agreed to assume concurrent federal criminal jurisdiction over the Band's Indian country, effective January 1, 2017. (Baldwin Decl. [Doc. No. 150] Ex. LL.) On December 20, 2016, the BIA and the Band entered into a Deputation Agreement, allowing the BIA to issue SLECs to qualified Band officers. (*Id.*, Ex. MM.) The Deputation Agreement allowed Band officers who held SLECs, such as Naumann, to enforce federal law within the Band's Indian country. (*Id.*; *see id.*, Ex. NN (Band officers' SLEC cards), Ex. Z, Naumann Dep. at 38.)

Walsh acknowledged that his view was that Band officers holding SLECs could not exercise SLEC authority on non-trust lands within the 1855 Treaty boundaries. (Baldwin Decl. [Doc. No. 150] Ex. KK, Walsh Dep. at 384-85.) In an email to a Band officer, Walsh explained that, although the Protocol predated the issuance of the SLECs, the Protocol remained in force and should be followed to avoid any challenges to jurisdiction. (*Id.*, Ex. OO at 2-3.)

I. The 2018 Agreement

In September 2018, the Band, County, and then County Sheriff Lindgren entered into a "Mutual Aid/Cooperative Agreement." (Baldwin Decl. [Doc. No. 150] Ex. AAA.) Under this Agreement, on a temporary basis, the parties agreed that the Band has concurrent jurisdiction with the Sheriff under Minn. Stat. § 626.90: (1) over all persons on trust lands; (2) over all Band members within the boundaries of the 1855 Treaty; and (3) over any person committing or attempting to commit a crime in the presence of a Band officer within the boundaries of the 1855 Treaty. (*Id.* ¶ 4(a).) However, the Agreement provides that:

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

(*Id.* ¶ 25(c).)

II. PROCEDURAL HISTORY

On November 17, 2017, the Band, Rice, and Naumann sued the County, Walsh, and Lindgren, seeking declaratory and injunctive relief, as well as costs and attorneys' fees. (Compl. [Doc. No. 1] at 7-8.) First, Plaintiffs seek a declaration that, under federal law, the Band has:

> inherent sovereign authority to establish a police department and to authorize Band police officers to investigate violations of federal, state and tribal law within the Mille Lacs Indian Reservation as established in [the 1855 Treaty], and, in exercising such authority, to apprehend suspects (including Band and

> non-Band members) and turn them over to jurisdictions with prosecutorial authority.

(*Id.* at 7.)

> Second, Plaintiffs seek a declaration that:
>
> Pursuant to 18 U.S.C. § 1162(d), 25 U.S.C. §§ 2801 and 2804, the Deputation Agreement between the Band and the [BIA], and the SLECs issued to Band police officers by the [BIA], Band police officers have federal authority to investigate violations of federal law within the Mille Lacs Indian Reservation as established in [the 1855 Treaty], and, in exercising such authority, to arrest suspects (including Band and non-Band members) for violations of federal law.

(*Id.*)

Finally, Plaintiffs seek to enjoin Defendants from taking any actions that interfere with Band officers' authority, as determined by this Court. (*Id.* at 8.)

On April 27, 2020, Magistrate Judge Brisbois entered the Third Amended Pretrial Scheduling Order, which, *inter alia*, granted the parties leave to file early dispositive motions "only so far as are outlined in their Joint Motion for Leave to File Early Dispositive Motions." (Third Am. Pretrial Scheduling Order [Doc. No. 138] at 6.) In their Joint Motion, the parties only sought leave to file the following dispositive motions: "(1) Plaintiffs' motion for summary judgment that they have standing and that their claims are ripe and not moot; (2) the Defendant County Attorney and County Sheriff's motion for summary judgment on their immunity defenses; and (3) the Defendant County Attorney's motion for summary judgment that the Court lacks subject matter jurisdiction." (Jt. Mot. [Doc. No. 132] at 1-2.)

III. DISCUSSION

A. Standard of Review

Summary judgment is appropriate if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A fact is 'material'" if it may affect the outcome of the lawsuit. *TCF Nat'l Bank v. Mkt. Intelligence, Inc.*, 812 F.3d 701, 707 (8th Cir. 2016). Likewise, an issue of material fact is "genuine" only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The moving party bears the burden of establishing a lack of any genuine issue of material fact in dispute, *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), and the Court must view the evidence and any reasonable inferences in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

Walsh and Lorge move for summary judgment alleging that this Court lacks subject matter jurisdiction over this matter or, alternatively, that they are nevertheless immune from suit. Plaintiffs move for summary judgment on three threshold issues of justiciability: standing, ripeness, and mootness.

The Court first considers Walsh's and Lorge's challenge to subject matter jurisdiction.

B. Subject Matter Jurisdiction

Defendants Walsh and Lorge contend that there is no basis under federal law for the Court to exercise federal question subject matter jurisdiction over any of Plaintiffs' claims of interference with the Band's sovereign law enforcement authority. (Walsh and Lorge Mem. in Supp. of Mot. for Summ. J. ("Ind. Defs.' Mem. Summ. J.") [Doc. No. 164] at 14-31.) Defendants further argue that Congress's enactment of the TLOA precludes the Court from applying federal common law to the issues raised in this case.[3] (*Id.* at 21-22.) In response, Plaintiffs contend that the Court may exercise federal question subject matter jurisdiction over each of its claims under federal common law, 28 U.S.C. § 1331 and § 1362, 25 U.S.C. § 2804, and under certain treaties. (Pls.' Mem. in Opp'n to Mot. for Summ. J. ("Pls.' Opp'n Summ. J.") [Doc. No. 173] at 12-24.)

Federal courts are "courts of limited jurisdiction" and only possess those powers authorized by the Constitution and by statute. *Gunn v. Minton*, 568 U.S. 251, 256 (2013) (internal quotations and citation omitted). Under 28 U.S.C. § 1331, federal district courts "shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." To determine whether a claim "arises under" federal law, federal courts apply the "well-pleaded complaint" rule. *Great Lakes Gas Transmission Ltd. P'ship v. Essar Steel Minn. LLC*, 843 F.3d 325, 329 (8th Cir. 2016). This rule "provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Id.* (quoting *Caterpillar Inc. v. Williams*, 482 U.S.

[3] The parties debate whether the TLOA provides a private right of action. However, since the Plaintiffs have not plead any cause of action under the TLOA, the Court declines to address this issue.

386, 392 (1987)). "Federal question jurisdiction exists if the well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Id.* (quoting *Williams v. Ragnone*, 147 F.3d 700, 702 (8th Cir. 1998)).

It is well established that questions of federal common law can serve as a basis for the exercise of federal question subject matter jurisdiction under § 1331. *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972); *see Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985). Indeed, in the context of federal Indian law, federal courts apply federal common law "as a necessary expedient when Congress has not spoken to a *particular* issue." *United States v. Lara*, 541 U.S. 193, 207 (2004) (discussing *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 233-37 (1985)) (internal quotations and citations omitted) (emphasis in original).

Federal courts have often treated the scope of a tribe's inherent sovereign authority as a matter of federal common law. *See Lara*, 541 U.S. at 205-07; *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206, 212 (1978); *United States v. Terry*, 400 F.3d 575, 579-80 (8th Cir. 2005) (citing *Strate v. A-1 Contrs.*, 520 U.S. 438, 456 n.11 (1997); *Duro v. Reina*, 495 U.S. 676, 696-97 (1990)); *see also Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1321 (9th Cir. 1983) ("Increasingly, the legal boundaries of tribal sovereignty are being defined by case law."); 1 Cohen's Handbook of Federal Indian Law § 7.04 (2019) ("Federal question jurisdiction … extends to claims based on federal common law, including cases involving … challenges to the exercise of state authority in Indian country."); *id.* § 7.04 n.9 (collecting cases).

Consistent with the above authority, the Ninth Circuit has specifically held that the scope of a tribe's inherent sovereign law enforcement authority is a matter of federal common law. *See Bishop Paiute Tribe v. Inyo Cnty.*, 863 F.3d 1144, 1151-52 (9th Cir. 2017). In that case, the Bishop Paiute Tribe brought a declaratory judgment action against a county, a sheriff, and a district attorney, seeking, *inter alia*, a declaration that the Tribe had "the authority on its Reservation to stop, restrain, investigate violations of tribal, state and federal law, detain, and transport or deliver a non-Indian violator to the proper authorities." *Id.* at 1150. The Ninth Circuit held that it had subject matter jurisdiction under § 1331 because the Tribe "allege[d] that federal common law grants the Tribe the authority to 'investigate violations of tribal, state, and federal law, detain, and transport or deliver a non-Indian violator to the proper authorities'" and that the "[t]he Defendants' arrest and charging of [a tribal officer]" allegedly violated such federal common law. *Id.* at 1152.

Here, Plaintiffs similarly allege that the scope of the Band's sovereign law enforcement authority is defined by federal common law, hence raising a federal question sufficient to confer subject matter jurisdiction on this Court. Specifically, Plaintiffs allege that, "[a]s a matter of federal common law, the Band possesses inherent sovereign authority to establish a police force and to authorize Band police officers to investigate violations of federal, state and tribal law within the Reservation." (Compl. [Doc. No. 1] ¶ H.) Plaintiffs further allege that, "[a]lso as a matter of federal common law, the Band possesses inherent sovereign authority to authorize its police officers to apprehend suspects and turn them over to jurisdictions with criminal prosecutorial authority." (*Id.*) In support of their allegations that Defendants have interfered with their sovereign law enforcement authority,

Plaintiffs cite to the County Attorney's threats of prosecution and arrest against Band officers as well as the County's instructions to the Sheriff's deputies not to arrest suspects apprehended by Band police officers. (*See id.* ¶¶ M-Q.) Accordingly, Plaintiffs have raised issues of federal common law on the face of their well-pleaded Complaint. As a result, they have adequately pleaded a federal question over which this Court has subject matter jurisdiction under § 1331.

Defendants rely primarily on the decision of the Eighth Circuit in *Longie v. Spirit Lake Tribe*, 400 F.3d 586 (8th Cir. 2005), to support their claim that the issues raised in this case are matters of tribal and/or state law, not federal law. (Ind. Defs.' Mem. Summ. J. at 19.) However, *Longie* is inapposite. It involved a disputed land transfer between a tribe and a member of that tribe. *Longie*, 400 F.3d at 590-91. The resolution of that dispute turned on whether there was a contract or other legal basis to force the tribe to effectuate the transfer under tribal law. *Id.* Unlike the disputed land transfer in *Longie* between the tribe and its member that raises issues under tribal law, the instant case raises issues of sovereign authority as between the Band and the County under federal common law. In fact, the Eighth Circuit made that very distinction in *Longie* when it described the United States Supreme Court's decision in *Nat'l Farmers Union Ins. Cos.* as "finding jurisdiction under section 1331 because federal common law establishes the limits of tribal sovereignty." *Id.* at 590 (citing *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985)).

Moreover, Walsh and Lorge's argument that Congress has already acted in the area of tribal law enforcement authority by enacting the TLOA, thus precluding the Court from

applying federal common law, is unavailing. While congressional legislation can displace federal common law under certain circumstances, "[t]he test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute 'speak[s] directly to [the] question' at issue." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423-24 (2011). Importantly, the TLOA does not speak to the scope of the Band's sovereign law enforcement authority. Rather, it creates a federal program through which certain tribal officers may assist federal authorities in the enforcement of federal criminal law in Indian country. *See* 25 U.S.C. § 2804. Accordingly, Congress has not displaced federal common law that serves to define the scope of a tribe's sovereign law enforcement authority.

Plaintiffs have raised issues of federal common law on the face of their well-pleaded Complaint, sufficient to confer federal question subject matter jurisdiction on this Court as to each of Plaintiffs' claims.

C. Justiciability

Next, the Court considers Plaintiffs' motion for summary judgment on three threshold justiciability doctrines: standing, ripeness, and mootness. According to Plaintiffs, the record evidence establishes that they have standing and that their claims are ripe and not moot. The Court considers each of these issues in turn.

1. Standing

Article III of the Constitution limits the jurisdiction of federal courts to certain "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. "One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue."

Clapper v. Amnesty Int'l U.S.A., 568 U.S. 398, 408 (2013). To establish Article III standing, a plaintiff must show—as an "irreducible constitutional minimum"—the existence of three elements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). First, there must be an "injury in fact." *Id.* Second, "there must be a causal connection between the injury and the conduct complained of," such that the injury is "fairly trace[able] to the challenged action of the defendant." *Id.* Third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (quotations and citation omitted). Standing "in no way depends on the merits of the plaintiffs' contention that particular conduct is illegal." *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

First, the Court considers whether Plaintiffs have suffered an injury in fact. Plaintiffs allege that they have suffered several related injuries in fact that establish standing: (1) interference with and infringement of the Band's sovereign law enforcement authority; (2) resulting injuries to Plaintiffs Rice and Naumann's abilities to practice their chosen professions; (3) harm to morale causing several officers to resign; and (4) a resulting decline in effective law enforcement and public safety. (Pls.' Mem. in Supp. of Mot. for Partial Summ. J. ("Pls.' Mem. Summ. J.") [Doc. No. 148] at 27-32.) Walsh and Lorge argue, to the contrary, that none of these injuries are sufficient to confer standing. (Walsh and Lorge Mem. in Opp'n to Mot. for Partial Summ. J. ("Ind. Defs.' Opp'n Summ. J.") [Doc. No. 176] at 29-45.)

"To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016)

(quoting *Lujan*, 504 U.S. at 560). Importantly, courts have long recognized that tribes have legally protected rights in their sovereignty and, accordingly, that infringement of those rights confers standing. *See Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 468 n.7 (1976) (a tribe's "discrete claim of injury" to "tribal self-government" can "confer standing" in a case involving a state's imposition of taxes); *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 463 (2d Cir. 2013) ("actual infringements on a tribe's sovereignty constitute a concrete injury sufficient to confer standing"); *Quapaw Tribe of Okla. v. Blue Tee Corp.*, 653 F. Supp. 2d 1166, 1179 (N.D. Okla. 2009) ("Indian tribes, like states and other governmental entities, have standing to sue to protect sovereign or quasi-sovereign interests."). Indeed, a tribe has a legally protected interest in exercising its inherent sovereign law enforcement authority. *Bishop Paiute Tribe v. Inyo County*, 863 F.3d 1144, 1153 (9th Cir. 2017); *see also Confederated Tribes & Bands of the Yakama Nation v. Yakima Cnty.*, 963 F.3d 982, 989 (9th Cir. 2020). In *Bishop Paiute Tribe*, for example, the Ninth Circuit found that a tribe has a legally protected interest in its "inherent sovereign authority to restrain, detain, and deliver to local authorities a non-Indian on tribal lands that is in violation of both tribal and state law." 863 F.3d at 1153. Consistent with this authority, the Court finds that the Band has a legally protected interest in exercising its inherent sovereign law enforcement authority.

As discussed earlier, the evidence in the record reveals numerous actual, concrete, and particularized incidents in which the Band's police officers have been restricted from carrying out their law enforcement duties pursuant to the Opinion and Protocol. The County concedes as much but argues that it is justified in doing so and challenges the extent

and scope of the Band's sovereign law enforcement authority. The resolution of this issue is for another day. For purposes of Article III standing, however, those injuries in fact are actual, concrete, and particularized and therefore confer standing on the Band to challenge the County's conduct.

Second, the Court considers whether Plaintiffs' injuries are fairly traceable to the challenged actions of Defendants in issuing and enforcing the Opinion and Protocol. "When government action or inaction is challenged by a party who is a target or object of that action, as in this case, 'there is ordinarily little question that the action or inaction has caused him injury.'" *Minn. Citizens Concerned for Life v. FEC*, 113 F.3d 129, 131 (8th Cir. 1997) (quoting *Lujan*, 504 U.S. at 561-62).

Plaintiffs argue that their injuries are fairly traceable to Defendants' conduct for three reasons. First, they argue that the evidence of record is clear that compliance with the Opinion and Protocol, despite being titled as such, was mandatory. (Pls.' Mem. Summ. J. at 32.) Second, Plaintiffs argue that Walsh clearly communicated to the Band police department that violations of the Opinion and Protocol could result in criminal and/or civil liability. (*Id.*) Finally, Plaintiffs note that Lindgren and his deputies repeatedly enforced the Opinion and Protocol. (*Id.*)

Walsh and Lorge contend that Plaintiffs' injuries are not fairly traceable to Defendants' actions for several reasons. First, they argue that the Opinion and Protocol did not actually restrict the Band's law enforcement authority because the Band "chose to cooperate with" the Opinion and Protocol on the advice of its Solicitor General, Matha. (Ind. Defs.' Opp'n Summ. J. at 33-34.) Second, they argue that Walsh never actually

threatened a Band officer with prosecution and Lindgren never actually threatened a Band officer with arrest. (*Id.* at 34-35.)

The Court finds that Plaintiffs' injuries are fairly traceable to Defendants' challenged conduct. The record is replete with evidence that County law enforcement and Band officials alike understood that compliance with the Opinion and Protocol was mandatory. Walsh made clear that violations of the Opinion and Protocol could result in criminal and/or civil enforcement. (*See, e.g.*, Baldwin Decl. [Doc. No. 150] Ex. N at 2.) And, as discussed earlier, Lindgren and his deputies enforced the Opinion and Protocol by actively interfering in the Band's criminal investigations, even on trust lands.

The Court finds unavailing the Defendants' argument that the Band's decision to follow the Opinion and Protocol, on the advice of its Solicitor General, to avoid potential criminal and civil liability, is the actual and intervening cause of these injuries. That argument "wrongly equates injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation." *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997). Indeed, "[a] plaintiff is not deprived of standing merely because he or she alleges a defendant's actions were a contributing cause instead of the lone cause of the plaintiff's injury." *City of Wyo. v. P&G*, 210 F. Supp. 3d 1137, 1151-52 (D. Minn. 2016) (collecting cases).

Defendants' arguments that they never actually threatened prosecution or arrest also miss the mark. First, Walsh made it clear that the Opinion and Protocol was to be enforced. Second, this lawsuit does not seek tort damages for prosecution or arrest under the Opinion and Protocol. Rather, it seeks a declaratory judgment that the Band's sovereign authority

has been infringed. The particularized injury that confers standing in this case is that very interference with the Band's sovereign law enforcement authority. Accordingly, the Court finds that Plaintiffs' injuries are "fairly traceable" to Defendants' alleged unlawful conduct.

Finally, in order to confer standing, the Court must find that it will be likely that the injury will be redressed by a favorable decision. In this case, the declaratory and injunctive relief sought is specifically designed to do just that—to recognize and restore the Band's sovereign law enforcement authority.

Accordingly, the Court finds that Plaintiffs have met their burden of establishing standing to pursue these claims.

2. Ripeness

Next, Plaintiffs seek summary judgment on the issue of ripeness. Whether a claim is ripe depends on "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Public Water Supply Dist. No. 10 v. City of Peculiar*, 345 F.3d 570, 572-73 (8th Cir. 2003) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). A plaintiff must satisfy both elements "at least to a minimal degree." *Id.* (citing *Nebraska Pub. Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1039 (8th Cir. 2000)). Under the "fitness for judicial decision" prong of the analysis, whether a case is fit "depends on whether it would benefit from further factual development." *Id.* at 573. A case "is more likely to be ripe if it poses a purely legal question and is not contingent on future possibilities." *Id.* Under the hardship prong, the plaintiff must have "sustained or is immediately in danger of sustaining some direct injury as the result of the challenged" conduct. *Id.* (quoting *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)).

Plaintiffs contend that their claims are ripe because the mandates of the Opinion and Protocol, as enforced by the County and the Sheriff, have repeatedly infringed on their sovereign law enforcement authority. (Pls.' Mem. Summ. J. at 35.) In response, Defendants argue that the Band has not in fact suffered a cognizable injury. (Ind. Defs.' Opp'n Summ. J. at 46-51.)

Plaintiffs satisfy both prongs of the ripeness analysis. This case is clearly fit for judicial decision. And under the "hardship prong," Plaintiffs have presented a record with sufficient evidence that they have sustained a direct injury to their sovereign law enforcement authority as a result of the challenged conduct.

3. Mootness

Finally, Plaintiffs move for summary judgment on the issue of mootness, contending that the 2018 Agreement, which temporarily granted the Band the same law enforcement powers that it possessed before the County revoked the 2008 Agreement, does not moot this case. A case can become moot by a party's voluntary cessation of the challenged conduct if it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Wright v. RL Liquor*, 887 F.3d 361, 363 (8th Cir. 2018) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). The party asserting that a case is moot bears a "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again." *Friends of the Earth*, 528 U.S. at 189 (internal quotations and citation omitted).

Defendants fail to meet this burden. If this case is dismissed, on mootness grounds, the 2018 Agreement will, by its very terms, terminate, and it is highly probable that the

parties will continue to dispute the extent of the boundaries of the Reservation and the extent of the Band's sovereign law enforcement authority. It is certainly not "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 189 (citation omitted).

D. Walsh and Lorge's Defenses of Immunity

Next, the Court considers Defendants Walsh's and Lorge's defenses of immunity from suit. Specifically, they argue: (1) that the Tenth Amendment bars this action because Plaintiffs unlawfully seek to control Walsh's prosecutorial discretion; (2) that *Younger* abstention is appropriate and principles of federalism and comity preclude the Court from awarding injunctive relief; (3) that the Eleventh Amendment immunizes Walsh and Lorge from this suit; and (4) that absolute prosecutorial immunity insulates Walsh and Lorge from this suit. (*See* Ind. Defs.' Mem. Summ. J. at 31-46.) The Court considers each of these arguments in turn.

1. Tenth Amendment and Prosecutorial Discretion

The gravamen of Defendants' claims of immunity under the Tenth Amendment rest on their prosecutorial discretion. Walsh and Lorge argue that Plaintiffs seek to interfere with that discretion and that Plaintiffs improperly ask this Court to review their charging decisions. (Ind. Defs.' Mem. Summ. J. at 31-36.) Plaintiffs respond that Defendants fundamentally misunderstand their claims. Plaintiffs argue that they do not seek to interfere with any charging decision. (Pls.' Opp'n Summ. J. at 25.) Rather, they seek clarity as to their sovereign law enforcement authority and they ask for an order preventing Walsh and Lorge from interfering with that authority. (*Id.*)

The Court is not aware of any authority, nor do Defendants cite any authority, for the proposition that a judicial declaration of the scope of a tribe's sovereign law enforcement authority or a judicial order prohibiting interference with that authority runs afoul of the Tenth Amendment.

It is well established that the Tenth Amendment does not foreclose federal courts from preventing state (or local) officials from infringing upon rights secured by federal law. *See Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 828-29 (10th Cir. 2007); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 928 n.44 (8th Cir. 1997), *aff'd*, 526 U.S. 172 (1999). For instance, when the Mille Lacs Band sought to prevent Minnesota officials from interfering with the Band's treaty-based rights to hunt, fish, and gather, the Eighth Circuit rejected a Tenth Amendment defense because the "case [was] about state law infringing on rights guaranteed by federal law, and there is no question that federal courts have the power to order state officials to comply with federal law." *Mille Lacs Band*, 124 F.3d at 928 n.44 (citations omitted). Accordingly, Walsh and Lorge's defense of immunity based on their prosecutorial discretion under the Tenth Amendment fails.

2. *Younger* Abstention and Principles of Federalism and Comity

Walsh and Lorge urge the Court to dismiss them from this case under the *Younger* abstention doctrine, and they contend that the Court cannot issue an injunction under the principles of federalism articulated in *Rizzo v. Goode*, 423 U.S. 362 (1976), and *O'Shea v. Littleton*, 414 U.S. 488 (1974).

The *Younger* abstention doctrine arose out of principles of comity articulated by the United States Supreme Court in *Younger v. Harris*, 401 U.S. 37 (1971). Under that doctrine, federal courts must "abstain from taking jurisdiction over federal constitutional claims that involve or call into question ongoing state proceedings." *Diamond "D" Const. Corp. v. McGowan*, 282 F.3d 191, 198 (2d Cir. 2002) (citing *Younger*, 401 U.S. at 43-44). Specifically, the Court is required to abstain when: "(1) there is an ongoing state proceeding, (2) that implicates important state interests, and (3) that provides an adequate opportunity to raise any relevant federal questions." *Tony Alamo Christian Ministries v. Selig*, 664 F.3d 1245, 1249 (8th Cir. 2012) (citing *Plouffe v. Ligon*, 606 F.3d 890, 894-95 (8th Cir. 2010)). If these three conditions are satisfied, "principles of comity and federalism preclude federal actions seeking injunctive or declaratory relief." *Id.*

"Circumstances fitting within the *Younger* doctrine ... are 'exceptional'; they include … 'state criminal prosecutions,' 'civil enforcement proceedings,' and 'civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions.'" *Sprint Communs., Inc. v. Jacobs*, 571 U.S. 69, 73 (2013) (quoting *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 367-68 (1989)). Unless the case is deemed to be "exceptional," however, the general rule applies—"the pendency of an action in [a] state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910)).

Defendants Walsh and Lorge argue that this Court must abstain from hearing this case under the *Younger* abstention doctrine. Specifically, they argue that the effect of injunctive relief in this case would be to improperly enjoin pending or threatened criminal prosecutions. (Ind. Defs.' Mem. Summ. J. at 36-38.) Plaintiffs respond that there is no pending state court proceeding in which the Band's sovereign law enforcement authority will be adjudicated, let alone one that qualifies as "exceptional" under Supreme Court precedent. They note that this Court has previously held that *Younger* abstention would be inappropriate in a case seeking a determination of the extent of the Band's treaty rights relating to hunting, fishing, and gathering, even in the presence of pending criminal prosecutions. (Pls.' Opp'n Summ. J. at 30 (citing *Mille Lacs Band of Chippewa Indians v. Minn. Dep't of Nat. Res.*, 853 F. Supp. 1118, 1132 (D. Minn. 1994))).

The Court agrees with the Plaintiffs. *Younger* abstention is simply not applicable in the absence of both a state and federal proceeding considering the same federal constitutional claims. Therefore, Defendants' motion for summary judgment based on the *Younger* abstention doctrine is denied.

Next, Walsh and Lorge contend that federalism and comity principles under *Rizzo v. Goode*, 423 U.S. 362 (1976), and *O'Shea v. Littleton*, 414 U.S. 488 (1974), preclude the Court from granting injunctive relief in this case.

In *Rizzo*, the Supreme Court struck down an injunction revising the internal procedures of the Philadelphia police department based, in part, on principles of federalism. 423 U.S. at 377-81. The Court explained that "[w]here … the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the special delicacy of

the adjustment to be preserved between federal equitable power and State administration of its own law." *Id.* at 378 (internal quotations and citations omitted). Further, the Court noted that such federalism concerns "have applicability where injunctive relief is sought … against those in charge of an executive branch of an agency of state or local governments." *Id.* at 380. In *O'Shea*, the Court struck down an injunction that sought to control and prevent specific events that might occur during state prosecutions, which, according to the Court, constituted "an ongoing federal audit of state criminal proceedings." 414 U.S. at 491, 500.

Walsh and Lorge contend that an injunction in this case would run afoul of the principles of federalism and comity under *Rizzo* and *O'Shea*. They warn that the Court "could be forced to referee jurisdictional disputes between the Sheriff and tribal police" and "the injunction would require continuous supervision by the federal courts over the administration of state executive functions." (Ind. Defs.' Mem. Summ. J. at 36-38.) In response, Plaintiffs argue that this case does not raise federalism concerns under *Rizzo* and *O'Shea* because here, Plaintiffs seek only a declaration as to the scope of their sovereign law enforcement authority. (Pls.' Opp'n Summ. J. at 31-35.) Nothing, they contend, in *Rizzo* or *O'Shea* bars such relief. (*Id.*)

The Court agrees that federalism principles under *Rizzo* and *O'Shea* do not preclude injunctive relief in this case. The Eighth Circuit has recognized that the federalism concerns in *Rizzo* only apply in "quite narrow circumstances." *Chambers v. Marsh*, 675 F.2d 228, 232 (8th Cir. 1982), *rev'd on other grounds*, *Marsh v. Chambers*, 463 U.S. 783 (1983). Unlike the injunction in *Rizzo*, Plaintiffs do not request an order "revising the internal

procedures" of the County Attorney's Office or Sheriff's Office. Rather, Plaintiffs seek to enjoin interference with their sovereign law enforcement authority, a matter of federal law. Accordingly, although federal courts must be cognizant of federalism concerns under *Rizzo*, "they must, and do, retain power to enforce compliance with" federal law. *Youakim v. Miller*, 562 F.2d 483, 491 (7th Cir. 1977).

Likewise, the federalism concerns articulated in *O'Shea* do not exist here. Unlike the plaintiffs in *O'Shea*, Plaintiffs do not seek an "ongoing federal audit" of any state proceedings. *See* 414 U.S. at 500. Rather, they ask this Court to define the extent of their sovereign law enforcement authority and enjoin any interference with that authority. *O'Shea* has no applicability to this case.

Accordingly, to the extent that Defendants move for summary judgment based on principles of federalism and comity articulated in *Rizzo* and *O'Shea*, the motion is denied.

3. Eleventh Amendment Immunity

Next, Walsh and Lorge argue that the Eleventh Amendment renders them immune from Plaintiffs' "official capacity" claims. Under the Eleventh Amendment, however, "only States and arms of the State possess immunity from suits authorized by federal law." *N. Ins. Co. v. Chatham Cnty.*, 547 U.S. 189, 193 (2006). The Supreme Court has consistently declined to extend Eleventh Amendment immunity to counties, even when "such entities exercise a 'slice of state power.'" *Id.* at 193-94 (quoting *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979)); *see Greenwood v. Ross*, 778 F.2d 448, 453 (8th Cir. 1985) ("It is settled that a suit against a county, a municipality, or other lesser governmental unit is not regarded as a suit against a

state within the meaning of the Eleventh Amendment." (quoting *Gilliam v. City of Omaha*, 524 F.2d 1013, 1015 (8th Cir. 1975))).

Whether an agency qualifies as an "arm of the state" under the Eleventh Amendment is a question of federal law that requires an analysis of the "provisions of state law that define the agency's character." *Thomas v. St. Louis Bd. of Police Comm'rs*, 447 F.3d 1082, 1084 (8th Cir. 2006) (quoting *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 n.5 (1997)). Specifically, courts must analyze "the agency's degree of autonomy and control over its own affairs and, more importantly, whether a money judgment against the agency will be paid with state funds." *Id.*

Applying the analytical framework in *Thomas*, the Court finds that Eleventh Amendment immunity does not shield Walsh and Lorge from liability here, because they are not "arms of the state." First, under Minnesota law, the County Attorney and Sheriff have wide autonomy and control over their affairs, wholly apart from the state. *See Thomas*, 447 F.3d at 1084. For example, the County Attorney and the Sheriff are not subject to state control in the execution of their statutory duties. Minn. Stat. § 388.051 (establishing County Attorney's duties); *id.* § 387.03 (establishing Sheriff's powers and duties). Moreover, the County Attorney and Sheriff are both elected positions. *Id.* § 382.01. And as elected county officials, the County Attorney and Sheriff can be removed through a petition containing the signatures of at least 25 percent of the number of people who voted in the last election for the county office that is the subject of the petition. *Id.* §§ 351.15-23; *see id.* § 351.14, subd. 5. Also, the County Board, not the state, sets and pays the salary of the County Attorney. *Id.* § 388.18, subd. 2, 5; *id.* § 388.22 subd. 1, 2. Likewise, the County

Board sets the Sheriff's salary. *Id.* § 387.20, subd. 2(a). Accordingly, the County Attorney and the Sheriff have significant autonomy and control over their affairs apart from the state.

Second, and "more importantly," *Thomas*, 447 F.3d at 1084, Minnesota law provides that a money judgment against Walsh and Lorge would be paid with county, not state, funds. Specifically, Minnesota law provides that "[w]hen a judgment is recovered against … a county officer, in an action … against the officer officially … the judgment shall be paid from funds in the [county] treasury," and if such funds are unavailable in the county treasury, "the unpaid amount of the judgment shall be levied and collected as other county charges." Minn. Stat. § 373.12. Thus, although Plaintiffs do not seek a money judgment in this case, a money judgment against Walsh and Lorge would be paid by the county.

Walsh and Lorge note that several of their duties and powers arise from Minnesota state statutes, such as Walsh's duty to enforce state water laws and Lorge's power to pursue and apprehend persons suspected of criminal activity. (*See* Ind. Defs.' Mem. Summ. J. at 41.) However, this demonstrates that Walsh and Lorge exercise, at most, "slices of state power" but does not establish that they are acting as "arms of the state" under the Eighth Circuit's framework in *Thomas*.

Accordingly, the Eleventh Amendment does not bar Plaintiffs' "official capacity" claims against Walsh and Lorge.

4. Absolute Prosecutorial Immunity

Next, Walsh and Lorge seek dismissal from this case on the ground of absolute prosecutorial immunity. Absolute prosecutorial immunity protects prosecutors from suits

for damages "arising out of their official duties in initiating and pursuing criminal prosecutions." *Saterdalen v. Spencer*, 725 F.3d 838, 842 (8th Cir. 2013) (quoting *Williams v. Hartje*, 827 F.2d 1203, 1208 (8th Cir. 1987)). However, absolute prosecutorial immunity does not extend to "[a] prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings." *Stockley v. Joyce*, 963 F.3d 809, 817 (8th Cir. 2020) (quoting *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993)). Specifically, "prosecutors are not entitled to absolute immunity for their actions in giving legal advice to the police," because providing advice to the police is "not a function 'closely associated with the judicial process.'" *Buckley v. Fitzsimmons*, 509 U.S. 259, 271 (1993) (quoting *Burns v. Reed*, 500 U.S. 478, 495 (1991)).

According to Walsh, the conduct at issue in this case—his "alleged, threatened prosecution of" Plaintiffs—relates to his prosecutorial function, and thus he should be immune from suit. (Ind. Defs.' Mem. Summ. J. at 43-44.) If Walsh is entitled to prosecutorial immunity, Defendants argue that Lorge is likewise entitled to immunity for following Walsh's "legal advice." (*Id.* at 46.) In response, Plaintiffs contend that Walsh's and Lorge's conduct at issue in this case does not fall within the scope of prosecutorial immunity and that, in any event, prosecutorial immunity cannot shield Walsh and Lorge because Plaintiffs do not seek money damages. (Pls.' Opp'n Summ. J. at 44-47.)

As a threshold matter, although prosecutors enjoy absolute prosecutorial immunity from damages liability in certain circumstances, absolute prosecutorial immunity does not extend to actions for declaratory and injunctive relief. *See Supreme Court v. Consumers*

Union of United States, 446 U.S. 719, 736 (1980) ("Prosecutors enjoy absolute immunity from damages liability, but they are natural targets for § 1983 injunctive suits" (citation omitted)); *Heartland Acad. Cmty. Church v. Waddle*, 427 F.3d 525, 531 (8th Cir. 2005) (citing and quoting *Consumers Union* for the proposition that "prosecutors, as state enforcement officers, are 'natural targets for § 1983 injunctive suits'"); *Bishop Paiute Tribe v. Inyo Cnty.*, No. 1:15-cv-00367-DAD-JLT, 2018 U.S. Dist. LEXIS 4643, at *21 (E.D. Cal. Jan. 10, 2018) (holding that absolute prosecutorial immunity defense was unavailable in suit arising under federal common law and seeking only injunctive and declaratory relief).

District Courts within the Eighth Circuit have also held that absolute prosecutorial immunity does not apply in an action for declaratory and injunctive relief. *See, e.g.*, *Richter v. Smith*, No. C16-4098-LTS, 2018 U.S. Dist. LEXIS 215431, at *21 (N.D. Iowa Dec. 21, 2018) ("absolute immunity bars recovery of money damages only"); *Kurtenbach v. S.D. AG*, 2018 U.S. Dist. LEXIS 53208, at *7 (D.S.D. Mar. 29, 2018) ("Immunities, i.e., absolute, prosecutorial or qualified immunity are not a bar to plaintiffs action for injunctive and declaratory relief under Section 1983." (internal quotations and citations omitted)); *Oglala Sioux Tribe v. Hunnik*, 993 F. Supp. 2d 1017, 1033 (D.S.D. 2014) (holding that State's Attorney was "not entitled to prosecutorial immunity for prospective injunctive or declaratory relief" where plaintiff did not seek money damages); *Hayden v. Nev. Cnty.*, No. 08-4050, 2009 U.S. Dist. LEXIS 22004, at *11 (W.D. Ark. Mar. 6, 2009) ("absolute immunity does not protect a prosecutor from claims for injunctive relief"). Here, Plaintiffs do not seek money damages—they seek only declaratory and injunctive relief.

Accordingly, Walsh and Lorge are not entitled to dismissal from this suit on the ground of absolute prosecutorial immunity.

5. Walsh and Lorge's Remaining Arguments

Walsh and Lorge raise several other arguments. First, they seek dismissal of the "official capacity" claims asserted against them on the ground that such claims are redundant. Second, they seek dismissal of the "individual capacity" claims asserted against them on the grounds that (1) equitable relief cannot be obtained against government officials in their individual capacities and (2) Plaintiffs have failed to state "individual capacity" claims against Walsh and Lorge because their allegations all involve official conduct. Third, they request a ruling that qualified immunity bars Plaintiffs from seeking costs and attorney's fees from Walsh and Lorge in their individual capacities and that there is no statutory basis to award Plaintiffs costs and attorney's fees against Walsh and Lorge in their individual capacities. (*See* Ind. Defs.' Mem. Summ. J. at 46-55.)

The Court declines to consider these arguments at this time. The Third Amended Scheduling Order did not authorize Walsh and Lorge to seek summary judgment on these issues through an early dispositive motion. (Third Am. Pretrial Scheduling Order [Doc. No. 138] at 6; *see* Jt. Mot. [Doc. No. 132] at 1-2.) Walsh and Lorge may raise these arguments again, if and when it is appropriate to do so.

IV. CONCLUSION

Based on the foregoing, and the entire file and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Plaintiffs' Motion for Summary Judgment on Standing, Ripeness, and Mootness [Doc. No. 146] is **GRANTED**;
2. Defendants Walsh and Lorge's Motion for Summary Judgment [Doc. No. 162] is **DENIED**;
3. Defendants County of Mille Lacs, Walsh, and Lorge's Motion to Strike and for Sanctions [Doc. No. 182] is **DENIED**.

IT IS SO ORDERED.

Dated: December 21, 2020

s/Susan Richard Nelson
SUSAN RICHARD NELSON
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

MILLE LACS BAND OF OJIBWE, a federally recognized Indian tribe; SARA RICE, in her official capacity as the Mille Lacs Band Chief of Police; and DERRICK NAUMANN, in his official capacity as Sergeant of the Mille Lacs Band Police Department, Plaintiffs, v. COUNTY OF MILLE LACS, MINNESOTA; JOSEPH WALSH, individually and in his official capacity as County Attorney for Mille Lacs County; and BRENT LINDGREN, individually and in his official capacity as Sheriff of Mille Lacs County, Defendants.	COMPLAINT

1. **Plaintiffs.** Plaintiff, the Mille Lacs Band of Ojibwe ("Band") is a federally recognized Indian tribe. Plaintiff Sara Rice is an enrolled member of the Mille Lacs Band, the Chief of the Mille Lacs Band Police Department, and a peace officer licensed by the Minnesota Board of Police Officer Standards and Training. Plaintiff Derrick Naumann is a Sergeant of the Mille Lacs Band Police Department, a peace officer licensed by the Minnesota Board of Police Officer Standards and Training, and holds a Special Law Enforcement Commission issued by the United States Bureau of Indian Affairs.

2. **Defendants.** Defendant County of Mille Lacs ("County") is a county located in the State of Minnesota. Under Minnesota law, the County may sue and be sued. Defendant Joseph Walsh is the County Attorney for Mille Lacs County. The County Attorney is an elected County official. Defendant Brent Lindgren is the Sheriff of Mille Lacs County. The Sheriff is an elected County official.

3. **Jurisdiction.** The Court has jurisdiction over this action under 28 U.S.C. §§ 1331 and 1362. This is a civil action arising under the Constitution, laws and treaties of the United States, and it is brought by an Indian band with a governing body duly recognized by the Secretary of the Interior. Plaintiffs seek declaratory and injunctive relief to prevent continuing violations of federal law by Defendants.

4. **Venue.** Venue is proper in the District of Minnesota under 28 U.S.C. § 1391(b). All Defendants reside in the District of Minnesota, and all of Defendants' actions or omissions giving rise to Plaintiffs' claim described herein occurred within the District of Minnesota.

5. **Statement of the Claim.**

A. The Mille Lacs Indian Reservation ("Reservation") was established in 1855 by Article 2 of the Treaty with the Chippewa, 10 Stat. 1165 (Feb. 22, 1855). The Reservation comprises approximately 61,000 acres of land. The United States owns approximately 3,572 acres of land within the Reservation in trust for the Band, the Minnesota Chippewa Tribe and Band members ("trust lands"). In addition, the Band owns approximately 6,038 acres within the Reservation in fee simple and, as of February 2015, Band members owned approximately 84 acres within the Reservation in fee simple (collectively, "Band fee lands").

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B. The boundaries of the Reservation as established in 1855 have not been disestablished or diminished. In particular, the Treaty with the Chippewa of the Mississippi and the Pillager and Lake Winnibigoshish Bands, 12 Stat. 1249 (Mar. 11, 1863), and the Treaty with the Chippewa, Mississippi, and Pillager and Like Winnibigoshish Bands, 13 Stat. 693 (May 7, 1864), preserved the Reservation for the Mille Lacs Band, and the Act of January 14, 1889, 25 Stat. 642 (known as the Nelson Act) did not disestablish or diminish the Reservation or alter the Reservation's boundaries.

C. All lands within the Reservation as established in 1855 are Indian country within the meaning of 18 U.S.C. § 1151.

D. Approximately 1,850 Band members live within the Reservation. Some Band members live on trust lands while others live on Band fee lands.

E. The Band's government center, which includes the offices of the Band's Chief Executive, the Band Assembly (the legislative branch of Band government) and the Band's court, is located within the Reservation. The Band owns and operates schools, health clinics, community centers, housing, water and wastewater infrastructure, and other facilities within the Reservation. The Band also owns and operates a major gaming and entertainment complex and other commercial establishments within the Reservation. Some of these facilities are located on trust lands, while others are located on Band fee lands.

F. The Reservation is located within Mille Lacs County. The Band's government and commercial operations within Mille Lacs County employ approximately 2,000 people, including many non-Band members.

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G. Under 18 U.S.C. § 1162, the United States, the Band and the State of Minnesota each have certain criminal and law enforcement jurisdiction within the Reservation.

H. As a matter of federal common law, the Band possesses inherent sovereign authority to establish a police force and to authorize Band police officers to investigate violations of federal, state and tribal law within the Reservation. Also as a matter of federal common law, the Band possesses inherent sovereign authority to authorize its police officers to apprehend suspects and turn them over to jurisdictions with criminal prosecutorial authority. The scope of the Band's inherent law enforcement authority is an issue of federal law.

I. Under Band law, the Band established and maintains a police department authorized to promote public safety, protect members of the Band and Band property, preserve the peace, and work with other law enforcement agencies to promote the peace. The Band has authorized its law enforcement officers to make arrests and to carry handguns, other firearms, and other weaponry for their personal protection and the protection of others.

J. The police officers employed by the Band's police department are all peace officers licensed by the Minnesota Board of Police Officer Standards and Training.

K. The United States has concurrent criminal jurisdiction within the Reservation under 18 U.S.C. § 1162(d). In December 2016, the United States Bureau of Indian Affairs entered into a Deputation Agreement with the Band and subsequently issued Special Law Enforcement Commissions (SLECs) to Band police officers under 25 U.S.C. §§ 2801 and 2804. Pursuant to the Deputation Agreement, the SLECs and federal law, Band police officers have authority to investigate violations of federal law throughout the Reservation and to arrest suspects (including Band members and non-Band members) as federal law enforcement officers. Plaintiff Naumann,

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along with other licensed peace officers employed by the Band's Police Department, holds an SLEC from the Bureau of Indian Affairs issued under the Deputation Agreement. The authority possessed by Band police officers under the Deputation Agreement and the SLECs is an issue of federal law.

L. According to statistics published by the Minnesota Bureau of Criminal Apprehension, Mille Lacs County had the highest crime rate of any county in Minnesota during 2015 and 2016. Within Mille Lacs County, a disproportionate amount of criminal activity occurs within the Reservation. Criminal activity within the Reservation is not limited to trust lands, but takes place on Band and non-Band member fee lands as well.

M. Defendants Mille Lacs County, the County Attorney and the County Sheriff assert that Band police officers have no law enforcement authority within the Reservation except on trust lands. Those assertions are contrary to federal law.

N. Defendants Mille Lacs County, the County Attorney and the County Sheriff assert that Band police officers have no authority to investigate violations of federal, state or tribal law by non-Band members, even on trust lands. Those assertions are contrary to federal law.

O. The County Attorney has threatened Band police officers, including Plaintiffs Rice and Naumann, with arrest and prosecution if they exercise law enforcement authority on non-trust lands within the Reservation or with respect to non-Band members. Those threats have deterred Plaintiffs Rice and Naumann and other Band police officers from exercising law enforcement authority they possess as a matter of federal law.

P. The County Attorney has asserted that he will not prosecute criminal cases based on investigations conducted, or evidence gathered, by Band police officers on non-trust lands

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within the Reservation or with respect to non-Band members. Those assertions are based on an erroneous understanding of the authority possessed by Band law enforcement officers under federal law and have deterred Plaintiffs Rice and Naumann and other Band police officers from exercising the authority they possess as a matter of federal law.

Q. The County Sheriff and the County Attorney have instructed the Sheriff's deputies not to arrest suspects apprehended by Band police officers exercising their inherent tribal and federally delegated law enforcement authority. Those instructions are based on an erroneous understanding of the authority possessed by Band law enforcement officers under federal law and have deterred Plaintiffs Rice and Naumann and other Band police officers from exercising the authority they possess as a matter of federal law.

R. Defendants' assertions, threats of prosecution and instructions, as set forth above, have been made or issued by the County Attorney and/or the County Sheriff on behalf of the County and are the official custom or policy of the County.

S. Defendants' assertions, threats of prosecution and instructions, as set forth above, have deterred Band police officers from exercising law enforcement authority conferred upon them by the Band pursuant to: (1) the Band's inherent authority under federal law; (2) the Deputation Agreement between the Band and the Bureau of Indian Affairs; and (3) the SLECs issued to Band police officers by the Bureau of Indian Affairs.

T. Defendants, through the assertions, threats of prosecution and instructions set forth above have deterred Band police officers from responding to criminal activity within the Reservation, including drug trafficking, gang activity and violence that threatens the safety, health, welfare and well-being of Band and non-Band members who live and work within, and visit, the

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Reservation. Defendants' assertions, threats of prosecution and instructions, as set forth above, have interfered with the lawful exercise of federal and tribal law enforcement authority.

U. Defendants' assertions, threats of prosecution and instructions, as set forth above, are contrary to federal law.

V. Defendants' assertions, threats of prosecution and instructions, as set forth above, 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 resolution by this Court.

Demand for Relief

1. Pursuant to 28 U.S.C. § 2201, Plaintiffs request that the Court declare that:

A. As a matter of federal law, the Band possesses inherent sovereign authority to establish a police department and to authorize Band police officers to investigate violations of federal, state and tribal law within the Mille Lacs Indian Reservation as established in Article 2 of the Treaty with the Chippewa, 10 Stat. 1165 (Feb. 22, 1855), and, in exercising such authority, to apprehend suspects (including Band and non-Band members) and turn them over to jurisdictions with prosecutorial authority; and

B. Pursuant to 18 U.S.C. § 1162(d), 25 U.S.C. §§ 2801 and 2804, the Deputation Agreement between the Band and the Bureau of Indian Affairs, and the SLECs issued to Band police officers by the Bureau of Indian Affairs, Band police officers have federal authority to investigate violations of federal law within the Mille Lacs Indian Reservation as established in Article 2 of the Treaty with the Chippewa, 10 Stat. 1165 (Feb. 22, 1855), and, in exercising such authority, to arrest suspects (including Band and non-Band members) for violations of federal law.

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2. Plaintiffs further request that the Court enjoin Defendants from taking or failing to take any actions that interfere with the authority of Band police officers as declared by the Court.

3. Plaintiffs further request an award of their costs and attorneys' fees in this action.

Dated: November 17, 2017

s/ Marc D. Slonim
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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

Plaintiffs, Counterclaim Defendants,

vs.

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

Defendants,

and

County of Mille Lacs, Minnesota,

Counterclaim Plaintiff,

vs.

Sara Rice, individually; Derrick Naumann, individually; Melanie Benjamin, individually and in her official capacity as Chief Executive of the Mille Lacs Band of Ojibwe Tribal Council; Carolyn Shaw-Beaulieu, individually and in her official capacity as Secretary/Treasurer of the Mille

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

ANSWER AND COUNTERCLAIM OF DEFENDANT COUNTY OF MILLE LACS, MINNESOTA, INCLUDING COUNTERCLAIM/ COMPLAINT AGAINST THIRD PARTY COUNTERCLAIM DEFENDANTS

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

Counterclaim Defendants.

Defendant County of Mille Lacs, Minnesota, as and for its Answer and Counterclaim to the Complaint in the above-referenced matter, alleges and states as follows:

Except as expressly hereinafter admitted, modified or otherwise answered, the County denies each and every allegation of the Complaint.

1. **Plaintiffs**. As to the first sentence of Paragraph 1, the County admits that the Mille Lacs Band of Ojibwe is a constituent member of the federally recognized Indian tribe Minnesota Chippewa Tribe, but is without sufficient information to affirm or deny the allegations of the first sentence of Paragraph 1, and therefore denies same and puts Plaintiff to its strict proof thereof. On information and belief the County admits the second and third sentences of Paragraph 1.

2. **Defendants.** The County admits the allegations of Paragraph 2.

3. **Jurisdiction.** As to Paragraph 3, the County admits that the Court has jurisdiction over actions arising under the Constitution, laws and treaties of the United States under 28 U.S.C. §§ 1331 and 1362. The County denies that the Court has jurisdiction over the claims brought by Plaintiffs, in whole or in part, which are barred by the jurisdictional limitations contained in the Indian Claims Commission Act of 1946, 60 Stat. 1049, § 12. As to the second sentence of Paragraph 3, the County admits that this is a civil action brought under the Constitution, laws and treaties of the United States, and deny any other allegations of the second sentence of Paragraph 3. As to the third sentence of Paragraph 3, the County denies that Plaintiffs are entitled to the relief sought and denies that the Defendants are in violation of federal law.

4. **Venue.** As to Paragraph 4, the County admits that venue is proper in the District of Minnesota under 28 U.S.C. § 1391(b), admits that the Defendants reside in the State of Minnesota, and denies the remaining allegations of Paragraph 4.

5. **Statement of the Claim.**

5.A. As to the allegations of Paragraph 5.A, the County admits that the Mille Lacs Indian Reservation was established in 1855 by Article 2 of the Treaty with the Chippewa, 10 Stat. 1165 (February 22, 1855), but denies any allegation or implication that such Reservation has not been disestablished. As to the second

sentence of Paragraph 5.A, the County admits that the Reservation originally comprised approximately 61,000 acres of land, but said Reservation has been diminished or disestablished. As to the third sentence of Paragraph 5.A, the County admits that the United States owns approximately 3,572 acres of land in trust in Mille Lacs County, but denies that those lands are within the 1855 Mille Lacs Reservation because the 1855 Mille Lacs Reservation was disestablished. As to the allegations of the last sentence of Paragraph 5.A, the County is without sufficient information to admit or deny the amount of acres owned in fee by the Band or by Band members in Mille Lacs County, and further denies that any said lands are within the 1855 Reservation, which has been disestablished. The County puts the Band to its strict proof thereof as to the fee acres owned by the Band and its members.

5.B. Denies the allegations of Paragraph 5.B.

5.C. Denies the allegations of Paragraph 5.C.

5.D. As to the allegations of 5.D, the County is without sufficient information to admit or deny the number of Band members living within the boundaries of the original, but now disestablished, 1855 Mille Lacs Reservation, and therefore puts the Band to its strict proof thereof. The County admits the allegations of the second sentence of Paragraph 5.D. Denies any remaining allegations in Paragraph 5.D.

5.E. As to the allegations of sentences one and two of Paragraph 5.E, the County admits that the Band has a government center and it owns and operates various facilities as alleged in Paragraph 5.E., denies that they are within the boundaries of the 1855 Reservation, which has been disestablished. As to the third and fourth sentences of Paragraph 5.E, the County admits that the Band operates a major gaming and entertainment complex and other commercial establishments in Mille Lacs County, and denies that those establishments are within the 1855 Reservation, which reservation has been diminished or disestablished, and admits that some facilities are on trust lands, while others are on fee lands.

5.F. As to the first sentence of Paragraph 5.F, the County admits that the original 1855 Mille Lacs Reservation is located in Mille Lacs County, but denies said reservation exists and alleges it has been disestablished. As to the second sentence of Paragraph 5.F, the County admits that the Band employs both Band members and non-Band members in Mille Lacs County, but the County is without sufficient information to admit or deny the number of people employed by the Mille Lacs Band and therefore denies same and puts the Band to its strict proof thereof.

5.G. As to Paragraph 5.G, the County admits that the United States, the Band and the State of Minnesota have varying law enforcement powers in Indian

country within Mille Lacs County, but denies that the 1855 Reservation still exists, and allege that the extent of Indian country in Mille Lacs County, Minnesota is land held in trust by the United States for the benefit of the Minnesota Chippewa Tribe or the Mille Lacs Band or its members. Denies the remaining allegations of Paragraph 5.G.

5.H. As to Paragraph 5.H, the County admits that the Band claims inherent sovereign authority to establish a police force. The County admits that Band police officers, within Indian country, are authorized to investigate violations of tribal law by Band members, and that Band officers have authority to detain and turn over individuals believed to have violated state or federal law to jurisdictions with criminal prosecutorial authority, and may have an ability to conduct a limited investigation incident to such detention. The County denies that the 1855 Reservation still exists. The County admits that federal law may define and limit the scope of inherent law enforcement authority, but denies that federal law may grant inherent law enforcement authority to investigate or exercise state law enforcement powers and activities and denies that federal law can grant inherent sovereign authority that violates the rights of non-Band members protected by the United States laws and Constitution and its structure or the laws and Constitution of the State of Minnesota. The County denies any remaining allegation of Paragraph 5.H.

5.I. As to the allegations of Paragraph 5.I, the County admits the allegations on information and belief.

5.J. As to the allegations of Paragraph 5.J, the County admits the allegations on information and belief.

5.K. As to the allegations of the first sentence of Paragraph 5.K, the County admits that the United States has assumed concurrent jurisdiction over Indian country in Mille Lacs County under 18 U.S.C. § 1162(d), but denies that this jurisdiction exists throughout the original boundaries of the 1855 Reservation, which has been disestablished. As to the second sentence of Paragraph 5.K, the County admits that the United States Bureau of Indian Affairs entered into a Deputation Agreement with the Band and issued Special Law Enforcement Commissions (SLECs) to some Band officers under the authority cited. As to the third sentence of Paragraph 5.K, the County admits that the Band police officers have the authority to investigate violations of federal law throughout Indian country within Mille Lacs County and to arrest suspects as federal law enforcement officers, but denies that they have such authority throughout the original boundaries of the 1855 Reservation, which has been disestablished. On information and belief, the County admits that, as to the fourth sentence of Paragraph 5.K, that Plaintiff Naumann holds an SLEC from the Bureau of Indian Affairs issued under a Deputation Agreement, which SLEC

commissions are also held by some other licensed police officers employed by the Band police department. The County admits the last sentence of Paragraph 5.K. The County denies any remaining allegations of Paragraph 5.K.

5.L. As to the allegations of Paragraph 5.L, the County admits that the statistics published by the Bureau of Criminal Apprehension show Mille Lacs County with a high crime rate, but there are questions regarding the accuracy of those statistics. As to the second sentence of Paragraph 5.L, the County admits that there is a disproportionate amount of criminal activity that occurs within the trust lands, but denies that there is a Reservation. The County admits that criminal activity within Mille Lacs County is not limited to trust lands, but takes place on fee lands as well, and denies that the Reservation still exists. The County denies any remaining allegations of Paragraph 5.L.

5.M. As to the first sentence of Paragraph 5.M, Mille Lacs County asserts that Band police officers have no law enforcement authority outside of trust lands absent a Cooperative Law Enforcement Agreement with Mille Lacs County and the Mille Lacs County Sheriff, except out-of-jurisdiction law enforcement authority, and denies the remaining allegations of Paragraph 5.M.

5.N. As to the allegations of Paragraph 5.N, Mille Lacs County acknowledges that Band police officers, in the absence of a Cooperative Law Enforcement Agreement with Mille Lacs County and the Mille Lacs County

Sheriff, have the authority to detain and turn over to state or federal authorities nonmembers who violate federal or state laws on trust lands, and may have a limited investigative authority incident to the stop and detention; the County admits that the Band police officers have authority to investigate violations of federal law by non-Band members on trust lands under their SLEC commissions; the County admits that Band police officers have the authority to stop and evict non-Band members from trust lands who may have violated state, federal or tribal law; the County admits that Band officers may have out-of-jurisdiction authority in some instances, and denies the remaining allegations of Paragraph 5.N.

5.O-U. Denies the allegations of Paragraphs 5.O-U.

5.V. As to Paragraph 5.V, the County admits the scope of law enforcement authority possessed by Band police officers in Mille Lacs County is ripe for resolution by this Court, and denies the remaining allegations of Paragraph 5.V.

AFFIRMATIVE DEFENSES

1. Plaintiffs' claims are barred by the applicable statute of limitations, including but not limited to the Indian Claims Commission Act of 1946, 60 Stat. 1049, § 12.

2. Plaintiffs' claims are barred, in whole or in part, by the jurisdictional bar contained in the Indian Claims Commission Act of 1946, 60 Stat. 1049, § 12.

3. Plaintiffs' claims are barred, in whole or in part, by the doctrines of res judicata and claim preclusion.

4. Plaintiffs' claims are barred, in whole or in part, by the doctrines of collateral estoppel and issue preclusion.

5. Plaintiffs' claims are barred by judicial estoppel.

6. The use of the term "investigate" in the Complaint is impermissibly vague and susceptible to a variety of meanings.

7. Plaintiffs' claims violate the principles of federalism.

8. Plaintiffs' claims impermissibly seek to interfere with the separation of powers between the judicial and executive branches of government.

9. Plaintiffs' claims impermissibly seek to interfere with the prosecutorial authority and discretion of the Mille Lacs County Attorney.

10. Plaintiffs' claims are barred, in whole or in part, by absolute immunity.

11. Plaintiffs' claims are barred, in whole or in part, by qualified immunity.

12. The Mille Lacs Band of Ojibwe has attempted to create uncertainty regarding the existence and boundaries of the 1855 Mille Lacs Reservation and the extent of Indian country in Mille Lacs County by resisting the efforts by the County to obtain a judicial determination of the claims by the Mille Lacs Band in the United States District Court while simultaneously and impermissibly petitioning federal agencies, in violation of the Indian Claims Commission Act of

1946, 60 Stat. 1049, § 12, to recognize the existence of the 1855 Mille Lacs Reservation.

13. Plaintiffs' claims, in whole in part, violate the sovereign rights of the State of Minnesota and its political subdivisions.

14. Plaintiffs' claims, in whole or in part, seek to violate the Constitutional rights of Mille Lacs County citizens, including the federal structure, which grants citizens the protection of two governments, the Nation and the State.

15. Efforts by the Mille Lacs Band to exercise inherent tribal criminal or civil authority over nonmembers, especially on fee lands owned by those nonmembers, are presumptively invalid.

16. Fee lands within the original boundaries of the 1855 Mille Lacs Reservation, which have passed at any time into non-Indian fee ownership, are no longer Indian country and are no longer part of the 1855 Reservation, which has been disestablished.

17. The Mille Lacs Band lacks regulatory or adjudicative authority over fee lands which have passed, at any time, into non-Indian ownership, unless those lands are currently held in trust by the United States for the Mille Lacs Band, the Minnesota Chippewa Tribe or tribal members.

18. The Mille Lacs Band lacks inherent criminal authority to investigate nonmember activities on land or roadways over which the Mille Lacs Band could not assert a landowner's right to occupy and exclude.

19. The Mille Lacs Band lacks inherent criminal authority over persons who are not enrolled members of Indian tribes, and may lack inherent criminal authority over enrolled Indians who are members of tribes other than the Mille Lacs Band.

20. The Mille Lacs Band lacks inherent civil regulatory authority over nonmember Indians in Indian country in Mille Lacs County.

21. Plaintiffs' claims are barred, in whole or in part, by the doctrine of laches.

22. Plaintiffs' claims are barred by payment by the United States for the sale and relinquishment of the lands in the 1855 Mille Lacs Reservation.

23. Plaintiffs' claims are barred by accord and satisfaction.

24. Plaintiffs' claims are barred by release.

25. Plaintiffs' claims are barred by arbitration and award if the Court determines that the Indian Claims Commission constitutes an arbitration rather than a judicial proceeding.

26. Plaintiffs' claims are barred by the doctrine of illegality.

27. Plaintiffs' claims are barred by waiver.

28. Plaintiffs fail to state a claim against Mille Lacs County on which relief can be granted.

29. Plaintiffs' claims are barred, in whole or in part, by official immunity.

30. Plaintiffs' claims are barred, in whole or in part, by prosecutorial immunity.

31. Plaintiffs' claims are barred, in whole or in part, by statutory discretionary immunity.

32. Plaintiffs' claims are barred, in whole or in part, by quasi-judicial immunity.

33. Plaintiffs' claims are barred, in whole or in part, by the public policy doctrine.

MILLE LACS COUNTY'S COUNTERCLAIMS FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

I. Preliminary Statement

1. All preceding paragraphs are incorporated by reference herein.

2. This is a counterclaim by the County of Mille Lacs against the Mille Lacs Band of Ojibwe, and individual officers and officials of the Mille Lacs Band of Ojibwe seeking a declaratory judgment and other relief on the basis that the exterior boundaries of the former 1855 Mille Lacs Reservation were disestablished by specific federal treaties and statutes, as the United States

Supreme Court has held. *United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498, 507 (1913) ("the relinquishment of that reservation").

II. Jurisdiction and Venue

3. This Court has jurisdiction over the subject matter of this action under and pursuant to Title 28 United States Code § 1331. This is a civil action brought by a Minnesota County which arises under the treaties and agreements between the United States and Mille Lacs Band, federal common law, and other federal statutes, including, but not limited to, the 1855 Treaty with the Chippewa (10 Stat. 1166), the 1863 Treaty with the Chippewa (12 Stat. 1249), the 1864 Treaty with the Chippewa (13 Stat. 693), the General Allotment Act of 1887 (24 Stat. 388), the Act of January 14, 1889 (25 Stat. 642) and the Act of May 27, 1902 (32 Stat. 245).

4. This Court has authority to issue a declaratory judgment pursuant to Title 28 United States Code §§ 2201 and 2202, for the purpose of determining an actual controversy between Plaintiffs and Defendants.

5. Venue is proper in this district under title 28 United States Code § 1391(b) because all parties reside in Minnesota and a substantial part of the events or omissions giving rise to this action occurred within this judicial district. The area which is the subject of this action is situated within this judicial district.

III. The Parties

6. Plaintiff and Counterclaim Defendant, the Mille Lacs Band of Ojibwe ("Band"), is a constituent member of the Minnesota Chippewa Tribe, which is a federally recognized Indian tribe. The Band exercises powers of tribal government, and the headquarters of the Band is located at Vineland, Minnesota, within Mille Lacs County, Minnesota.

7. Plaintiffs and Counterclaim Defendants Rice and Naumann serve as Chief and Sergeant of the Tribal Police Department, respectively. The Main Office of the Tribal Police Department is located at Oodena Drive, Onamia, Minnesota, within the County.

8. Counterclaim Defendants Benjamin, Shaw-Beaulieu, Blake, Aubid, and Davis are elected governing officials of the Band, which exercises powers of tribal government. The headquarters of the Band is located at Vineland, Minnesota, within the County. The exercise of tribal power over non "Indian country" lands within the disestablished 1855 Mille Lacs Indian Reservation conflicts with the governmental power and authority of the County exercised under Minnesota law.

9. Defendant and Counterclaim Plaintiff, County of Mille Lacs ("County") is organized under and exercises government power and authority pursuant to and under the laws of Minnesota. Its government power and authority are

exercised over the territorial boundaries encompassed within the County as established by Minnesota law.

IV. General Background

10. The controversy in this action centers around a question of federal law involving the status of the former 1855 Mille Lacs Reservation, which lay within the County. The County maintains that this 1855 Reservation has been disestablished by federal treaties and statutes. The Band disagrees. As a result, this case presents an issue of Congressional intent and statutory construction.

11. The County also maintains that the United States Supreme Court squarely recognized this reservation disestablishment over a century ago. In 1912, the Band sued the United States for the fair market value of the 1855 Mille Lacs Reservation. *See United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498 (1913). In the *Mille Lac Band* litigation, the Band, the United States, and the United States Supreme Court all agreed that the 1855 Mille Lacs Reservation had been disestablished.

12. The Band disputes the position of the County regarding the status of the former 1855 Reservation and the Band now maintains, contrary to binding precedent, that the original limits of the former 1855 Reservation are still intact.

13. For most of the last 150 years, the 61,000-acre area of the former 1855 Reservation has been primarily owned and populated by non-members of the

Mille Lacs Band. The cities involved are Isle, Wahkon and Onamia, and the three townships of Isle Harbour, South Harbour and Kathio, all within the County.

14. Today, the consequences of resurrected reservation status for any area with similar demographics would be staggering, as the United States Supreme Court has noted. *See* "justifiable expectations" recognized in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 605 (1977) and *Hagen v. Utah*, 510 U.S. 399, 420-421 (1994).

15. For nearly a century, no court or agency recognized the former 1855 Mille Lacs Reservation. Rather, the "reservation" or "Indian country" designations in the Mille Lacs area have been limited to informal references to several parcels of land held in trust for the Band, the Minnesota Chippewa Tribe, or members of the Band (most acquired subsequent to 1910). Accordingly, until recently, this rural area was not treated any differently than other non-reservation rural areas throughout the State of Minnesota.

16. Historically, in addition to the County, state agencies, the Office of the Attorney General and the Office of the Governor of the State of Minnesota have supported this historical understanding and similarly maintained that the 1855 Mille Lacs Reservation has been disestablished.

V. Disestablishment Background

17. The Mille Lacs Reservation was created in an 1855 Treaty (Treaty with the Chippewas, February 22, 1855, 10 Stat. 1165). In that 1855 Treaty, several

smaller areas were reserved in common as reservations from a larger area that was ceded by the Minnesota Chippewa. One of the smaller areas reserved in common was the former Mille Lacs Reservation ("1855 Reservation").

18. In the Treaties of 1863-1864, the Minnesota Chippewa (not just the Band) ceded all the 1855 Reservation to the United States. The consideration promised was paid. The Minnesota Chippewa were to remove to a central area reserved in common. *See DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist.*, 420 U.S. 425 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 589-605 (1977); *S. Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (similar cessions).

19. Article 12 in these 1863-1864 treaties also granted to the Band, as a matter of "favor," a conditional privilege that they "not be compelled to remove" from the ceded 1855 Reservation as long as they did not "interfere with or in any way molest any persons or property of the whites." The Band later maintained this conditional privilege of occupancy preserved their interest in the 1855 Reservation in its entirety, as if no cession had taken place in the treaties of 1863-1864.

20. To resolve the conflict between the Mille Lacs Band's claim of an occupancy right to the former Reservation and the opening of the Reservation for sale and preemption under the general land laws, in 1889, Congress passed the Nelson Act. 25 Stat. 642. Pursuant to that Act, three Commissioners negotiated an

agreement with the Minnesota Ojibwe Bands, including the Mille Lacs Band. The Band formally agreed to forever relinquish the Article 12 conditional privilege of occupancy in the 1855 Reservation to the United States, pursuant to the terms of the 1889 Act. (Act of January 14, 1889, 25 Stat. 642).

21. The Nelson Act agreement was approved and accepted by the president on March 4, 1890. *See Mille Lac Band*, 229 U.S. at 505. The Nelson Act agreement provided that the United States would sell the remaining lands in the 1855 Reservation. The United States Supreme Court found that there had been an express relinquishment and cession of the 1855 Mille Lacs Reservation, including the right of occupancy. *Id*. at 504-05.

22. Twenty years later, the Band filed suit against the United States in the Court of Claims of the United States. The Band maintained that the United States failed to provide proper compensation for the surrender of their Article 12 conditional privilege of occupancy to the 1855 Reservation pursuant to the 1889 Act. The Band sued the United States for that compensation.

23. The United States Supreme Court held that the Band was entitled to additional compensation from the United States for the relinquishment of that conditional privilege. *Mille Lac Band*, 229 U.S. at 507.

24. In the process, the United States Supreme Court recognized that the 1889 agreement contained an "express" relinquishment of the lands in the 1855

Reservation, quoting the agreement where the Band did "forever relinquish to the United States their right of occupancy on the Mille Lacs Reservation." *Id.* at 504-05. (Act of January 14, 1889, 25 Stat. 642). As a result, the United States Supreme Court succinctly stated that the Mille Lacs Reservation had been relinquished:

> The commission, the Secretary of the Interior, and the President, in seeking, obtaining and approving the *relinquishment of that reservation*, all treated it as within the purview of the act, and the Mille Lacs did the same.

Id. at 507 (emphasis added).

25. The United States Supreme Court recognized and expressly relied on the representation of the Band regarding the extinguishment of the Mille Lacs Reservation pursuant to the terms of the 1889 Act, and the recognition of that concession by the United States. *Id.* In this respect, the 1889 Act addressed and settled the conditional privilege of occupancy claim, and with it any reservation status issue of the Mille Lacs Band that was dependent on Article 12, and the United States Supreme Court so held. *Id.*

26. As noted above, for nearly a century, no one, including the Band, suggested that the claim of reservation status should apply to the 1855 Reservation.

27. Since that time, several generations have relied on the understanding clearly reflected in the holding of the United States Supreme Court in the 1913 *Mille Lac* case.

28. Pursuant to the 1863-64 Treaties, the Nelson Act and Agreement, subsequent litigation including claims made in the Indian Claims Commission, the Mille Lacs Band and/or Minnesota Chippewa Tribe have received payments for the entire 1855 Reservation.

29. Accordingly, the "reservation" or "Indian country" designations in the Mille Lacs area have been limited to informal references to several parcels of land held in trust for the Band, the Minnesota Chippewa Tribe, or for members of the Band.

30. Under these circumstances, the general rule that the off-reservation activities of Indians are subject to a State's nondiscriminatory laws, absent federal law to the contrary, has been observed and applied. *See, e.g., Oregon Dep't. of Fish and Wildlife v. Klamath Tribe*, 473 U.S. 753, 765 n.16 (1985); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 n.18 (1983).

31. As noted above, a reservation status designation for this 1855 area would conflict with justifiable expectations.

32. The actual controversy in this case regarding the reservation status of the 1855 Reservation causes conflict and uncertainty affecting the lives and property of County residents on a daily basis.

VI. Reservation Status ("Indian Country")

33. Any determination regarding Indian reservation status, (i.e., "Indian country," 18 U.S.C. § 1151(a)), in this or any other area is significant for the Indian band or tribe, the United States and the state and local governments.

34. Title 18 U.S.C. § 1151(a) broadly defines "Indian country" as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation . . ."

35. For this reason, beginning in the 1960s, the United States Supreme Court has expended an extraordinary amount of effort in order to authoritatively resolve the precise issue presented in this case: conflicting positions regarding the reservation status of an area under 18 U.S.C. § 1151(a). *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962); *Mattz v. Arnett*, 412 U.S. 481 (1973); *DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist.*, 420 U.S. 425 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *Solem v. Bartlett*, 465 U.S. 463 (1984); *Hagen v. Utah*, 510 U.S. 399 (1994); *S. Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998).

36. As noted above, the "reservation status" or "Indian country" designation in the Mille Lacs area for the past century has been limited to informal references to small acreages held in trust for Band members, the Band, or the Minnesota Chippewa Tribe.

37. Non-Indians are also of the view that reservation status is a very serious and unsettling issue. Some have publicly acknowledged considering selling their property and moving elsewhere. Others, on both sides, have discussed the issue in terms that increase divisiveness and animosity, creating an atmosphere of distrust and social unrest in this rural area.

38. Resurrecting the reservation status today would have tremendous consequences for the residents and citizens involved. The Supreme Court has given weight to the "justifiable expectations" of non-member landowners following decades and decades of occupancy and ownership of land that is not "Indian country." *See Rosebud Sioux Tribe*, 430 U.S. at 605; *Hagen*, 510 U.S. at 420-21.

VII. The Band Begins to Reassert its Claims to the 1855 Reservation

39. In recent years the Band has maintained that the 1855 Reservation continues to exist.

40. The Band disputes the position of the County on the 1855 Reservation, and maintains, contrary to its own previously-asserted claims in litigation, and

contrary to binding precedent, that the original limits of the 1855 Reservation are still intact.

41. Because the 1855 Reservation was disestablished and the Mille Lacs Band's claims to a right of occupancy within the former 1855 Reservation were "extinguished" through the Nelson Act, and affirmed by the United States Supreme Court in 1913, much of the lands within the original 1855 boundaries were sold and settled by non-members. For nearly a century, no one, including the Band, asserted that the Indian country in its control and authority included all lands within the boundaries of the 1855 Reservation.

42. Beginning in the late 1980s or early 1990s, the Band quietly began a campaign to influence state and federal agencies that the 1855 Reservation was never diminished or disestablished.

43. The Band has sought and received an opinion in support of the recognition of the 1855 Reservation from the Field Solicitor, Bureau of Indian Affairs, in a letter dated February 28, 1991.

44. In 1999, the Bureau of Indian Affairs, at the Band's request, submitted a request to the Department of the Army, St. Paul District, Corp. of Engineers, recognize the 1855 Reservation as an Indian reservation. At that time, the County notified the Bureau of Indian Affairs and the Band that it disagreed with the Band's position.

45. In 2001 and 2002, the Band submitted applications for Treatment as a State to the Environmental Protection Agency ("EPA"), asking that the EPA recognize the 1855 Treaty area as its Indian reservation.

46. In 2013, the Band petitioned the Department of Justice for United States Assumption of Concurrent Federal Criminal Jurisdiction, over the lands encompassed in the 1855 Reservation. The County opposed this request. On January 20, 2016, the Office of Tribal Justice granted the request by the Mille Lacs Band for the United States Assumption of Concurrent Federal Criminal Jurisdiction.

47. On November 20, 2015, the Office of the Solicitor issued Opinion M-37032, stating that the Mille Lacs Reservation had not been diminished or disestablished. The Opinion was withheld from Mille Lacs County by the Band and federal authorities for several months. The Opinion was relied upon in the granting of the United States assuming concurrent federal criminal jurisdiction, and the BIA in entering into a Deputation Agreement with the Band as described below.

48. In December 2016, the Band entered into a Deputation Agreement with the Bureau of Indian Affairs whereby the Band was authorized to exercise federal law enforcement authority throughout the original boundaries of the 1855 Reservation. Individual Band police officers were allowed to apply for

"Special Law Enforcement Commissions" ("SLECs") granting them the power and authority of federal BIA officers, again throughout the original boundaries of the 1855 Reservation. The Band similarly asserts the right to exercise inherent criminal jurisdiction throughout the original boundaries of the 1855 Reservation, including criminal investigatory authority over nonmembers on public highways and on fee lands, including fee lands owned by nonmembers.

49. On November 8, 2017, just prior to the filing of this suit by Plaintiffs, the Band sought and obtained a letter from the Solicitor's office addressed to County Attorney Joe Walsh claiming in part that there was "no basis in law" to dispute the Band's exercise of criminal jurisdiction throughout the original boundaries of the 1855 Reservation.

50. On information and belief, the Band has participated and cooperated with the EPA in asserting jurisdiction over all lands within the original 1855 Reservation boundaries on the basis that the lands constitute Indian country. Specifically, on information and belief, the Band operates one or more businesses on fee lands within the original 1855 Reservation boundaries that have underground storage tanks and which have been permitted and regulated by the EPA, instead of the Minnesota Pollution Control Agency. These regulatory activities by the EPA have been solicited and encouraged by the Band and the

Band has participated and cooperated with EPA regulatory activities on fee lands.

51. These efforts by the Band to incrementally reestablish the 1855 Reservation, beginning in the early 1990s, have caused an ongoing dispute and controversy between the Band and the County, and confusion for the residents of Mille Lacs County.

VIII. Additional Conflicts Regarding Reservation Status Public Law 280

52. Conflicts over reservation status in the 1855 Mille Lacs area in federal, tribal, state and local laws would be even more pronounced without the statutory provisions of Public Law 280 that provide for limited state jurisdiction in "Indian country" in the State of Minnesota. Pub.L. No. 83-280, 67 Stat. 588-89 (1953) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-24, 28 U.S.C. § 1360). As the Minnesota Supreme Court noted in *State v. Stone*, 572 N.W.2d 725 (Minn. 1997), Public Law 280 granted the State of Minnesota broad criminal and limited civil jurisdiction over all "Indian country" within the state. For example, all state crimes committed by Indians or non-Indians within Indian country in Minnesota are prosecuted by the state and local government officials without reference to reservation status.

53. Nevertheless, as the Minnesota Supreme Court also held in *Stone*, Public Law 280 does *not* provide for state and local jurisdiction over members of

Indian tribes who commit violations of civil regulatory laws in Indian country. Examples of traffic related civil regulatory laws of this nature listed by the Minnesota Supreme Court include: failure to provide motor vehicle insurance, proof of insurance, driving with expired registration, driving without a license, driving with expired driver's license, and speeding and so forth. *Stone*, at 728. This exception involving public safety in the County is tangible and significant.

54. Other civil regulatory laws, though not enumerated, are clearly within the scope of *Stone*. Accordingly, the conflict over the reservation status of the 1855 Reservation creates conflict over the enforcement of these civil regulatory laws. Band members can be prosecuted for civil/regulatory violations in Indian country, if at all, only in tribal court.

55. The dispute over the existence of the 1855 Reservation, the petitions to federal agencies to treat the entire area encompassed within the original boundaries of the 1855 Reservation as Indian country, the granting of federal concurrent criminal jurisdiction throughout the original boundaries of the 1855 Reservation, and the granting of a Deputation Agreement to the Mille Lacs Band and SLEC commissions to tribal police officers for federal law enforcement authority throughout the original boundaries of the 1855 Reservation have created controversy, uncertainty and risk, and has injured the County in the exercise of its criminal and civil regulatory authority outside of trust lands.

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

COUNT I.
DECLARATORY JUDGMENT OF DISESTABLISHMENT OF 1855 RESERVATION

56. The County restates the allegations in paragraphs 1 through 55 of the Counterclaim as if set forth fully herein.

57. The Band has repeatedly attempted to resurrect the 1855 Reservation boundaries, despite the Band's own agreement to "relinquish" all claims to that land, subsequent payments for the Band's relinquishment, and a century of settlement and ownership of those lands by non-Band members.

58. As a matter of law, the 1855 Reservation was disestablished under various federal treaties, laws and statutes including, but not limited to, the 1863 Treaty with the Chippewa (12 Stat. 1249), the 1864 Treaty with the Chippewa (13 Stat. 693), the Act of January 14, 1889 (25 Stat. 642) and the Act of May 27, 1902 (32 Stat. 245). The legal arguments of Plaintiffs that claim this former reservation

area is still within the limits of a reservation and "Indian country" under 18 U.S.C. § 1151(a) are without merit.

59. For nearly a century, the reservation or Indian country designation in this area has been limited to informal references to small acreages held in trust for the Mille Lacs Band members, the Minnesota Chippewa Tribe, or the Mille Lacs Band. This Court should confirm that historical and legal fact.

60. The County maintains that since the 1863 and 1864 Treaties the 1855 Reservation has been disestablished.

61. The Court should confirm that the 1855 Reservation was disestablished, as set forth in the 1863 and 1864 Treaties, the Nelson Act of 1889, and so held and affirmed by the United States Supreme Court in 1913.

62. The Court should declare that the 1855 Reservation was disestablished.

COUNT II.
ENJOINING THE EXERCISE OF FEDERAL AND INHERENT CRIMINAL LAW ENFORCEMENT OUTSIDE OF TRUST LANDS

63. The County restates the allegations in paragraphs 1 through 62 of the Counterclaim as if set forth fully herein.

64. The Court should enjoin the Plaintiffs and Counterclaim Defendants, from exercising tribal inherent criminal authority or federal criminal authority outside of Indian country in Mille Lacs County, which is limited to lands held in trust by the United States for the Mille Lacs Band, the Minnesota Chippewa

Tribe, or individual Band members, except for such authority, if any, as declared by the Court and as may otherwise be exercised outside of Indian country.

COUNT III.
DECLARATORY JUDGMENT THAT THE BAND IS ESTOPPED FROM CONTESTING THE RESERVATION STATUS

65. The County restates the allegations in paragraphs 1 through 64 of the Counterclaim as if set forth fully herein.

66. As a matter of law, the Plaintiffs and Counterclaim Defendants should be estopped from asserting that the 1855 Mille Lacs Indian Reservation exists.

67. In 1912, the Band filed suit in the Court of Claims against the United States claiming that the 1855 Reservation had been disestablished without just compensation.

68. In 1912, the Band repeatedly asserted during the Court of Claims litigation that the 1855 Reservation was "taken," "lost," "relinquished," "finally extinguished," "extinguished," and "legally extinguished." The United States agreed with the Band's description of the status of the 1855 Reservation. The Court of Claims held that the Mille Lacs Band had been "divested…of their reservation."

69. In 1913, the Band repeatedly stated before the United States Supreme Court the "relinquishment of the Mille Lacs Reservation" and that "such reservation was extinguished as an Indian reservation." Again, the United States

agreed with the Band's description of the Reservation's status. The United States Supreme Court held that the Nelson Act effectuated the "relinquishment of that reservation."

70. After 1913, Congress has never acted to reestablish the 1855 Reservation.

71. Since that time, the designation of "Indian country" in this area and any references to a "reservation" have been limited to informal references to small acreages held in trust for the Mille Lacs Band members or the Mille Lacs Band. The Court should hold that the Plaintiffs and Counterclaim Defendants are estopped from contesting the disestablished status of the 1855 Reservation.

COUNT IV.
DECLARATORY JUDGMENT THAT THE INDIAN CLAIMS COMMISSION ACT BARS THE RESURRECTION OF THE 1855 RESERVATION

72. The County restates the allegations in paragraphs 1 through 71 of the Counterclaim as if set forth fully herein.

73. The Indian Claims Commission Act of 1946, 60 Stat. 1049 (formerly codified at 25 U.S.C. § 70(a)), precludes the Mille Lacs Band from resurrecting the 1855 Reservation.

PRAYER FOR RELIEF

WHEREFORE, the County respectfully prays that the Court enter judgment in its favor and against the Plaintiffs and Counterclaim Defendants as follows:

1. Declaring and adjudging that the 1855 Reservation boundaries have been disestablished.
2. In the alternative, determining that the 1855 Mille Lacs Reservation was diminished and that Indian country in Mille Lacs County consists only of lands held in trust by the United States for the Mille Lacs Band, the Minnesota Chippewa Tribe or members of the Mille Lacs Band.
3. Enjoining Plaintiffs and Counterclaim Defendants from exercising tribal inherent or federal criminal authority outside of trust lands (Indian country), except as otherwise permitted by law.
4. Declaring and adjudging that the Plaintiffs and Counterclaim Defendants are estopped from contesting the disestablishment or diminishment of the 1855 Reservation.
5. Declaring and adjudging that the Indian Claims Commission Act of 1946 bars the resurrection of the 1855 Reservation Boundaries.
6. Dismissing the Plaintiffs' Complaint in its entirety, with prejudice, on the merits, and at its cost.

7. Allowing the County its costs and disbursements; and

8. Granting the County all other just and appropriate relief to which the Court deems it to be entitled.

Dated: December 21, 2017

NOLAN, THOMPSON & LEIGHTON, PLC

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Attorney for Defendant and Counterclaim Plaintiff County of Mille Lacs, Minnesota

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Mille Lacs Band of Ojibwe, a federally recognized Indian tribe; Sara Rice, in her official capacity as the Mille Lacs Band Chief of Police; and Derrick Naumann, in his official capacity as Sergeant of the Mille Lacs Band Police Department, Plaintiffs, v. County of Mille Lacs, Minnesota; Joseph Walsh, individually and in his official capacity as County Attorney for Mille Lacs County; Brent Lindgren, individually and in his official capacity as Sheriff of Mille Lacs County, Defendants, and County of Mille Lacs, Minnesota, Counterclaim Plaintiff, v. Mille Lacs Band of Ojibwe, a federally recognized Indian tribe; Sara Rice, in her official capacity as the Mille Lacs Band Chief of Police; Derrick Naumann, in his official capacity as Sergeant of the Mille Lacs Band Police Department; Melanie Benjamin, individually and in her official capacity as Chief Executive of the Mille Lacs Band of Ojibwe Tribal Council; Carolyn Shaw-Beaulieu, individually and	Case No. 17-cv-05155 (SRN/LIB) **MEMORANDUM OPINION AND ORDER**

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

Marc D. Slonim, Beth Ann Baldwin, and Wyatt Golding, Ziontz Chestnut, 2101 Fourth Avenue, Suite 1230, Seattle, WA 98121; Charles A. Nauen, Arielle Wagner, and David J. Zoll, Lockridge Grindal Nauen PLLP, 100 Washington Avenue South, Suite 2200, Minneapolis, MN 55401; and Todd R. Matha, Mille Lacs Band of Ojibwe, Office of the Solicitor General, 43408 Oodena Drive, Onaima, MN 56359 for Plaintiffs and Counterclaim Defendants.

Randy V. Thompson, Nolan Thompson & Leighton, 5001 American Boulevard West, Suite 595, Bloomington, MN 55437 for Defendant and Counterclaimant County of Mille Lacs;

Scott M. Flaherty and Scott G. Knudson, Briggs & Morgan, PA, 80 South Eighth Street, Suite 2200, Minneapolis, MN 55402 for Defendant Joseph Walsh; and

Douglas A. Kelley and Steven E. Wolter, Kelley, Wolter & Scott, PA, 431 South Seventh Street, Suite 2530, Minneapolis, MN 55414 for Defendant Brent Lindgren.

SUSAN RICHARD NELSON, United States District Judge

This matter comes before the Court on Plaintiffs' and Counterclaim Defendants' Motion to Dismiss Defendant Mille Lacs County's Counterclaim under Rules 12(b)(1), 12(b)(6), and 12(f) ("Motion to Dismiss") [Doc. No. 25]. Because the Court finds that Mille

Lac County lacks standing to assert its counterclaims, it will grant the Motion to Dismiss under Rule 12(b)(1).

I. BACKGROUND

This case involves important and complex issues concerning the boundaries of the Mille Lacs Indian Reservation and, consequently, the law enforcement authority of the Mille Lacs Band within those boundaries. However, because the Motion to Dismiss revolves around the narrower question of Mille Lacs County's standing to assert its counterclaims, and not the merits of either party's claims or defenses, the Court will limit this background to only the facts necessary to explain its ruling.

A. The Parties and Their Relationship to the Reservation

Plaintiffs are the Mille Lacs Band of Ojibwe, a federally recognized Indian tribe, and two members of its Police Department, Chief Sara Rice and Sergeant Derrick Naumann. (collectively, "the Band") (Compl. [Doc. No. 1] ¶ 1.)[1] The Band has a Chief Executive, legislative Assembly, and court system. (*Id*. ¶ 5E.) The Band also owns and operates public infrastructure and commercial establishments, including a "major gaming and entertainment complex." (*Id*.) In addition, the Band maintains a police department. Its officers are authorized to make arrests and carry handguns, and "are all peace officers licensed by the Minnesota Board of Police Officer Standards and Training." (*Id*. ¶¶ 5I – 5J.)

Approximately 1,850 Band members reside on the Mille Lacs Indian Reservation ("the Reservation"), which is located in Mille Lacs County. (*Id*. ¶ 5D.) The Band claims that the Reservation "comprises 61,000 acres of land," as established under Article 2 of the 1855 Treaty between the Chippewa and the United States. (*Id*. ¶ 5A (citing 10 Stat. 1165 (Feb. 22, 1855)).) ("The 1855 Reservation"). According to the Band, "the boundaries of the Reservation as established in 1855 have not been disestablished or diminished." (*Id*. ¶ 5B.) However, of the 61,000 acres, only 9,694 acres are owned in fee simple by the Band or its members (6,122 acres), or by the United States in trust for the Band (3,572 acres). (*Id*. ¶ 5A.) The remaining 51,306 acres are owned by non-Band members.

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[1] As explained below, Defendant Mille Lacs County named five additional Band members as Counterclaim Defendants. Counterclaim Defendants are all elected officials of the Mille Lacs Band Assembly. Because Counterclaim Defendants share identical interests to Plaintiffs for purposes of this motion, the Court will refer to all eight parties as "the Band."

Defendants are the County of Mille Lacs, County Attorney Joseph Walsh, and County Sheriff Brent Lindgren (collectively, "the County").[2] The County agrees that "the original 1855 Mille Lacs Reservation is located in Mille Lacs County," (Def. Answer [Doc. No. 17] ¶ 5F), but asserts that, because the 1855 Reservation has been "disestablished" by federal treaties and statutes, any land within the 1855 boundaries that has "passed at any time into non-Indian fee ownership" is no longer part of the Reservation. (*Id.* Affirmative Defense ¶ 16.) In the County's opinion, then, the Reservation only consists of land held in trust by the United States for the Band. (*Id.* Affirmative Defense ¶ 17.) This boundary dispute underlies this litigation.

B. 2002 Litigation

Before describing how this dispute resulted in the present suit, the Court will briefly discuss the last time these parties attempted to litigate the Reservation's boundaries in this District, as that history looms large over this motion.

In the "late 1980s or early 1990s," the Band began to more vigorously assert its views about the continuing viability of the 1855 Reservation. (County Def.'s Counterclaim ("Counterclaim") [Doc. No. 17] ¶ 42.) In the County of Mille Lacs, these assertions allegedly "creat[ed] [an] atmosphere of extreme distrust and social unrest." *Cty. of Mille Lacs v. Benjamin*, No. 02-cv-00407 (JMR/RLE), Compl. ¶ 37 (D. Minn. Feb. 20, 2002).

[2] As also explained below, only the County of Mille Lac brought counterclaims against the Band. However, for convenience, the Court will refer to all Defendants in this background section as "the County."

("The 2002 Complaint").[3] So, in 2002, the County sued the Band for a declaratory judgment that "the exterior boundaries of the 1855 Mille Lacs Indian Reservation have been disestablished or diminished." *Id.* Prayer for Relief ¶ 1. In the 2002 Complaint, the County stated that Band politicians and various federal agencies, including the Bureau of Indian Affairs, the Environmental Protection Agency, and the Army Corps of Engineers, had publicly endorsed the Band's claim to the 1855 Reservation. *Id.* ¶¶ 36-41 (statements by Band politicians and in official Band documents); ¶¶ 53A-B, E-F (Bureau of Indian Affairs); ¶¶ 53C-D (Environmental Protection Agency); ¶¶ 53G-I (Army Corps of Engineers). Because of these official pronouncements, the County claimed, among other things, that County law enforcement would not be able to arrest Band members for civil infractions on disputed land,[4] and that its citizens would be unfairly subject to the Band's regulatory regime. *See, e.g.*, *id.* ¶¶ 48-52, 54-62. The County further alleged that time was of the essence, warning that, if the Court dismissed its suit, "by the time the County could return here . . . the Band would probably argue that the County was too late." *Id.* ¶ 73.

On summary judgment, Judge Rosenbaum rejected the County's arguments and dismissed the suit for lack of standing and for being unripe. In so ruling, he noted that the

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[3] The Band attached the 2002 Complaint to its Memorandum in Support of the Motion to Dismiss as "Exhibit A." (*See* Pl.'s Mem. Ex. A [Doc. 28].) The Court takes judicial notice of the document as a matter of public record, and accordingly considers it in this Order. *See Roe v. Nebraska*, 861 F.3d 785, 788 (8th Cir. 2017).

[4] Although federal law (Public Law 280) authorizes Minnesota law enforcement to exercise criminal jurisdiction over Tribe members on reservations, the Minnesota Supreme Court has ruled that this authorization does not extend to civil regulatory enforcement regimes like traffic fines. *See State v. Stone*, 572 N.W. 2d 725 (Minn. 1997). Hence the County worried that, were the Band to treat its Reservation as including the disputed 51,000 acres, County police would not be able to enforce traffic regulations against Band members on those lands.

County was not suffering an "actual, concrete, or imminent" injury. *Cty. of Mille Lacs v. Benjamin*, 262 F. Supp. 2d 990, 995 (D. Minn. 2003). Without some evidence that County citizens were facing actual penalties from tribal regulatory bodies, or that Band members were refusing to heed County law enforcement, the County's "mere interest in the proper enforcement of law and community safety [would] not provide standing." *Id.* at 997. The Eighth Circuit affirmed in relevant part, stating that, because, "[t]he County presented no evidence that its ability to enforce state or local law on the reservation has been usurped or even affected by the Band's alleged intentions[,] . . . it is not in immediate danger of sustaining threated injury traceable to an action of the Band." *Cty. of Mille Lacs v. Benjamin*, 361 F.3d 460, 464 (8th Cir. 2004).

C. Subsequent Developments

The dismissal of the 2002 litigation did not mark the end of this dispute. Indeed, several recent events culminated in the parties once more appearing before this Court.

First, at some undisclosed point in time, the Environmental Protection Agency began to regulate the underground storage tanks of "one or more Band businesses" on disputed land, in lieu of the traditional state regulator, the Minnesota Pollution Control Authority. (Counterclaim ¶ 50.)

Second, in 2013, the Band petitioned the U.S. Department of Justice for an Assumption of Concurrent Federal Criminal Jurisdiction over the lands encompassed in the 1855 Reservation. (*Id.* ¶ 46.) The Band was apparently motivated by a desire to combat high crime rates in Mille Lacs County, as "a disproportionate amount of criminal activity occurs within the Reservation." (Compl. ¶ 5L.)

Third, on November 20, 2015, the Office of the Solicitor in the United States Department of the Interior issued an opinion letter, Opinion M-37032, which stated that the 1855 Reservation had not been diminished or disestablished. (Counterclaim ¶ 47.) This letter resulted in the Justice Department granting the Band concurrent federal criminal jurisdiction in January 2016 (*id*. ¶ 46), and in the Bureau of Indian Affairs ("BIA") entering into a Deputation Agreement with the Band in December 2016. (*Id*. ¶ 48.) The Deputation Agreement allows individual Band police officers to exercise federal law enforcement authority throughout the 1855 Reservation as if they were BIA officers, so long as the officers apply for and receive a "Special Law Enforcement Commission" ("SLEC"). (*Id*.) Plaintiff Sergeant Naumann, among others, has received a SLEC from the BIA. (Compl. ¶ 5K; Answer ¶ 5K (admitting that Plaintiff Naumann, and "some other licensed police officers employed by the Band police department," hold SLECS).)

Fourth, in response to the Deputation Agreement and the conferral of SLECs on Band police officers, County Attorney Walsh allegedly "threatened Band police officers, including Plaintiffs Rice and Naumann, with arrest and prosecution if they exercise law enforcement authority on non-trust lands within the [1855] Reservation or with respect to Band members." (Compl. ¶ 5O; *but see* Answer ¶ 5O (denying allegation).) The County Attorney also allegedly asserted that he will not prosecute criminal cases based on investigations conducted by Band police officers, and that the County will not arrest subjects apprehended by Band police officers. (Compl. ¶¶ 5P-5Q; *but see* Answer ¶¶ 5P-Q (denying allegations).)

Finally, on November 8, 2017, days before the Band filed this suit, the Solicitor of the Department of the Interior sent a letter to County Attorney Walsh, "claiming in part that there was 'no basis in law' to dispute the Band's exercise of criminal jurisdiction throughout the original boundaries of the 1855 Reservation." (Counterclaim ¶ 49.)[5]

D. Current Litigation and Procedural History

In light of these developments, and in a role reversal from the 2002 litigation, the Band filed a declaratory judgment action on November 17, 2017. In its complaint, the Band described the County's aforementioned "assertions, threats of prosecution and instructions" as contrary to both federal law and the Band's "inherent authority," and accordingly requested two declarations from this Court. First, it seeks a declaration that "the Band possesses the inherent sovereign authority to authorize Band police officers to investigate violations of federal, state, and tribal law [within the 1855 Reservation]." (Compl. Demand for Relief ¶ 1A.) Second, it seeks a declaration that "pursuant to [various federal statutes, the Deputation Agreement, and the SLECs], Band police officers have federal authority to investigate violations of federal law [within the 1855 Reservation]." (*Id.* ¶ 1B.) In addition, the Band requested that the Court "enjoin Defendants from taking or failing to take any

[5] The County also noted in its briefing that the County is currently litigating a Freedom of Information Act suit against the Department of Justice and the Department of the Interior, in which the County "seek[s] records related to tribal law enforcement activities, the assumption of concurrent federal jurisdiction, and communications regarding these matters with the Band." (Def.'s Mem. [Doc. No. 35] at 12.) The case is ongoing. *See Cty. of Mille Lacs v. U.S. Dep't of Justice and Dep't of Interior*, No. 17-cv-04863 (MJD/LIB), Joint Letter to Magistrate Judge, Doc. No. 23 (D. Minn. July 27, 2018) (describing a recent production of 57 documents from the Department of Justice to the County). However, because this separate litigation does not affect the Court's ruling, the Court will not address it further in this motion.

actions that interfere with the authority of Band police officers as declared by the Court." (*Id.* ¶ 1C.) As such, though the Complaint implicitly asks this Court to determine the Reservation's boundaries, it does so in a more focused manner than the County's 2002 declaratory judgment suit.

The County of Mille Lacs answered on December 21, 2017. Its Answer included the following affirmative defenses, among others: (1) that the 1885 Reservation "has been disestablished," and that the Band therefore lacks civil regulatory or criminal authority over lands not "currently held in trust by the United States for the Mille Lacs Band, the Minnesota Chippewa Tribe, or tribal members" (Affirmative Defenses ¶¶ 16-20); (2) that the Band's claims are barred by res judicata, collateral estoppel, and judicial estoppel (Affirmative Defenses ¶¶ 3-5); and (3) that the Band's claims are barred by the Indian Claims Commission Act. (Affirmative Defenses ¶¶ 1-2, 12.) [6]

The County's Answer also set forth a 21 page, four-count Counterclaim, which is the subject of this motion ("the Counterclaim"). The Counterclaim in large part mirrored the 2002 complaint,[7] with the addition of the facts noted in Section I.C, *supra*, and concluded with four separate requests for declaratory and injunctive relief. First, it asks the Court to

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[6] In separate Answers, Defendants Walsh and Lindgren also asserted affirmative defenses. However, neither Defendant raised counterclaims. (*See* Lindgren Answer [Doc. No. 19]; Walsh Am. Answer [Doc. No. 21].)

[7] *Compare, e.g.*, 2002 Compl. ¶¶ 7-13 *with* Counterclaim ¶¶ 10-16 (identical background allegations); 2002 Compl. ¶ 29 *with* Counterclaim ¶ 32 (identically alleging that "the actual controversy in this case . . . causes conflict and uncertainty affecting the lives and property of County residents on a daily basis"); 2002 Compl. ¶¶ 48-50 *with* Counterclaim ¶¶ 52-54 (identically alleging that "the conflict over the Reservation status . . . creates conflict over the enforcement of civil regulatory laws [in the County]").

declare that the 1855 Reservation has been disestablished. (Counterclaim ¶¶ 58-62.) Second, it asks the Court to enjoin the Band from "exercising tribal inherent criminal authority or federal criminal authority" on lands not "held in trust by the United States for the Mille Lacs Band, the Minnesota Chippewa Tribe, or individual Band members." (*Id*. ¶¶ 63-64.) Third, it asks the Court to declare that the Band is "estopped from asserting that the 1855 Mille Lacs Indian Reservation exists." (*Id*. ¶¶ 65-71.) Fourth, it asks the Court to declare that the Indian Claims Commission Act of 1946 "precludes [the Band] from resurrecting the 1855 Reservation." (*Id*. ¶¶ 72-73.)

As evident from this description, the counterclaims present essentially the same issues as several of the affirmative defenses. However, according to the County, the declaratory and injunctive relief requested in the counterclaims is necessary because "it is possible that the status of the disputed lands will not be resolved in this litigation." (Def.'s Mem. at 42.) Further, the Counterclaim named five additional Band officials as counterclaim Defendants, "to ensure that the Court ha[s] jurisdiction over [the Counterclaim's requests for relief] in the event that the Band asserts sovereign immunity." (*Id*. at 13); *see Ex Parte Young*, 209 U.S. 123 (1908) (allowing suits in federal courts against officials acting on behalf of a governing entity, despite the entity's sovereign immunity).

On February 5, 2018, the Band, including the Counterclaim Defendants, moved to dismiss the Counterclaim under Rules 12(b)(1), 12(b)(6), and 12(f), relying in large part on the case law arising out of the 2002 litigation. The Court held oral argument on May 18, 2018.

II. DISCUSSION

The Band offers three arguments in support of dismissal. First, it argues that the Court lacks subject matter jurisdiction over the Counterclaim because the County does not sufficiently allege standing under Article III. Second, it argues that the County fails to allege a cognizable legal theory on which relief can be granted. Finally, it argues that, at the least, the Court should strike the Counterclaim as "redundant" under Rule 12(f).

Because Article III standing "is a jurisdictional prerequisite that must be resolved before reaching the merits of a suit," the Court will address that issue first. *City of Clarkson Valley v. Mineta*, 495 F.3d 567, 569 (8th Cir. 2007). Further, because the Court finds that it lacks subject matter jurisdiction over the County's counterclaim, it declines to address the Band's other two arguments in support of dismissal. *See Shoots v. iQor Holdings U.S., Inc.*, No. 15-cv-00563 (SRN/SER), 2016 WL 6090723, at *2 (D. Minn. Oct. 18, 2016) ("[W]here standing is absent, the Court has no authority to go further than dismissing the case.").

A. Motion to Dismiss for Lack of Subject Matter Jurisdiction

1. Article III Standing

Article III of the Constitution limits the jurisdiction of the federal courts to "Cases" and "Controversies." U.S. Const., art. III, § 2, cl. 1. Accordingly, any federal court plaintiff must have case-or-controversy "standing" to assert a claim—specifically, a plaintiff must show "(1) that he has suffered an 'injury in fact' that is 'actual or imminent, not conjectural or hypothetical'; (2) that the injury is causally connected to the defendant's allegedly illegal conduct and not to the 'independent action of some third party not before the court'; and (3) that 'it [is] likely, as opposed to merely speculative, that the injury will be 'redressed by a favorable decision.'" *Wieland v. U.S. Dep't of Health and Human Servs.*, 793 F.3d 949, 954

(8th Cir. 2015) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). Because "standing is not dispensed in gross," this constitutional requirement applies to counterclaimants like the County. *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017); *cf. Western Heritage Ins. Co. v. Asphalt Wizards*, 795 F.3d 832, 836 (8th Cir. 2015) (affirming the dismissal of a defendant's counterclaims based on lack of standing).

When a party makes a facial attack on a pleading in a 12(b)(1) motion, as is the case here, the court "accept[s] as true all facts alleged in the [counter]complaint," and "considers only the materials that are necessarily embraced by the pleadings and exhibits attached to the [counter]complaint." *Carlsen v. GameStop, Inc.*, 833 F.3d 903, 908 (8th Cir. 2016) (internal citations and quotation marks omitted). Courts also accept "general factual allegations of injury resulting from the defendant's conduct," since, at this stage of litigation, courts "presume that general allegations embrace those specific facts necessary to support the claim." *City of Clarkson Valley*, 495 F.3d at 569 (citing *Lujan*, 504 U.S. at 561). However, even at the pleading stage, the party invoking the court's jurisdiction (here, the County) bears the burden of "clearly . . . alleg[ing] facts demonstrating each element" of standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). "Strict compliance with this jurisdictional standing requirement is mandated." *Delorme v. U.S.*, 354 F.3d 810, 815 (8th Cir. 2004).

2. The County's Standing to Assert its Counterclaim

The parties primarily dispute whether the County has sufficiently alleged the "injury in fact" element of standing, such that the Counterclaim's allegations can be distinguished

from the standing evidence that both this Court and the Eighth Circuit found lacking in the prior litigation.[8] Then as now, the County cannot claim injury merely because it believes the Band's "campaign to influence state and federal agencies that the 1855 Reservation was never diminished or disestablished" is illegal. (Counterclaim ¶ 42); *see Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 482-83 (1982) (noting that standing does not arise from "the right, possessed by every citizen, to require that the Government be administered according to law"). Rather, the County must clearly allege that, because of the Band's post-2002 actions, "its ability to enforce state or local law on the reservation has been usurped or . . . affected by the Band's alleged intentions," *Benjamin*, 361 F.3d at 464, or that it has "personally . . . suffered some actual or threatened injury as a result of the putatively illegal conduct of [the Band]," *Valley Forge Christian Coll.*, 454 U.S. at 472.

As best the Court can tell, the Counterclaim alleges that the Band's post-2002 actions are tangibly injuring, or threatening to injure, the County in three ways. *First*, the Band's actions potentially subject the County to concurrent law enforcement, which is causing confusion and uncertainty for County officials. *Second*, the Band's actions potentially inhibit the ability of County police to prosecute civil violations like speeding. *Third*, the Band's actions will depress property values and, in turn, reduce the tax base and income for the County.

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[8] The Court acknowledges that the 2002 litigation arose under summary judgment motions, whereas this case comes before the Court on a motion to dismiss under Rule 12(b)(1). As such, the Court relies on the precedents for their factual descriptions and their general statements of law, while simultaneously applying the appropriate standard of review for this motion.

The first two allegations do not evince an actual or imminent injury to the County's legal interests, even when taken as true and viewed in a light most favorable to the County. And to the extent the third allegation properly shows injury in fact, it fails to adequately plead causation.

First, the County argues that "the assertion by the Band that it possesses law enforcement authority on non-trust lands" constitutes "a threat to the County's jurisdiction and regulatory authority." (Def.'s Mem. at 20.) Far from being a hypothetical worry, the County contends, the Band has "sought and obtained" various agreements with federal agencies recognizing the Band's right to police the entire 1855 Reservation, *see supra* Section I.C., and has initiated the underlying lawsuit to enforce those agreements. (Def.'s Mem. at 8-11.) The County alleges that this looming jurisdictional infringement "ha[s] caused an ongoing dispute and controversy between the Band and the County, and confusion for residents of Mille Lacs County," (Counterclaim ¶ 51) such that the County "need not wait any longer for the injury to worsen before bringing its claim for declaratory relief." (Def.'s Mem. at 20.)

The Court disagrees. The Band and its allied federal agencies made similarly strong jurisdictional assertions in 2002, as that complaint detailed at length. *See, e.g.*, 2002 Compl. ¶¶ 36-41 (statements by Band politicians and in official Band documents); ¶¶ 53A-B, E-F (Bureau of Indian Affairs); ¶¶ 53C-D (Environmental Protection Agency); ¶¶ 53G-I (Army Corps of Engineers). Indeed, the Counterclaim recites much of this history. (Counterclaim ¶¶ 39-45.) However, the Eighth Circuit declined to find such assertions sufficiently injurious without some "definite controversy that exists from the Band's purported expansion of tribal

jurisdiction over the disputed portion of the reservation." *Benjamin*, 361 F.3d at 464. The County ripostes that the Band's lawsuit, alongside the federal agency agreements, demonstrates that such a "definite controversy" now exists. (*See* Def.'s Mem. at 18-24.) The Court is not convinced that this distinction is strong enough to overcome the prior case law. For one, because standing "is not dispensed in gross," the County must allege injury beyond being a defendant in this suit. *Town of Chester, N.Y.*, 137 S. Ct. at 1650.

What's more, even assuming this suit for injunctive relief presents a more serious threat to the County than the Band's prior actions, the County still does not allege that the Band's lawsuit is causing a "concrete and particularized" injury to a "legally protected interest." *Carlsen*, 833 F.3d at 908 (citing *Lujan*, 504 U.S. at 560). The County concedes that the Band's desired police powers would not displace the County's criminal jurisdiction. (*See* Counterclaim ¶ 52 (stating that "all state crimes committed by Indians or non-Indians within Indian country in Minnesota are prosecuted by state and local governments without reference to reservation status.").) And neither the Counterclaim nor the County's brief in opposition state how the Band's potential exercise of concurrent jurisdiction harms the County, other than to call it "controversial" and "confusing." (*See, e.g.*, *id.* ¶¶ 51, 55.) [9] Although the County is correct that "we don't need to wait until there is actually conflict between officers in the field," (Hr'g Tr. 30:18-19), the County needs to at least allege that its "ability to enforce the law is being affected" by the Band's recent actions, *Benjamin*, 361 F.3d at 464.

[9] The Court addresses the County's argument about *Virginia v. Hicks* and potentially displaced civil regulatory jurisdiction below.

Recent reservation boundary litigation out of Nebraska offers a useful comparison. *See Smith v. Parker*, 996 F. Supp. 2d 815 (D. Neb.), *aff'd* 774 F.3d 1166 (8th Cir. 2014), *aff'd sub. nom Nebraska v. Parker*, 136 S. Ct. 1072 (2016). There, the Village of Pender, along with various businesses within the Village, disagreed with the Omaha Tribal Council about the proper boundaries of the Omaha Reservation. In particular, the Village did not believe it lay within reservation boundaries. However, the Village did not sue for declaratory and injunctive relief until after the Omaha repeatedly attempted to enforce its Beverage Control Ordinance against individual Pender businesses, including through threatened fines and enforcement actions in tribal court. *Id*. at 820-21. While *Smith* did not directly concern standing, its facts illustrate the kind of injury a plaintiff (or counter-plaintiff) might allege in a case like this one. Here, the County does not allege that the concurrent law enforcement the Band seeks through its lawsuit threatens to harm the County in a similarly concrete way. For instance, the County does not allege that the Band is threatening to impose conflicting regulations on it, or that County officials will be disrupted by tribal officers carrying SLECs. *Cf. Bishop Paiute Tribe v. Inyo Cty.*, 863 F.3d 1144, 1153-54 (9th Cir. 2017) (finding that a an Indian Tribe had sufficiently alleged ripeness when its police force "ha[d] been ordered to cease and desist exercising what it believe[d] to be its proper inherent authority," which "cost the Tribe money" and "interfered with [its] ability to maintain peace and security on the reservation").[10]

[10] The County points to Judge Rosenbaum's comment, "[i]t is clear that potential liability stemming from a filed complaint can be sufficient to create standing," as evidence that being a defendant in this suit affords it standing to advance a counterclaim. (Def.'s Mem. at 9 (citing *Benjamin*, 262 F. Supp. 2d at 997).) The Court disagrees. "Can"

Second, the County argues that, even if concurrent law enforcement won't necessarily inhibit County criminal jurisdiction, the Band's lawsuit, if successful, will result in the County losing prosecutorial power over Band members for certain civil infractions. (*See, e.g.*, Hr'g Tr. 25: 14-19 (arguing that ruling for the Band in its lawsuit will "immediately" lead to loss of civil jurisdiction)); *see also supra* note 4 (describing how recognizing the full 1855 Reservation would limit County civil jurisdiction over Band members on disputed land). The County asserts that the Supreme Court recognized the injury of "inability to prosecute" in *Virginia v. Hicks*, 539 U.S. 113, 121 (2003), and that the County adequately alleged that injury here. (*See* Def.'s Mem. at 18.)

Again, the Court disagrees. As a threshold matter, *Virginia v. Hicks* does not appear to stand for the proposition the County cites it for. In that case, the Supreme Court briefly discussed standing as it related to the State of Virginia's standing to appeal an overturned criminal conviction from the state Supreme Court to the federal Supreme Court. *See Virginia*, 539 U.S. at 121. Although the case is cited frequently as a matter of First Amendment law, the Court cannot find any instance in which it has been used to justify standing in a context analogous to this one.

Still, assuming governments can claim injury when a third party's actions wrongfully limit their ability to prosecute crime, the County does not allege that the Band's actions pose

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does not mean "must." And the one case Judge Rosenbaum cited in support of that principle, *Va. Sur. Co. v. Northup Grumman Co.*, 144 F.3d 1243, 1246 (9th Cir. 1998), involved an insurance company seeking a declaratory judgment against a defendant in response to the defendant's agent filing a $14 million lawsuit against the company in a foreign court. The County does not allege that the Band's suit poses a similarly concrete harm here.

an "actual or imminent" threat to its ability to enforce the civil code across the 1855 Reservation. *Wieland*, 793 F.3d at 954; *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (noting that the alleged injury must be "*certainly* impending") (emphasis in original). In the Complaint, which is arguably the factor most distinguishing this case from the 2002 litigation, (*see, e.g.*, Def.'s Mem at 19 (calling the Band's suit "the greatest single difference between the *Benjamin* case and today")), the Band does not ask the Court to enjoin the County from enforcing civil infractions against Band members on the 1855 Reservation. Its request for injunctive relief is limited to protecting *its own* policing power, as recognized in the federal agreements. In its briefing, the Band re-affirmed that, "[a]lthough the 'Indian Country' status of non-trust lands could affect the County's civil regulatory authority, the Band seeks no relief regarding such authority." (Pl.'s Reply Mem. [Doc. No. 38] at 6.) The County does not contradict these assertions. Indeed, the Counterclaim's allegations related to this issue almost entirely mirror the 2002 Complaint's allegations. *Compare* 2002 Compl. ¶¶ 48-50 *with* Counterclaim ¶¶ 52-54. Thus, then just as now, the County fails to allege that its purported "inability to prosecute" civil regulations "has created a real injury." *Benjamin*, 262 F. Supp. 2d at 997.[11]

[11] In a similar vein, the County alleges that the Band's actions have undermined *the State's* jurisdiction over waste treatment facilities. (*See* Counterclaim ¶ 50.) This allegation does not help the County's cause because the County must show that it "*personally* . . . suffered some actual or suffered some actual or threatened injury as a result of the putatively illegal conduct of [the Band]." *Valley Forge Christian Coll.*, 454 U.S. at 472 (emphasis added). That said, the Court takes the County's point that it must raise the issue, because, if it did not, "the Band would almost certainly cite the EPA's unchallenged exercise of regulation over underground tanks as evidence that the disputed land is Indian Country." (Def.'s Mem. at 11 n.3.)

Finally, the County maintains that "these controversies further undermine property tax values for residents on fee lands within the original boundaries of the 1855 Reservation, and reduce the tax base and income for the County." (Counterclaim ¶ 55.) The Court will assume for purposes of this motion that a "reduce[d] tax base and income" injures the County. *See Sierra Club v. Morton*, 405 U.S. 727, 733–34 (1972) ("[P]alpable economic injuries have long been recognized as sufficient to lay the basis for standing"). However, this allegation nonetheless falters on the second prong of the standing analysis, causation.

As noted above, a party asserting federal court jurisdiction must clearly allege that its "injury is causally connected to the defendant's allegedly illegal conduct and not to the independent action of some third party not before the court." *Wieland*, 793 F.3d at 954; *see also St. Louis Heart Center, Inc. v. Nomax, Inc.*, 899 F.3d 500, 504 (8th Cir. 2018) (dismissing claim where plaintiff failed to show that "its alleged injury is traceable to" the alleged illegal behavior). Here, the County does not allege that its economic injury is "causally connected" to any of the Band's recent actions. The Counterclaim generically asserts that "these controversies" are lowering property tax revenues. (Counterclaim ¶ 55.) More importantly, though, neither the Counterclaim nor the County's brief distinguish this cursory allegation of economic injury from the nearly-identical claims of economic injury that Judge Rosenbaum rejected in 2002 (albeit on summary judgment). Per Judge Rosenbaum, even taking the County's allegations related to lowered property tax values as true, "the claimed diminution of land value would result from the disinterest of third-party potential-purchasers in owning land in the reservation—not from legal uncertainty."

Benjamin, 262 F. Supp. 2d at 998. "The impact of this Court's decision depends, therefore, on actions of third-party buyers and owners who are not parties to this litigation." *Id*. (citing *Lujan*, 504 U.S. at 560-61). This is equally true here. Even assuming "general allegations" of reduced revenue "embrace those specific facts necessary to support the claim," *City of Clarkson Valley*, 495 F.3d at 569, the County has not alleged anything to show that the Band's actions, including the filing of this lawsuit, are impacting its coffers, as opposed to the independent actions and beliefs of "third-party potential purchasers," *Benjamin*, 262 F. Supp. 2d at 998.

For these reasons, the County has not sufficiently pled standing under Article III. The Court accordingly lacks subject matter jurisdiction over the Counterclaim.

III. CONCLUSION

The Court reiterates that this decision concerns only standing. The Court makes no assessment of the merits of the parties' claims and defenses. *See Red River Freethinkers v. City of Fargo*, 679 F.3d 1015, 1023 (8th Cir. 2012). To the extent the County's affirmative defenses overlap with its counterclaims, the County may advance those defenses as this case proceeds through discovery. Furthermore, "because the basis for this decision is jurisdictional[,] . . . the dismissal necessarily is without prejudice." *Shoots*, 2016 WL 6090723, at *8 (citing *Benjamin*, 361 F.3d at 464-65).

Based on the submissions and the entire file and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Plaintiffs' and Counterclaim Defendants' Motion to Dismiss Defendant County of Mille Lacs's Counterclaim [Doc. No. 25] is **GRANTED**; and

2. County Defendant's Counterclaim [Doc. No. 17] is **DISMISSED** without prejudice.

Dated: September 19, 2018

s/Susan Richard Nelson
SUSAN RICHARD NELSON
United States District Judge

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) **PLAINTIFFS' RESPONSE TO WALSH AND LORGE'S SUPPLEMENTAL MEMORANDUM OF LAW ON MOOTNESS**

BALDWIN DECLARATION - EXHIBIT E

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I. INTRODUCTION

Defendants Joseph Walsh and Don Lorge argue that Plaintiffs' claims against them are moot. *See* Defendants Walsh and Lorge's Supplemental Memorandum of Law on Mootness (Doc. 305[1], Dec. 13, 2021) ("W&L Supp. Mootness Mem."). Walsh and Lorge do not address Plaintiffs' claims against Mille Lacs County. Those claims arise from the same acts as Plaintiffs' claims against Walsh and Lorge (official actions by the County Attorney and County Sheriff that interfered with the Band's inherent and federally delegated law enforcement authority) and seek the same relief (declaratory and injunctive relief defining and preventing interference with that authority). *See* Complaint (Doc. 1, Nov. 17, 2017) ("Complaint"). Thus, if Plaintiffs' claims against Walsh and Lorge are moot so too are Plaintiffs' claims against the County, requiring dismissal of the entire case.

However, for the reasons explained below, Plaintiffs' claims are not moot as to any Defendant. To establish mootness, Walsh and Lorge have the burden to demonstrate, to a high degree of certainty, that the allegedly wrongful acts challenged by Plaintiffs are not likely to recur if this case is dismissed. Their argument rests on: (1) Walsh's alleged revocation of his 2016 Opinion and Protocol after the Mille Lacs Band entered into a new cooperative law enforcement agreement with the County and County Sheriff in September 2018; (2) Walsh's 2021 declaration asserting that he would not re-issue his 2016 Opinion and Protocol in light of *United States v. Cooley*, 141 S. Ct. 1638 (2021); and (3) Walsh and

[1] Documents previously filed with this Court are referenced by their ECF filing numbers as "Doc. #".

Lorge's assertion that it is speculative whether the dispute that gave rise to this case would recur if the case were dismissed as moot. *See* W&L Supp. Mootness Mem. at 9-18.

These arguments do not demonstrate, either separately or in combination, that the allegedly wrongful acts challenged by Plaintiffs are not likely to recur if this case is dismissed. First, by Walsh and Lorge's own account, Walsh's alleged revocation of his 2016 Opinion and Protocol was based on the existence of a new cooperative agreement between the Band, the County and the Sheriff. However, this Court held that the new agreement is an interim agreement that will terminate upon the conclusion of this case and, therefore, does not demonstrate that the allegedly wrongful acts would not recur if the case were dismissed. Memorandum Opinion and Order at 35-36 (Doc. 217, Dec. 21, 2020) ("12/21/2020 Mem. Op."). Walsh and Lorge's further allegation that Walsh voluntarily revoked his 2016 Opinion and Protocol because of the interim agreement does not demonstrate otherwise; to the contrary, by tying Walsh's alleged revocation to the new *interim* agreement it simply confirms that the allegedly wrongful acts will likely recur if this case is dismissed. Defendants offer no basis, let alone the "compelling circumstances" required by Local Rule 7.1(j), for reconsideration of the Court's previous ruling on this issue.

Second, although Walsh's recent declaration (Doc. 306-1, Aug. 31, 2021) ("2021 Walsh Decl.") states that, because of *Cooley*, he would not reissue his *2016 Opinion and Protocol* following termination of the interim agreement, *id*. at 6 ¶ 16, it does not say that he would take no action to restrict Plaintiffs' law enforcement authority following

termination of that agreement. Put another way, his declaration identifies one thing he would not do, but does not identify what he *would* do. In his 2016 Opinion and Protocol and subsequent communications, Walsh asserted that Plaintiffs had *no* inherent or federally delegated law enforcement authority on non-trust lands within the 1855 Mille Lacs Reservation because it was the County's position that the Reservation had been disestablished. *See* 12/21/2020 Mem. Op. at 5. *Cooley* does not address that issue and *all* Defendants continue to argue that the Reservation has been disestablished. Nothing in Walsh's 2021 Declaration suggests that he has changed his position on this issue or would recognize Plaintiffs' inherent and federally delegated law enforcement authority on non-trust lands within the Reservation following the interim agreement's termination.

Similarly, in his 2016 Opinion and Protocol Walsh asserted that Plaintiffs had no inherent authority to investigate state-law violations on trust lands. *Id*. Although his 2021 Declaration indicates that Walsh would recognize Plaintiffs' authority to investigate state-law violations under facts such as those in *Cooley*, it does not indicate that he would recognize such authority under all circumstances recognized in cases such as *United States v. Terry*, 400 F.3d 575 (8th Cir. 2005), which Walsh testified under oath was not controlling. Under these circumstances, Walsh's 2021 Declaration does not demonstrate to a high degree of certainty that Defendants' interference with Plaintiffs' law enforcement authority will not recur if this case were dismissed as moot.

Third, as this Court previously held, there is nothing speculative about the likelihood of on-going disputes over Plaintiffs' law enforcement authority if this case were dismissed

as moot. 12/21/2020 Mem. Op. at 35-36. Rather, it is Walsh and Lorge who engage in speculation—suggesting, for example, that the Minnesota Attorney General will issue an advisory opinion that successive Attorneys General have held is not authorized under state law, that Walsh and Lorge would follow such an opinion despite their *rejection* of the Attorney General's position on the existence of the Reservation, and that the Minnesota Legislature will amend state law in a manner that somehow moots this case. Because Walsh and Lorge have the burden to demonstrate that Defendants' interference with Plaintiffs' law enforcement authority will not recur, such speculation fails to demonstrate that Plaintiffs' claims are moot.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Walsh's 2016 Opinion and Protocol.

In June 2016, Mille Lacs County terminated a 2008 law enforcement agreement ("2008 Agreement") among the Band, the County and County Sheriff. 12/21/2020 Mem. Op. at 4. The primary reason for termination was a dispute regarding the existence of the Mille Lacs Reservation.[2] Plaintiffs maintain the Reservation's boundaries, as established in 1855, remain intact, such that all lands within those boundaries comprise Indian country.

[2] *See* Doc. 150-37 at 4-5 (Walsh testimony, at transcript pp. 318-19, that "[t]he primary motivating factor of the revocation … was the M-opinion [regarding the continued existence of the original Reservation boundary], and what I think the board viewed as the Band using their law enforcement authority to improve their position vis-a-vis the boundary"); Doc. 151 at 8 (Sheriff meeting minutes asserting "[t]his is a boundary dispute between the County and the Band"); Doc. 152 at 2 and 5 (Sheriff meeting minutes discussing "Boundary issues" and asserting "99.9%" likelihood of revocation as "all will come united because this is a boundary issue").

12/21/2020 Mem. Op. at 3. Defendants, including Walsh and Lorge, maintain the Reservation has been disestablished and that the only lands within the 1855 boundaries that comprise Indian country are trust lands. *Id.*

The County's termination of the 2008 Agreement led to a dispute over the Band's law enforcement authority under state law.[3] In July 2016, then-Minnesota Attorney General Lori Swanson denied Walsh's request for an opinion on that dispute. Doc. 165-1 at 22-29. Her office explained that under Minn. Stat. § 8.07 it did not have authority to adjudicate disputes, could only issue opinions regarding city or county administration authority, and did not generally issue opinions on hypothetical or fact-dependent questions, issues that may arise in litigation, or provisions of federal law. *Id*. at 22. According to the Attorney General's office, Walsh's request contravened each of these limitations. *Id*. at 22-23.[4]

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[3] *See* Doc.174-1 (6-28-2016 Letter from Band Solicitor General Todd Matha to Minnesota State Auditor Rebecca Otto); Doc. 177-2 (7-1-2016 Letter from Walsh to then-Minnesota Attorney General Lori Swanson).

[4] When Walsh and Lorge asked the State to pay their legal fees in this case, a new Minnesota Attorney General, Keith Ellison, reiterated that Walsh's opinion request was not the proper subject of a request for an Attorney General's opinion—something Walsh himself had acknowledged was likely the case:

> This Office did not delegate its authority but instead explained that §8.07 is not applicable for the type of issues the County Attorney raised in the request for an opinion. *Notably, the County Attorney acknowledged in a phone call that his request likely was not the proper subject of a § 8.07 opinion and instead was the proper subject of a county attorney opinion.* When the County Attorney subsequently issued his own opinion, he was fulfilling his independent statutory obligation to "give opinions and advice, upon the

Six days later Walsh issued the Opinion and Protocol that gave rise to this case. *See* 12/21/2020 Mem. Op. at 4-5. In addition to addressing the Band's state-law authority, he asserted the Band's inherent law enforcement authority under federal law did not extend to non-trust lands within the 1855 Reservation (because the Reservation, allegedly, had been disestablished) and did not include authority to investigate state-law violations—by Indians or non-Indians—even on trust lands. *Id*.

Walsh testified he took a "conservative position" to avoid challenges to Band officer authority in state court, which meant Band officers "had less authority [rather] than more." Doc. 174-2 at 53-54 (2-19-2020 Walsh Dep. 293:15-25, 294:1-3). Thus, in asserting Band officers could not investigate state-law violations on trust lands, *i.e.*, on lands all parties concede are Indian country and where the Band retains the power to exclude, Walsh declined to follow *United States v. Terry*, which held:

> The Supreme Court has recognized that tribal law enforcement authorities possess "traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands," and therefore have "the power to restrain those who disturb public order on the reservation, and if necessary to eject them." … "Where jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities." … *Because the power of tribal authorities to exclude non-Indian law violators from the reservation would be meaningless if tribal police were not empowered to investigate such violations, tribal police must have such power.*

> request of the county board or any county officer, upon all matters in which the county is or may be interested." Minn. Stat. § 388.051, subd 1(2).

Declaration of Beth Baldwin (filed herewith) ("Baldwin Decl."), Ex. A at 31 (*Walsh and Lorge v. State*, Complaint Ex. B at 2) (emphasis added).

400 F.3d at 579-80 (emphasis added; citations omitted). Walsh testified that he did not consider this or similar decisions controlling:

> Q Does your opinion analyze existing case law on the inherent authority of tribal governments to investigate violations of state law in Indian country?
>
> A Footnote 8 on page 8 talks about the admissibility of investigations conducted pursuant to inherent tribal criminal authority in state court is presently unknown.
>
> Q So it doesn't analyze any cases that address that question?
>
> A I'm not aware of any cases within the state of Minnesota, which are the only cases controlling for the purposes of my office in the state courts.
>
> Q So you wouldn't consider an 8th Circuit decision controlling?
>
> A It's not.
>
> Q And you wouldn't consider it worthwhile to look at cases from other jurisdictions?
>
> A It doesn't change my risk of contested issues on appeal at all.

Doc. 174-2 at 61 (Walsh Dep. 301:1-21).[5]

Walsh's Opinion and Protocol stated Band officers who exercised police authority beyond that recognized in his Opinion and Protocol could be subject to criminal and civil penalties for unauthorized use of force, obstruction of justice and impersonating a peace officer. *See* 12/21/2020 Mem. Op. at 5. The Sheriff's Office enforced Walsh's Opinion

[5] Minnesota's Supreme Court cited and followed *Terry* in holding a tribal officer lawfully "detained and investigated" an individual suspected of violating state law "pursuant to the tribal authority to detain and remove recognized by the Supreme Court and other federal courts." *State v. Thompson*, 937 N.W.2d 418, 421 (Minn. 2020). Although it was decided in January 2020, Walsh and Lorge do not argue *Thompson* mooted this case.

and Protocol by, among other things, taking control of crime scenes from Band officers to prevent them from conducting investigations. *Id.* at 6-12. As this Court found, "[t]he record is … replete with evidence that, pursuant to the Opinion and Protocol, County law enforcement officers repeatedly interfered with law enforcement measures undertaken by Band officers." *Id.* at 6.

In December 2016, the Bureau of Indian Affairs ("BIA") signed a deputation agreement with the Band and issued Special Law Enforcement Commissions ("SLECs") to 20 Band officers. *See id.* at 21. The Deputation Agreement and SLECs authorized Band officers to investigate violations of federal law throughout the Band's Indian country (including all lands within the 1855 Reservation boundaries). *Id.*

On December 22, 2016, the Band's attorneys wrote to Walsh "regarding the authority of [Band] law enforcement officers to investigate violations of federal, state and tribal law within the Band's Indian country." Doc. 150-7 at 1. Their letter acknowledged the dispute over the Reservation's continued existence and instead focused on trust lands, *i.e.*, "on lands that both the Band and the County agree are Indian country." *Id.* The letter cited multiple federal and state court cases, including *Terry*, and the Deputation Agreement for the proposition that Band officers "have authority to investigate violations of federal, state and tribal law within Indian country." *Id.*

Walsh did not modify his Opinion and Protocol in response to the letter or Deputation Agreement; as to the latter, he believed Band officers could not exercise SLEC authority on non-trust lands within the 1855 Reservation boundaries (because, allegedly,

the Reservation was disestablished) and continued to advise them to follow his Opinion and Protocol, which prohibited them from investigating violations of state law, even on trust lands. *See* 12/21/2020 Mem. Op. at 21.[6]

B. Law Enforcement Consequences

Significant drug and gang problems plagued the Reservation when Defendants promulgated and enforced Walsh's Opinion and Protocol. Band officers responded to 61 drug overdose calls on the Reservation in 2017. *See* Doc. 150-33 at 43-50 (Sara Rice Dep. at 243-50); Doc. 150-44 (Defendants' Deposition Exhibit 131). According to data compiled by Defendants, six Native Americans including four Band members died of overdoses on the Reservation that year. Doc. 150-33 at 40-42 (Rice Dep. at 238-40). In September 2017, then-Governor Dayton wrote that Reservation overdoses constituted a public safety emergency. Doc. 150-19.

The restrictions imposed on Band officers caused a decline in morale, reduced their effectiveness, including their ability to address drug crimes and overdoses, and led to

[6] Walsh and Lorge claim that "Walsh's concerns regarding admissibility of evidence that guided his drafting of his 2016 Opinion and Protocol" were "remarkably similar" to the lower court holdings in *Cooley*. W&L Supp. Mootness Mem. at 3 n.1. However, *Cooley* involved tribal law enforcement authority on *non-trust* lands (*i.e.*, a U.S. Highway), from which tribes lack authority to exclude non-Indians. As discussed in the text (*see* Part II.A *supra* and Part III.C *infra*), well before *Cooley* was decided, it was well established in the Eighth Circuit and elsewhere that tribes have authority to investigate violations of state law on *trust* lands, from which tribes do have authority to exclude non-Indians. Walsh's adamant refusal to consider that authority, either in drafting his 2016 Opinion and Protocol or when it was brought to his attention by the Band's counsel, underscores the likelihood of continuing disputes among the parties over the scope of Plaintiffs' law enforcement authority if this case is dismissed as moot.

several resignations. 12/21/2020 Mem. Op. at 14-17. County deputies assigned to patrol the Reservation lacked the intimate knowledge of the Band community possessed by Band officers and did not provide the same level of proactive policing. *Id*. at 17-19. Open drug trafficking and use increased, and public safety declined. *Id.* at 19-20. According to a State Corrections Officer, "'[t]here simply [was] not the law enforcement presence on the Reservation there had been and that has dramatically impacted our probationary work'"; the "'general perception from the offenders we were working with at the time was kind of free rein'"; and over time, "'[t]here was a general sense that the Reservation became almost a safe haven for drug trafficking.'" *Id.* at 20 (internal modifications normalized).

Faced with law enforcement and drug crises, Plaintiffs filed this lawsuit in November 2017. *See* Complaint. Plaintiffs' claims arise exclusively from Defendants' interference with Band law enforcement authority and seek relief tailored to those claims: a declaration of the scope of the Band's inherent and federally delegated law enforcement authority within the 1855 Reservation and an injunction preventing interference with that authority. *Id.* Plaintiffs do not (and under Article III could not) seek a stand-alone declaration regarding the Reservation's boundaries divorced from the law enforcement dispute. *See Cnty. of Mille Lacs v. Benjamin*, 361 F.3d 460, 463-64 (8th Cir. 2004).

C. The 2018 Interim Agreement.

After revoking the 2008 Agreement, the County demanded that any new agreement prohibit the Band from exercising any form of inherent jurisdiction—civil or criminal—over any person outside trust lands; that is, it demanded that the Band act as if the

Reservation had been disestablished.[7] The County did not drop this demand until after Plaintiffs commenced this lawsuit. A new agreement, signed in September 2018 ("2018 Agreement"), terminates automatically upon conclusion of this case in lieu of such provisions:

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

Doc. 150-51 at 17 ¶ 25(c) (emphasis added). The 2018 Agreement does not resolve the parties' disputes over the Band's inherent and federally delegated law enforcement authority within the 1855 Reservation. *Id.* at 13-14 ¶ 18.

In his recent declaration, Walsh asserts that when the new cooperative agreement was executed he "revoked [his] 2016 Opinion and Protocol." 2021 Walsh Decl. at 6 ¶ 14. However, Walsh's Declaration does not attach, and Defendants have never produced, a signed copy of a revocation document. Baldwin Decl. at 2 ¶¶ 3-4. Moreover, during an August 19, 2020, hearing, counsel for Walsh initially argued that Walsh had *not* withdrawn his Opinion and Protocol. *Id.* at 2 ¶ 5. Although Walsh's counsel reversed course later in the hearing, claiming that Walsh had informed "law enforcement partners that the new

[7] *See* Doc. 150-48 (9-27-2016 proposed cooperative agreement) at 2 ¶ 3.b.i; Doc. 150-49 (6-1-2017 proposed cooperative agreement) at 3 ¶ 3.b.i; Doc. 150-50 (9-20-2017 proposed cooperative agreement) at 5 ¶ 3.b.i.

cooperative agreement replaced the County Attorney's Opinions from 2016," he acknowledged that there was no evidence of that in the record. *Id*. at 3 ¶ 6.

After signing the 2018 Agreement, Defendants asserted that "certain matters [Plaintiffs] complained of were the result of the termination of the [2008 Agreement], which has currently been reinstated and that the claims of Plaintiffs in those regards have been mooted[,]" including Plaintiffs' "claims against the County Attorney and the Sheriff." Defendants' Joint Statement of the Case at 6 (Doc. 50, Nov. 6, 2018). To address this assertion, after completing fact discovery Plaintiffs moved for summary judgment that their claims were not moot. *See* Plaintiffs' Motion for Summary Judgment on Standing Ripeness and Mootness at 1, 3-4 (Doc. 146, July 8, 2020). This Court agreed with Plaintiffs and rejected Defendants' mootness argument in its December 21, 2020, Memorandum Opinion and Order. 12/21/2020 Mem. Op. at 2, 35-36.

The Court noted that "[a] case can become moot by a party's voluntary cessation of the challenged conduct if it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id*. at 35 (quoting *Wright v. RL Liquor*, 887 F.3d 361, 363 (8th Cir. 2018) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000))). However, Defendants failed to meet their "'heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again.'" *Id*. (quoting *Friends of the Earth*, 528 U.S. at 189 (internal quotations and citation omitted)).

> If this case is dismissed, on mootness grounds, the 2018 Agreement will, by its very terms, terminate, and it is highly probable that the parties will

> continue to dispute the extent of the boundaries of the Reservation and the extent of the Band's sovereign law enforcement authority. It is certainly not "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 189 (citation omitted).

Id. at 35-36.

D. Walsh and Lorge's Appeal.

On January 19, 2021, Walsh and Lorge filed an interlocutory appeal challenging certain rulings in this Court's December 21, 2020, Memorandum Opinion and Order. Notice of Appeal (Doc. 218, Jan. 19, 2021). Specifically, they argued that this Court lacked jurisdiction over Plaintiffs' claims against them under 28 U.S.C. § 1331, that Plaintiffs did not have a "cause of action" against them, and that they were immune from suit under various immunity doctrines. Walsh and Lorge's 8th Cir. Opening Brief (filed April 1, 2021) (Baldwin Decl. Ex. B). However, Walsh and Lorge did *not* challenge this Court's ruling that Plaintiffs' claims were not moot.[8]

[8] Walsh and Lorge have asserted that they did not challenge this Court's mootness ruling because it was not an appealable collateral order. *See* Walsh and Lorge's Reply to Response and Suggestion to Recall Mandate at 3 n.1 (filed Sept. 17, 2021) (Baldwin Decl. Ex. E). However, in an interlocutory appeal, the Court of Appeals must first address its *and the District Court's* jurisdiction. *E.g., Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). It was this duty to determine the District Court's jurisdiction that allowed Walsh and Lorge to challenge this Court's ruling on subject-matter jurisdiction under 28 U.S.C. § 1331, which, like the Court's ruling on mootness, was not, by itself, an appealable collateral order. *See*, *e.g.*, *Catlin v. United States*, 324 U.S. 229, 236 (1945); *Keyes v. Gunn* 890 F.3d 232, 235 n.4 (5th Cir. 2018). Because mootness also deprives the Court of jurisdiction, *see*, *e.g.*, W&L Supp. Mootness Mem. at 9 (citing *Miller v. Redwood Toxicology Lab., Inc*., 688 F.3d 928, 934 (8th Cir. 2012)), if Walsh and Lorge believed the claims against them were moot they could have raised—and, indeed, had an *obligation* to

On August 31, 2021, after the appeal was fully briefed and awaiting argument, Walsh and Lorge "move[d] to dismiss their [interlocutory] appeal on mootness grounds" and asked the Eighth Circuit to "direct the district court to dismiss [Plaintiffs'] claims against [them]." Walsh and Lorge's Motion to Dismiss or Certify at 1 (filed Aug. 31, 2021) (Baldwin Decl. Ex. C) ("W&L 8th Cir. Mot. to Dismiss"). Walsh and Lorge argued that the Supreme Court's decision in *Cooley* "clarified the law on a key issue that forms the basis for [Plaintiffs'] claims against Walsh and Lorge." *Id.* at 1. Walsh and Lorge added that "[t]he *Cooley* decision intersects with three other developments since [Plaintiffs] filed suit" in support of their mootness argument. *Id.* at 4. Two of those developments were the 2018 Agreement and Walsh's alleged decision to revoke his 2016 Opinion and Protocol.[9] However, Walsh and Lorge's motion completely failed to mention this Court's ruling that the 2018 Agreement did not moot Plaintiffs' claims, a ruling Walsh and Lorge had not challenged in their appeal. As noted above, Walsh and Lorge's subsequent attempt to explain that failure (on the grounds that the ruling was not an appealable collateral order) lacked merit. *See* n.8 *supra*.

Under Fed. R. App. P. 27(a)(3)(A), Plaintiffs' deadline to respond to the motion was September 10, 2021. On the morning of September 10, 2021, before Plaintiffs filed their

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raise—that issue in the Court of Appeals. However, they made no mention of mootness until *after* the appeal was fully briefed and awaiting oral argument.

[9] The third "development" identified by Walsh and Lorge was the December 2016 Deputation Agreement between the Band and BIA. *Id.* However, that agreement was made some eleven months *before* Plaintiffs filed suit and thus could provide no support for their mootness claim.

response, the Eighth Circuit entered judgment granting "[Walsh and Lorge's] motion to dismiss on terms fixed by the court[,]" providing that "[e]ach side will bear its own costs on appeal[,]" and directing that "[t]he Court's mandate shall issue forthwith." Judgment (Doc. 292, Sept. 10, 2021) ("8th Cir. Judgment"). In support, the Judgment cited Fed. R. App. P. 42(b). *Id.* Rule 42 is entitled "Voluntary Dismissal" and, under Rule 42(b), "[a]n appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court." Thus, on its face, the Judgment treated Walsh and Lorge's motion as a motion for voluntary dismissal under Rule 42. The Eighth Circuit did not "direct the district court to dismiss [Plaintiffs'] claims against [them]," as Walsh and Lorge requested, and did not address Walsh and Lorge's mootness argument. 8th Cir. Judgment. The Eighth Circuit's mandate issued soon thereafter. Mandate (Doc. 293, Sept. 10, 2021).

Plaintiffs filed a timely response to Walsh and Lorge's motion to dismiss in the Eighth Circuit later on September 10. Plaintiffs-Appellees' Response to Defendants-Appellants' Motion to Dismiss or Certify (filed Sept. 10, 2021) (Baldwin Decl. Ex. D) Plaintiffs explained that, notwithstanding the Eighth Circuit's Judgment, they were filing a response to Walsh and Lorge's motion "so that they will have filed a timely response in the event there are any further proceedings before [the Eighth Circuit] under [Fed. R. App. P.] 40 or Eighth Circuit Rule 27A(d)"—that is, under the rules governing rehearing or reconsideration of the Eighth Circuit's disposition of the appeal. *Id.* at 2.

Walsh and Lorge filed a reply brief in support of their motion on September 17, 2021, in which they suggested that the Eighth Circuit should recall its mandate to clarify

its judgment. Walsh and Lorge's Reply to Response and Suggestion to Recall Mandate (filed Sept. 17, 2021) (Baldwin Decl. Ex. E). However, as indicated by Fed. R. App. P. 27(b), Walsh and Lorge's post-judgment reply did "not constitute a request to reconsider, vacate, or modify the disposition; *a motion requesting that relief must be filed*." (Emphasis added.)

No further orders having been issued by the Eighth Circuit, on October 15, 2021, Walsh and Lorge filed a motion to recall the mandate in the Eighth Circuit and to confirm that "*Cooley* moots the case against them." Walsh and Lorge's Motion to Recall the Mandate at 8 (filed Oct. 15, 2021) (Baldwin Decl. Ex. F). Walsh and Lorge repeated the mootness arguments made in their motion to dismiss but did not address their failure to file a timely motion for rehearing under Fed. R. App. P. 40(a)(1) or reconsideration under Eighth Circuit Rule 27A(d). Plaintiffs filed a response to Walsh and Lorge's motion to recall the mandate on October 19, 2021, noting Walsh and Lorge's failure to file a timely motion for rehearing or reconsideration. Plaintiffs-Appellees' Response to Defendants-Appellants' Motion to Recall the Mandate (filed Oct. 19, 2021) (Baldwin Decl. Ex. G). The very next day, the Eighth Circuit "summarily denied" Walsh and Lorge's motion to recall the mandate. Order (filed Oct. 20, 2021) (Baldwin Decl. Ex. H). The one-sentence order does not direct this Court to dismiss Plaintiffs' claims against Walsh and Lorge and does not mention mootness. *Id.*

E. The November 15, 2021, Status Conference.

On October 22, 2021, this Court scheduled a status conference for November 15,

2021. Notice (Doc. 296, Oct. 22, 2021). During the status conference, the Court ordered supplemental briefing from the parties to address the following questions:

> Number one. I view it as a procedural question. That is, what is the procedural impact of the Eighth Circuit's dismissal of the interlocutory appeal? Is there or is there not a direction for me to dismiss the case? Have they or have they not ruled on mootness?
>
> And then number two. Assuming they have not, and there is no direction for me to dismiss the case, is the case moot based on Mr. Walsh' declaration?

Baldwin Decl. Ex. I at 6-7 (Transcript of Nov. 15, 2021, Status Conference at 17-18).

Walsh and Lorge submitted their supplemental brief on December 13, 2021 (W&L Supp. Mootness Mem.), along with a motion "for an order dismissing them from the case pursuant to" their supplemental brief. Defendants Walsh and Lorge's Motion to File Supplemental Memorandum of Law on Mootness at 1 (Doc. 303, Dec. 13, 2021). In an accompanying notice of hearing, Walsh and Lorge state that they "bring their supplemental [brief]" before the Court as requested in the November 15, 2021, status conference "and pursuant to Rule 12" but cite no provision of Fed. R. Civ. P. 12 that is applicable here. *See* Defendants Walsh and Lorge's Notice of Hearing Regarding Supplemental Memorandum of Law on Mootness at 1 (Doc. 304, Dec. 13, 2021). Walsh and Lorge submitted declarations supporting the motion, which are identical to the declarations they had initially filed in the Eighth Circuit supporting their motion to dismiss or certify. *See* 2021 Walsh Decl.; Declaration of Don Lorge (Doc. 306-2, Aug. 31. 2021) ("2021 Lorge Decl.").

III. ARGUMENT

A. The Eighth Circuit Did Not Direct the District Court to Dismiss This Case or Otherwise Rule on Walsh and Lorge's Mootness Arguments.

There is nothing ambiguous about the Eighth Circuit's September 10, 2021, Judgment. The Judgment expressly dismissed Walsh and Lorge's appeal under Fed. R. App. P. 42(b) and makes no suggestion that Plaintiffs' claims against Walsh and Lorge are moot. As Walsh and Lorge admit, "[t]he judgment did not mention mootness nor direct dismissal of Walsh and Lorge on that basis." W&L Supp. Mootness Mem. at 7. The Judgment's: (1) citation of Appellate Rule 42(b); (2) omission of any discussion of mootness or any direction to this Court to dismiss Plaintiffs' claims against Walsh and Lorge (despite Walsh and Lorge's specific request for such direction); (3) issuance without awaiting a response from Plaintiffs; and (4) direction that the mandate issue forthwith all demonstrate that the Eighth Circuit treated Defendants' motion as a motion for voluntary dismissal and did not address Walsh and Lorge's mootness argument.

Counsel for Walsh and Lorge assert that they "have been unable to find a precedent where justiciability was challenged and a case dismissed without explanation." W&L Supp. Mootness Mem. at 7. However, the Eighth Circuit *did* provide an explanation; it treated Walsh and Lorge's motion as a motion for voluntary dismissal under Appellate Rule 42(b) and granted it on that basis. If Walsh and Lorge disagreed with that reading of their motion, they could have filed a timely motion for rehearing or reconsideration, but they failed to do so. Walsh and Lorge's related arguments—that the Eighth Circuit "did not specify another substantive basis" for granting their motion and that, "when an appellate court wants to avoid ruling on mootness, the court will so state," *id.* at 8, fail for the same reason. Here, the Eighth Circuit did state the basis for granting Walsh and Lorge's

motion: Appellate Rule 42(b). Because Walsh and Lorge voluntarily moved to dismiss their own appeal, the Eighth Circuit had no reason to and did not address mootness.

Notably, Walsh and Lorge themselves were concerned that the Eighth Circuit had not issued a ruling on mootness, *twice* asking the Court of Appeals to recall its mandate to rule on mootness. *See* Walsh and Lorge's Reply at 3 (Baldwin Decl. Ex. E) ("If the Court agreed the case against Walsh and Lorge had become moot, as appears to be so from granting their motion, it should say so …. Accordingly, Walsh and Lorge suggest the Court recall its mandate to clarify whether the case against them is now moot."); Walsh and Lorge's Motion to Recall the Mandate at 2 (Baldwin Decl. Ex. F) (recognizing that if Walsh and Lorge were correct that the Eighth Circuit had granted their motion to dismiss the case as moot, "the district court should have been directed to dismiss them from the pending action"); *id.* at 5 ("Walsh and Lorge request the mandate be recalled so the Court can confirm it agrees the case against Walsh and Lorge is now moot[.]"). The Eighth Circuit did not respond at all to the first request (which was made in Walsh and Lorge's post-judgment reply brief, not in a timely motion for rehearing or reconsideration) and summarily denied the second. On this record, there is no reason to believe that the Eighth Circuit intended to direct this Court to dismiss Walsh and Lorge from this case *sub silentio*, despite repeatedly declining to do so expressly.

Walsh and Lorge appear to agree. They concede that, "in the absence of any clear direction from the appellate court, … the prudent course is for this Court to address in the first instance the changed legal and factual landscape they believe moots Plaintiffs' case

against them." W&L Supp. Mootness Mem. at 9. This is not only the prudent course, but it is the only available course because, for the reasons discussed above, the Eighth Circuit made no ruling on mootness.

B. This Court Correctly Ruled That the Parties' 2018 Law Enforcement Agreement Did Not Moot Plaintiffs' Claims, and Walsh and Lorge Present No Reason to Reconsider that Ruling.

Walsh and Lorge concede that they have "a high burden of persuasion" to demonstrate that Plaintiffs' claims against them are moot. W&L Supp. Mootness Mem. at 10 (quoting *Friends of the Earth*, 528 U.S. at 190, for the principle that a "'defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur'"). They argue that Plaintiffs' claims against them have become moot for several reasons, beginning with the assertion that the "County and the Band have a cooperative agreement in place, and, accordingly, Walsh has revoked his 2016 Opinion and Protocol." *Id.*

This Court expressly rejected Walsh and Lorge's argument that the 2018 Agreement moots Plaintiffs' claims in its December 21, 2020, Memorandum Opinion and Order. 12/21/2020 Mem. Op. at 2, 35-36. As the Court explained, "[i]f this case is dismissed, on mootness grounds, the 2018 Agreement will, by its very terms, terminate, and it is very highly probable that the parties will continue to dispute the extent of the boundaries of the Reservation and the extent of the Band's sovereign law enforcement authority." *Id.* at 35. The record amply supports the Court's conclusion: the County terminated the prior law

enforcement agreement primarily because of the dispute over the Reservation's existence; Defendants insisted that any new agreement contain provisions requiring the Band to act as if the Reservation did not exist until after Plaintiffs filed this case; and Defendants then insisted on an automatic termination clause because they were relying on the Court's resolution of the Reservation-boundary question in lieu of those provisions. *See* Part II.A, nn.2-3, and Part II.C *supra*.

This record confirms that, if this case were dismissed as moot, the existing interim agreement would terminate in accordance with its terms, the parties would continue to dispute the existence of the Reservation, and, consistent with their position that the Reservation has been disestablished, Defendants would continue to assert that the Band has no law enforcement authority on non-trust lands and only limited law enforcement authority on trust lands. Thus, as the Court found, "[i]t is certainly not 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" 12/21/2020 Mem. Op. at 36 (quoting *Friends of the Earth*, 528 U.S. at 189 (citation omitted)); *see also Lucini Italia Co. v. Grappolini*, 288 F.3d 1035, 1038 (7th Cir. 2002) (agreement that avoids injury during the pendency of litigation does not result in mootness).

Walsh and Lorge did not challenge this Court's Order in the Eighth Circuit, have not moved for reconsideration of this Court's Order here, and identify no "compelling circumstances" that might warrant reconsideration of it. *See* Local Rule 7.1(j) (authorizing a party to move for reconsideration after obtaining leave, upon a showing of "compelling

circumstances"). To the extent Walsh and Lorge offer any basis for reconsideration of the Court's Order, they argue that "[t]his case … is not controlled by the voluntary cessation exception to the mootness doctrine" because Walsh did not revoke his Opinion and Protocol "to invent a mootness argument." W&L Supp. Mootness Mem. at 11. Instead, according to Walsh and Lorge, Walsh revoked his Opinion and Protocol because the Band and the County had entered into a new cooperative agreement. *Id.*

There are several problems with this argument. First, it is not a proper basis for reconsideration. "Permission for reconsideration is only granted for 'exceptional circumstances requiring extraordinary relief[.]'" *Fields v. Emmerich*, Civ. No. 13-509, 2014 U.S. Dist. LEXIS 106397 at *6 (D. Minn. Aug. 4, 2014) (quoting *Nelson v. Am. Home Assur. Co.*, 702 F.3d 1038, 1043 (8th Cir. 2012). "[R]econsideration 'should not be employed to relitigate old issues.'" *Id.* (quoting *Clear Channel Outdoor, Inc. v. City of St. Paul*, 642 F. Supp. 2d 902, 909 (D. Minn. 2009) (quotations and citations omitted)). Rather, "'[m]otions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence.'" *Id.* (quoting *Hagerman v. Yukon energy Corp.*, 839 F.2d 407, 414 (8th Cir. 1988)); *accord Niazi Licensing Corp. v. St. Jude Med. S.C., Inc.*, No. 17-cv-5096, 2021 U.S. Dist. LEXIS 222960 at *2-3 (D. Minn. Nov. 18, 2021) ("motion for reconsideration cannot be employed to repeat arguments previously made, introduce evidence or arguments that could have been made, or tender new legal theories for the first time") (citing *Hagerman*, 839 F.2d at 414).

Walsh and Lorge's written response to Plaintiffs' summary judgment motion that this case is not moot asserted that this is not a voluntary cessation case because the parties voluntarily entered into the 2018 Agreement. *See* Defendants Walsh and Lorge's Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment on Standing, Ripeness and Mootness at 51-56 (Doc. 176, July 29, 2020). At the August 19, 2020, hearing on the motion, counsel for Walsh and Lorge added that this is not a voluntary cessation case because Walsh had "*not* withdrawn his Opinion and Protocol." Baldwin Decl. ¶ 5 (emphasis added). Walsh and Lorge's counsel then corrected that statement but did not suggest that Walsh's alleged communication to law enforcement partners affected the voluntary cessation analysis. *See id*. ¶ 6.

Walsh and Lorge's current argument is, therefore, simply an attempt to re-cast an argument that they already made based on evidence that was available to them at that time. It does not seek to correct a manifest error of law or fact or present newly discovered evidence but instead seeks to introduce evidence or arguments that could have been made previously. Accordingly, it provides no basis for reconsideration of the Court's order.

Second, Walsh's stated rationale does not support and, to the contrary, fatally undermines Walsh and Lorge's mootness argument. By tying Walsh's alleged decision to revoke his 2016 Opinion and Protocol to the 2018 Agreement, Walsh and Lorge simply confirm that, if the 2018 Agreement were to terminate, Walsh would again need to address the scope of the Band's law enforcement authority. And, because the County, Walsh and Lorge all continue to assert that the Reservation no longer exists, it is highly probable, if

not certain, that Walsh would limit the Band's authority to trust lands, preventing Plaintiffs from exercising such authority on non-trust lands within the 1855 Reservation boundaries. Moreover, even on trust lands, it is likely the Walsh would continue to take an overly conservative position regarding the Band's law enforcement authority, an issue discussed in greater detail below.

Third, Walsh and Lorge are mistaken in suggesting that Walsh's alleged voluntary revocation of his 2016 Opinion and Protocol necessarily results in mootness because he did not act with the intent to moot this case. Under *Friends of the Earth* and its progeny, voluntary acts, whether termed "voluntary cessation" or "voluntary compliance," can result in mootness, but *only* if the defendant can meet "the formidable burden of showing that it is *absolutely clear* the allegedly wrongful behavior could not reasonably be expected to recur." 528 U.S. at 190 (emphasis added); *see also Strutton v. Meade*, 668 F.3d 549, 556 (8th Cir. 2012) (in a voluntary cessation case, "[t]he burden of showing that the challenged conduct is unlikely to recur rests on the party asserting mootness"); *McCarthy v. Ozark Sch. Dist.*, 359 F.3d 1029, 1037 (8th Cir. 2004) (voluntary-cessation standard "is stringent: 'a case might become moot if subsequent events made it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur'") (quoting *Young v. Hayes*, 218 F.3d 850, 852 (8th Cir. 2000) (emphasis added)).

Under this standard—which Walsh and Lorge concede is controlling here, W&L Supp. Mootness Mem. at 10—a case is not rendered moot simply because the defendant did not act with intent to moot the case. *See*, *e.g.*, *Hartnett v. Pa. State Educ. Ass'n*, 963

F.3d 301, 2020 U.S. App. LEXIS 19768, *7-*8 (3d Cir. 2020) ("[*W]hy* the defendant ceased its behavior" matters not for voluntary-cessation analysis) (emphasis in original). Thus, in *Let Them Play MN v. Walz*, No. 21-cv-79, 2021 U.S. Dist. LEXIS 159741, *15-17 (D. Minn., Aug. 24, 2021), on which Walsh and Lorge rely, the court considered the Governor's reasons for rescinding certain pandemic restrictions, but its holding rested not merely on the absence of an intent to moot the case but on the court's conclusion that the challenged conduct was unlikely to recur.[10] Here, Walsh's reasons for allegedly revoking his Opinion and Protocol show just the opposite: if this case is dismissed as moot, the interim agreement will terminate according to its terms and Walsh can be expected to again seek to restrict Plaintiffs' law enforcement authority to trust lands and, even on trust lands, impose restrictions on that authority.

C. Neither Walsh and Lorge's August 31, 2021, Declarations Nor *Cooley* Demonstrate that This Case Is Moot.

Walsh and Lorge next argue that "the *Cooley* decision represents a change in law, which Walsh states would preclude him from reissuing an opinion and protocol *like what*

[10] The court also found that "the more fundamental cause of mootness" was "the Minnesota Legislature's termination of the peacetime-emergency declaration," which deprived the Governor of "the standing legal authority to issue binding rules under the previously declared peacetime emergency." *Id*. at *17-18. Walsh and Lorge identify no change in state law or any other development that would prevent Walsh from issuing a new opinion and protocol or taking other action to limit the Band's law enforcement authority. *See United States v. Mercy Health Servs*., 107 F.3d 632, 636 (8th Cir. 1997) (case not moot where "'resumption of the challenged conduct depends solely on the defendants' capricious actions by which they are free to return to their old ways'") (quoting *Steele v. Van Buren Sch. Dist.*, 845 F.2d 1492, 1494 (8th Cir. 1988) (quotations, citations, and alterations omitted)).

he provided in 2016[.]" W&L Supp. Mootness Mem. at 10 (emphasis added). In his Declaration, Walsh asserts:

> 15. At the time I drafted my opinion and protocol in 2016, the United States Supreme Court had not determined the scope of retained inherent tribal jurisdiction to investigate potential state and federal law criminal violations. In the Opinion, I set out several conclusions relevant to inherent tribal criminal authority. One of these conclusions was that tribes do not have criminal jurisdiction over non-Indians, with a narrow exception under the Violence Against Women Act.
>
> 16. I have read the recent United States Supreme Court decision in *United States v. Cooley*, 141 S. Ct. 1638 (June 1, 2021). In *Cooley*, the Court held that tribes, and by extension tribal police officers, within their reservation had inherent authority to stop and investigate non-Indians for possible state and federal law violations. The *Cooley* decision alleviated my major concern in issuing my Opinion in 2016: having evidence that was admissible in court. Consequently, I could not and would not reissue *my 2016 Opinion and Protocol* should the current cooperative agreement entered into in 2018 terminate.

2021 Walsh Decl. at 6 (emphasis added). Lorge's Declaration states that "[i]f the 2018 Cooperative Agreement is terminated, as Sheriff I would follow the advice of the County Attorney and instruct my deputies and staff accordingly." 2021 Lorge Decl. at 2 ¶ 6. Walsh and Lorge argue that these representations—although apparently made for the sole purpose of mooting this case—are "entitled to substantial deference." W&L Supp. Mootness Mem. at 12 (citing *Defunis v. Odegaard*, 416 U.S. 312 (1974); *Prowse v. Payne*, 984 F.3d 700 (8th Cir. 2021)).

There are several problems with this argument. To begin, *Cooley* involved tribal authority to investigate state-law violations on reservation lands where the tribe lacked the power to exclude. The Court held previously that "'where jurisdiction to try and punish an

offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities.'" *Cooley*, 141 S. Ct. at 1644 (quoting *Duro v. Reina*, 495 U.S. 676, 697 (1990) (internal modification normalized)). According to the Court, "[t]he authority to search a non-Indian prior to transport is *ancillary to this authority that we have already recognized*." *Id.* (citing *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1180-81 (9th Cir. 1975)) (emphasis added). "Indeed, several state courts and other federal courts have held that tribal officers possess the authority at issue here." *Id.* (citing, *inter alia*, *Terry*, 400 F.3d at 579-80). The only difference in *Cooley* was that the issue arose on lands over which the tribe lacked the power to exclude. Although "in *Duro* [the Court] traced the relevant tribal authority to a tribe's right to exclude non-Indians from reservation land[,]" *Cooley* held "tribes 'have inherent sovereignty independent of the authority arising from their power to exclude,' … and here *Montana's* second exception recognizes that inherent authority." *Id.* (citation omitted, internal modification normalized).

Neither Walsh's declaration nor *Cooley's* holding moots this case. First, Walsh's 2016 Opinion and Protocol asserted that the Band had *no* law enforcement authority on non-trust lands within the 1855 Reservation (which comprise the large majority of the lands within the 1855 Reservation) because of the County's position that the Reservation had been disestablished. *See* Walsh's 2016 Opinion and Protocol, Doc. 150-9 at 14 ("[i]nherent tribal jurisdiction is limited to 'Indian country'" and the County "believe[s] that 'Indian country' in Mille Lacs County is limited to tribal trust lands"). Walsh and Lorge have

maintained that position throughout this case, including in the briefs all Defendants submitted earlier this year on cross-motions for summary judgment on the disestablishment issue and at oral argument on those motions.[11] Indeed, in Walsh's 2021 Declaration, he continues to cite correspondence from former Governors and Attorneys General asserting that the Reservation had been disestablished, making no mention of the State's *current* position that the boundary of the 1855 Reservation remains intact. *Compare* 2021 Walsh Decl. at 3-4 ¶ 10, *with Amicus Curiae* Brief of the State of Minnesota (Doc. 247, Feb. 8, 2021). Nothing in *Cooley* addresses the reservation-boundary issue, and Walsh's declaration makes no suggestion that his position on that issue has changed one iota.

As Walsh declares, *Cooley* applies to "tribes, and by extension tribal police officers, *within their reservation*[.]" 2021 Walsh Decl. at 6 ¶ 16 (emphasis added). Counsel for Walsh and Lorge acknowledged at the November 15, 2021, status conference that "the scope of tribal law enforcement authority in terms of the geographic scope would depend upon the boundary issue. Because if the boundaries were disestablished, then there's

[11] *See* Defendants' Motion for Summary Judgment on Reservation Cession (Doc. 239, Feb. 1, 2021); Defendants' Memorandum of Law in Support of Motion for Summary Judgment on Reservation Cession (Doc. 241, Feb. 1, 2021); Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Partial Summary Judgment that the Boundaries of the Mille Lacs Indian Reservation, as Established in 1855, Remain Intact (Doc. 257, Feb. 22, 2021); Defendants' Reply Memorandum of Law in Support of Motion for Summary Judgment on Reservation Cession (Doc. 271, Mar. 8, 2021); Defendants' Memorandum in Response to *Amicus Curiae* Brief of the United States in Support of Plaintiffs' Motion for Partial Summary Judgment that the Boundaries of the Mille Lacs Indian Reservation, as Established in 1855, Remain Intact (Doc. 277, Mar. 12, 2021).

Indian Country within Mille Lacs County, but there is not the reservation boundary as such." Baldwin Decl. Ex. I at 4 (Transcript 11:2-7 (Mr. Knudson)).

Under these circumstances, neither Walsh's declaration nor *Cooley's* holding demonstrates that the conduct challenged by Plaintiffs will not recur. To the contrary, if this case were dismissed as moot, the 2018 Agreement would terminate and Walsh likely would continue to assert Band officers lack inherent or federally delegated authority on non-trust lands within the 1855 Reservation.

Second, in his 2016 Opinion and Protocol, Walsh took the position that Band officers had no authority to investigate state-law violations *even on trust lands*, where the Band has the power to exclude. This position contravened existing law. As *Cooley* explained, "[t]he authority to search a non-Indian prior to transport is *ancillary to ... authority that we have already recognized*." *Id.* (emphasis added). "Indeed, several state courts and other federal courts [had] held that tribal officers possess the authority at issue here." *Id*. (citing *Terry* and other cases). In *Terry*, the Eighth Circuit held that tribal officers have inherent authority to investigate violations of federal and state law, at least on trust and Band-owned fee lands on which the Band has the power to exclude law violators. *See* 400 F.3d at 579-80 ("Because the power of tribal authorities to exclude non-Indian law violators from the reservation would be meaningless if tribal police were not empowered *to investigate such violations*, tribal police must have such power.") (emphasis added).

Despite this existing body of law, Walsh refused to recognize that Plaintiffs possessed the authority to investigate state-law violations on trust or Band-owned fee lands where the Band has the power to exclude. He testified that he did not consider *Terry* controlling, took a "conservative viewpoint [that Band police officers] had less authority than more, which would lead to less appeals and less contested issues," and issued an opinion and protocol that prohibited Band officers from exercising such authority—with potential criminal liability if they did. *See* Doc. 174-2 at 53-54, 60-61 (Walsh Dep. 295:24-25, 296:1-3, 300: 3-25, and 301:1-21); Doc. 150-9 at 9 (Walsh's 2016 Opinion stating "[a]s all investigations of state law violations must be completed by a peace officer within his or her state law jurisdiction, either the Mille Lacs County Sheriff's Office or the police department of a municipality must take possession of all evidence gathered regarding that investigation"). That "conservative" approach led to a decline in morale among and resignation by Band officers, reduced the effectiveness of those who remained, and contributed a drug and law enforcement crisis on the Reservation. *See* Parts II.A and II.B *supra*.

Notably, Walsh's declaration does not indicate whether he is now prepared to follow *Terry*. Although he pledges to follow *Cooley*, he apparently views the case as leaving "the scope of any such authority beyond the facts of the case" up to "the lower courts to work out." W&L Supp. Mootness Mem. at 5; *see also* W&L 8th Cir. Motion to Dismiss at 4 (Baldwin Decl. Ex. C) (*Cooley* "did not address the scope of [tribal] authority beyond the facts of the case," which involved, among other things, a suspect's "possession of two

semi-automatic rifles"). Given Walsh's conservative approach, it is likely that he would continue to impose restrictions on Band authority to investigate state-law violations on trust as well as non-trust lands—including proactive efforts to address drug trafficking—and nothing in his declaration suggests otherwise. Thus, the question whether tribal officers have inherent authority to investigate state-law violations under *Terry*, outside of the specific circumstances presented in *Cooley*, remains a live issue.

Third, Walsh and Lorge's argument that deference should be afforded to their statements that the challenged conduct will not recur is unavailing. In the Eighth Circuit, "[a] defendant 'faces a heavy burden' to establish mootness by way of voluntary cessation, … but the standard is *slightly less onerous* when it is the government that has voluntarily ceased the challenged conduct." *Prowse*, 984 F.3d at 703 (quoting *Ctr for Special Needs Tr. Admin., Inc. v. Olson*, 676 F.3d 688, 697 (8th Cir. 2012)) (emphasis added). Here, Walsh has *not* stated that he would revise his position on the Reservation boundary or his conservative approach; his declaration states only that he would not issue an opinion and protocol identical to his 2016 Opinion and Protocol. Thus, although the standard is "slightly less onerous," Walsh and Lorge have not satisfied it. *See Speech First, Inc. v. Schlissel*, 939 F.3d 756, 768 (6th Cir. 2019) (government actors that voluntarily cease offending actions via methods that are "discretionary[] and easily reversible" must rely on "significantly more than … bare solicitude" to establish mootness).

This is illustrated by the cases on which Walsh and Lorge rely. *Defunis*, 416 U.S. 312, was a challenge to a law school admissions policy. By the time the case reached the

Supreme Court, the plaintiff had been admitted to the law school and the school "represented that, without regard to the ultimate resolution of the issues in this case, [he] will remain a student in the Law School for the duration of any term in which he has already enrolled." *Id*. at 316-17. The Supreme Court reasoned that, because the plaintiff "has now registered for his final term, it is evident that he will be given an opportunity to complete all academic and other requirements for graduation, and, if he does so, will receive his diploma regardless of any decision this Court might reach on the merits of this case." *Id*. at 317. There was no ambiguity in the law school's representation and no doubt that the plaintiff would receive the relief he had requested when he filed this case. *See id.* Here, by contrast, Walsh's declaration makes no representation regarding Plaintiffs' law enforcement authority on non-trust lands or the scope of that authority on trust lands; as a result, it is far from "evident" that Plaintiffs will receive the relief they sought when they filed this case if it were dismissed as moot.

Similarly, in *Prowse*, 984 F.3d 700, the plaintiff challenged a prison's denial of hormone therapy to treat plaintiff's gender dysphoria. At oral argument in the Eighth Circuit, the parties informed the court that the plaintiff was "already receiving hormone therapy and had been for several months." *Id*. at 702. In response to the court's request for supplemental briefing on mootness, the prison submitted an affidavit "expressly stat[ing] that [the plaintiff] 'will continue to receive hormone therapy so long as her treating medical professionals determine that hormone therapy is clinically indicated or recommended for her.'" *Id*. at 702-03; *see also id.* at 702 n.4. The court found that,

"[u]nder these circumstances, the prison administrators have established that the unconstitutional conduct [the plaintiff] alleges 'could not reasonably be expected to recur.'" *Id*. at 703 (quoting *Friends of the Earth*, 528 U.S. at 189). As in *Defunis*, there was no ambiguity in the defendant's representation. Here, however, Walsh's declaration fails to address central issues in this case and thus does not establish that alleged wrongful conduct could not reasonably be expected to recur.

D. Walsh and Lorge's Argument that It Is Speculative Whether the Challenged Conduct Will Recur Lacks Merit.

Walsh and Lorge claim it is speculative to argue that the alleged misconduct will recur because it assumes the parties will fail to negotiate a new law enforcement agreement, Minnesota's Attorney General will again refuse to opine on the Band's law enforcement authority, and statutory provisions governing the Band's state authority will remain unchanged. W&L Supp. Mootness Mem. at 16. Walsh and Lorge made an identical argument in response to Plaintiffs' motion for summary judgment that the case is not moot. *See* Defendants Walsh and Lorge's Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment on Standing, Ripeness and Mootness at 54-57 (Doc. 176, July 29, 2020). This Court rejected the argument, finding that, "[i]f this case is dismissed, on mootness grounds, the 2018 Agreement will, by its very terms, terminate, and it is *highly probable* that the parties will continue to dispute the extent of the boundaries of the Reservation and the extent of the Band's sovereign law enforcement authority." 12/21/2020 Mem. Op. at 35-36 (emphasis added). As discussed above, Walsh and Lorge

provide no basis for reconsidering this ruling, let alone the "compelling circumstances" required by Local Rule 7.1(j).

However, even if the Court were willing to reconsider this issue, it should again reject Walsh and Lorge's argument. It is not Plaintiffs' burden to prove that the challenged conduct will recur; it is Walsh and Lorge's burden to establish it will not. *E.g., Prowse*, 984 F.3d at 703. Here, it is Walsh and Lorge—not Plaintiffs—who engage in speculation to advance their mootness argument.

Walsh and Lorge first speculate that the parties might negotiate a new law enforcement agreement. *See* W&L Supp. Mootness Mem. at 16. However, as discussed above, the primary reason the County terminated the 2008 law enforcement agreement was because of the dispute over the existence of the Reservation. *See* Part II.A *supra*. In entering into a new agreement, the County and the Sheriff insisted upon its automatic termination upon completion of this case because they were relying on the Court's resolution of the Reservation-boundary issue in lieu of other provisions requiring the Band to act as if the Reservation did not exist. *See* Part II.C *supra.* Under these circumstances, it is not speculative to assert that, if this case were dismissed, the 2018 Agreement would terminate and that the parties would be unable to enter into a new agreement but would instead continue to dispute the extent of the Reservation's boundaries; rather, as this Court found, it is "highly probable[.]" 12/21/2020 Mem. Op. at 35.

Second, Walsh and Lorge speculate that the Minnesota Attorney General might opine on the scope of the Band's law enforcement authority, relieving Walsh of the need

to do so. *See* W&L Supp. Mootness Mem. at 16. However, as discussed above, successive Attorneys General have concluded that they lack authority to issue such an opinion under State law, and Walsh agreed that they were likely correct. *See* Part II.A *supra*. Walsh and Lorge offer no reason to believe that the Attorney General will reverse course in the future; for example, they point to no change in the statutory authority or other factors that led the Attorney General to deny Walsh's 2016 request. Moreover, Walsh and Lorge offer no reason to believe they would *follow* an Attorney General's opinion: although the Attorney General has clearly stated Minnesota's position that the Reservation was not disestablished, *see* Doc. 247, Walsh and Lorge continue to insist otherwise.

Third, Walsh and Lorge speculate that there might be an amendment to Minn. Stat. § 626.90, which governs the Band's law enforcement authority under state law, which might in some unexplained way moot the issues in this case. *See* W&L Supp. Mootness Mem. at 16. However, they offer no reason to believe that that provision will be amended. Although actual statutory amendments can moot a case, the mere possibility of such amendments cannot.

IV. CONCLUSION

The Eighth Circuit's dismissal of Walsh and Lorge's appeal did not direct this Court to dismiss Plaintiffs' claims against Walsh and Lorge and did not rule on the question of mootness. On the merits, neither Walsh's alleged revocation of his 2016 Opinion and Protocol based on the parties' 2018 Agreement nor Walsh and Lorge's 2021 Declarations based on *Cooley* demonstrate with any degree of certainty, much less the requisite absolute

clarity, that the challenged conduct in this case will not recur, and there is nothing speculative about this conclusion. Accordingly, this case is not moot.

Plaintiffs respectfully request that the Court deny Walsh and Lorge's motion (Doc. 303) and proceed to rule on the parties' cross motions for summary judgment regarding the Reservation boundary (Docs. 223 and 239).

DATED: December 30, 2021.

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

Plaintiffs,

vs.

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

Defendants.

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

DEFENDANTS' JOINT STATEMENT OF THE CASE

Defendants are the County of Mille Lacs, Minnesota, the Mille Lacs County Attorney Joseph Walsh, and the Mille Lacs County Sheriff Brent Lindgren (jointly referred to as the "County" herein).

The County claims that the Mille Lacs Reservation, established by the 1855 Treaty with the Chippewa (10 Stat. 1166) was disestablished by the 1863 and 1864 Treaties with the Chippewa (12 Stat. 1249 and 13 Stat. 693) and/or the Nelson Act of January 14, 1889 (25 Stat. 642) and the Agreement pursuant to that Act.

Various other general and specific Acts of Congress bear on the disestablishment of the reservation.

In the Treaties of 1863 and 1864, the Minnesota Chippewa ceded all of the 1855 Reservation to the United States. The consideration promised was paid. The Minnesota Chippewa were to remove to a central area reserved in common. *See DeCoteau v. Dist. Cty. Court for Tenth Judicial District*, 420 U.S. 425 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); and *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) for similar cessions. Article 12 of the 1863 and 1864 Treaties granted to the Mille Lacs Band a conditional privilege that they "not be compelled to remove" from the ceded 1855 reservation as long as they did not "interfere with or in any way molest any persons or property of the whites." The Band later maintained this conditional privilege of occupancy preserved their interest in the 1855 Reservation in its entirety.

Despite the clear cession language in the 1863 and 1864 Treaties, to resolve this conflict between the Mille Lacs Band's claim of an occupancy right to the former Reservation and the opening of the Reservation for sale and preemption under the General Land Laws, in 1889 Congress passed the Nelson Act. The Band formally agreed to forever relinquish the Article 12 conditional privilege of occupancy in the 1855 Reservation to the United States. The United States Supreme Court later found that there had been an express relinquishment and

cession of the 1855 Mille Lacs Reservation, including the right of occupancy. *See United States v. Mille Lacs Band of Chippewa Indians*, 229 U.S. 498, 504-05 (1913).

Pursuant to the 1863 and 1864 Treaties, the Nelson Act and Agreement, subsequent litigation including claims in the Indian Claims Commission, the Mille Lacs Band and/or Minnesota Chippewa Tribe have received payments for the entire 1855 Reservation.

The original boundaries of the 1855 Reservation today comprise the three townships of Kathio, Isle Harbor and South Harbor in Mille Lacs County. The only lands that comprise Indian country (18 U.S.C. § 1151(a)) are the lands held in trust by the United States for the Minnesota Chippewa Tribe, the Band, and individual Band members ("trust lands").

The area encompassed by the three townships in question was not treated as Indian country by the State of Minnesota, the Band, or the United States for over 100 years.

The Mille Lacs Band in its lawsuit seeking additional compensation before the United States Court of Claims and the United States Supreme Court, as well as the United States, each took the position that the Mille Lacs Reservation had been "relinquished," "extinguished," "legally extinguished," and "extinguished as an Indian reservation." Similarly, the Minnesota Chippewa Tribe, in claims before the Indian Claims Commission, took the position that the Mille Lacs

Reservation had been extinguished and relinquished. The Mille Lacs Band received additional payment based on this claim.

The claim that the Mille Lacs Reservation continues to exist is barred by the doctrines of collateral estoppel and res judicata. The claim is further barred by the statute of limitations and jurisdictional bar of the Indian Claims Commission Act of 1946 (60 Stat. 1049, § 12).

The instant litigation seeks to assert jurisdiction over fee lands and non-members who, for well over 100 years, have had the justifiable expectation that these three townships are no longer Indian country, with the exception of trust lands, and that they are not subject to the jurisdiction, whether criminal or civil, of the Mille Lacs Band or the jurisdiction exercised by the United States government only in Indian country. The Defendants' Answers set forth numerous additional factual and affirmative defenses which are omitted here in the interest of brevity.

With regard to the Band's claims of law enforcement authority, the authority of the Band, whether inherent or federal law enforcement authority, is limited to Indian country, i.e. trust lands.

The United States has assumed concurrent criminal jurisdiction over Indian country in Mille Lacs County under 18 U.S.C. § 1162(d), but the County's position is that this is limited to trust lands with narrow exceptions. The United

States Bureau of Indian Affairs entered into a Deputation Agreement with the Band and issued Special Law Enforcement Commissions to some Band officers, which provide those Band police officers with authority to investigate violations of federal law throughout Indian country in Mille Lacs County and to arrest suspects as federal law enforcement authorities. Again, the County's position is that these authorities are limited, except in narrow circumstances, to trust lands.

The County asserts that the Band's inherent and federally delegated law enforcement authority is limited to the trust lands, except in limited circumstances, but denies that this is an unlawful interference with the exercise of the Band's inherent and federally delegated law enforcement authority. The County further takes the position that Band officers have the authority to stop and evict non-members from trust lands who may have violated state, federal or tribal law. Because the County and the Band have once again entered into a Cooperative State Law Enforcement Agreement, Band officers have the specific state law enforcement authority granted by Minn. Stat. § 626.90, the limits of which authority vary with regard to members and non-members, and with regard to trust lands and non-trust lands within the three townships of Kathio, South Harbor and Isle Harbor.

The County denies the other claims of unlawful interference asserted by the Band, including denying threatening to arrest or prosecute Band police

officers. The County further states that certain matters complained of were the result of the termination of the Cooperative State Law Enforcement Agreement, which has currently been reinstated and that the claims of Plaintiffs in those regards have been mooted. The County believes the new Cooperative State Law Enforcement Agreement has mooted the claims against the County Attorney and the Sheriff. The County does not believe it is necessary to include the County Attorney or Sheriff as parties to this litigation, and, accordingly, they should be dismissed.

The County specifically denies curtailing access by Band police officers to radio communications, and allege it was the Band that improperly terminated the radio agreement with the County.

The County denies that the Defendants have deterred Band police officers from responding to criminal activity within the trust lands, and further denies that Mille Lacs County can be accurately described as having the highest crime rate in Minnesota. During the past two years, the number of tribal, federal and county law enforcement officers in the three townships was actually increased.

The County requests that the Court determine that the 1855 Reservation has been disestablished and that the County has not unlawfully interfered with the exercise of law enforcement authority outside of Indian country. There are no damage claims.

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Dated: November 6, 2018

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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**

BALDWIN DECLARATION - EXHIBIT G

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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:

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[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

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[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

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[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

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[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

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[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.

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[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?

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[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).

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[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]

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[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

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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.

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[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,

Dated: July 29, 2020

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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 **DEFENDANT COUNTY OF MILLE LACS, MINNESOTA'S RESPONSE MEMORANDUM TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Defendant County of Mille Lacs, Minnesota (the "County") here writes to respond separately to the argument Plaintiffs make regarding standing. The County joins Defendants Walsh and Lorge in all other aspects of their response memorandum.

The County agrees that Plaintiffs' claims present a justiciable dispute appropriate for determination by this Court—at trial. However, because there are genuine issues of material fact, on which Plaintiffs rely in support of their motion, and which the Court must construe in the light most favorable to Defendants as the non-moving party, Plaintiffs' Motion for Summary Judgment must be denied.

ARGUMENT

To establish Article III standing, "a plaintiff must [1] 'present an injury that is concrete, particularized, and actual or imminent; [2] fairly traceable to the defendant's challenged behavior; and [3] likely to be redressed by a favorable ruling.'" *Dep't of Commerce v. New York*, 139 S. Ct. 2251, 2565 (2019)(quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 733 (2008)). "However, we must avoid 'conflat[ing] the requirement for an injury-in-fact with the…validity of [the Tribe's] claim." *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 464 (2d Cir. 2013) (quoting *Dean v. Blumenthal*, 577 F.3d 60, 66 n. 4 (2d Cir. 2009) (per curiam)).

Further, at the summary judgment stage, establishing standing requires more than adequate pleading. "Because the requirements of standing 'are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.'" *City of Clarkson Valley v. Mineta*, 495 F.3d 567, 569 (8th Cir. 2007) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). Thus, for a plaintiff "[t]o prevail on a [. . .] motion for summary judgment [. . .] mere allegations of injury are insufficient. Rather, a plaintiff must establish that there exists no genuine

issue of material fact as to justiciability ***or the merits***." *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 329 (1999) (emphasis added).

Plaintiffs have not met that burden. When evaluating Plaintiffs' motion for summary judgment, "'[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.'" *Tolan v. Cotton*, 572 U.S. 650, 651 (2014)(quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). The record shows that there are many genuine issues of material fact on Plaintiffs' claims of law enforcement interference, and whether Plaintiffs, including Plaintiffs Rice and Naumann, were actually injured by Defendants' actions. Accordingly, the Court cannot find that there is no genuine dispute as to the allegations of injury alleged by Plaintiffs. The County disputes the *validity* of Plaintiffs' claims, as there are material facts at issue, but agrees that the Plaintiffs have adequately established a justiciable claim sufficient for determination by this Court. In other words, this matter should proceed to trial.

Implicit in Plaintiffs' claims is the main material fact in dispute between the parties: whether or not 61,000 acres of land in Mille Lacs County is Indian country. The scope of Plaintiffs' sovereign jurisdiction and ability to exercise its law enforcement authority hinges on that determination. Whether or not Defendants' actions *unlawfully* interfered with Plaintiffs' authority cannot be

decided at summary judgment, in a motion on justiciability.[1] Further, one cannot grant Plaintiffs' Motion without affirmatively ruling on the issue at the heart of this dispute: whether or not the reservation established by the Treaty of 1855 was disestablished by the treaties of 1863, 1864, the Nelson Act and Agreement of 1889, and the 1902 Agreement and authorizing statute.

Essentially, what Plaintiffs have done is precisely what Plaintiffs *opposing* a motion for summary judgment on the basis of standing should do: assert facts in dispute sufficient to show that the issue must be determined by a trier of fact. But Plaintiffs here are moving for summary judgment on the justiciability of their claims. And they did not keep the issue supporting justiciability narrow and undisputed. Plaintiffs instead filed nearly 750 pages of material with the Court in the form of affidavits and supporting documents. Plaintiffs then ask the Court to determine that—as a matter of law—they have *established* that these facts are not disputed, and that there need be no determination at trial on their veracity. Such a conclusion strains credulity. Plaintiffs say: "Because, on the record as a whole, a trier of fact could *not* conclude that Rice and Naumann suffered *no* injury to their ability to practice their profession, plaintiffs are entitled to summary judgment that they suffered an injury in fact." (Pls. Mem. 31.) But the record *absolutely* leaves a

[1] And the alleged unlawfulness does not go to standing, it goes to the merits.

possibility, if not a probability, that a trier of fact could make that precise conclusion. Plaintiffs have simply gone too far in their attempt to bring the matter before this Court.

Denying Plaintiffs' motion for summary judgment does not mean finding that there is no Article III standing. Rather, it allows the Court to hold that the Plaintiffs have established a justiciable claim sufficient to satisfy standing requirements, and that the facts underlying that claim are properly before the Court at trial.

CONCLUSION

For the foregoing reasons, Defendant Mille Lacs County respectfully requests that the Court deny Plaintiffs' Motion for Summary Judgment as Plaintiffs rely on disputed facts in establishing the justiciability of their claim.

NOLAN, THOMPSON, LEIGHTON & TATARYN, PLC

Dated: July 29, 2020

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IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Mille Lacs Band of Ojibwe, et al., Plaintiffs-Appellees, v. Joseph Walsh, et al., Defendants-Appellants.	**Appeal No. 21-1138**

Appellants' motion to dismiss on grounds of mootness or in the alternative to certify an Eleventh Amendment question to the Minnesota Supreme Court

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INTRODUCTION

Appellants Joseph Walsh and Donald Lorge hereby move to dismiss their appeal on mootness grounds. A recent decision by the United States Supreme Court has clarified the law on a key issue that forms the basis for Appellees' claims against Walsh and Lorge. *See United States v. Cooley*, 141 S. Ct. 1638 (June 1, 2021). If this Court agrees, it should direct the district court to dismiss Appellees' claims against Walsh and Lorge. Alternatively, if the Court concludes otherwise, Walsh and Lorge request the Court certify to the Minnesota Supreme Court a state law question relevant to their Eleventh

Amendment defense. They make this motion without prejudice to their argument that the federal courts lack subject matter jurisdiction over Appellees' claims that Walsh and Lorge interfered with Appellees' inherent tribal and federally granted law enforcement authority.[1]

ARGUMENT

I. The *Cooley* decision clarified the authority of tribal police over non-Indians within a reservation

Like Walsh and Lorge's appeal, *Cooley* involved tribal law enforcement authority. Around 1:00 a.m. in February 2016, a Crow tribal police officer saw a truck parked along a public highway within the Crow Reservation. The officer ordered Cooley, the driver, out of the car, conducted a pat down search and called for tribal and county assistance. Two semi-automatic rifles were visible in the truck, and on further searches of the vehicle, the tribal officer found methamphetamine and drug paraphernalia. *See United States v. Cooley*, 919 F.3d 1135, 1140 (9th Cir. 2019). The district court ordered the evidence suppressed because the tribal police officer lacked authority to investigation non-apparent violations of state law by a non-Indian.[2] *Id.* at

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[1] Per Fed. R. App. P. 27(a)(2)(iii), the district court's opinion is attached as Exhibit 1. That opinion is also the Addendum to Appellants' Brief filed earlier on April 2, 2021.

[2] This holding, affirmed by the Ninth Circuit, is remarkably similar to Walsh's concerns regarding admissibility of evidence that guided his drafting of the Mille Lacs County Opinion and Protocol. *See* Declaration of Joseph J.

1140-41. The Ninth Circuit affirmed in a unanimous panel opinion, ruling that because tribes cannot exclude non-Indians from public rights of way, tribal police do not have "the ancillary power to investigate non-Indians who are using such public rights-of-way." *Id.* at 1141.

The Ninth Circuit denied the government's request for an *en banc* rehearing. 947 F.3d 1215, 1216 (2020). While concurring in that decision, two circuit judges addressed the judges who dissented from the denial of rehearing. They wrote:

> There is no conflict among the circuits regarding the question presented here, the opinion is not in conflict with a Supreme Court decision, and the practical implications are limited.

Id.

The Supreme Court, however, granted certiorari and reversed in an apparent unanimous opinion.[3] The Court held that tribes and their tribal officers could apply their inherent tribal authority to stop and investigate non-Indians traveling on a public right-of-way within a reservation for violations of federal or state law. This authority did not depend on a tribal power to exclude, which would not apply to public highways, but on retained

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Walsh dated August 27, 2021 at ¶ 13 (citing *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020)).

[3] Justice Alito seemingly conditioned joining the opinion on his interpretation of its limited holding. *See* 141 S. Ct. at 1646.

inherent tribal authority. The Court looked to the so-called second *Montana* exception, a threat to a tribe's political integrity, economic security, health or welfare to justify tribal officer's authority to detain Cooley and search his truck. *Id.* at 1645. Cooley's possession of two semi-automatic rifles presented a sufficiently serious threat to invoke the second exception, the first time Court has done so. The Court did not address the scope of such authority beyond the facts of the case.

The *Cooley* decision intersects with three other developments since Appellees filed suit. In December 2016, the Bureau of Indian Affairs and the Band entered into a deputation agreement under the Tribal Law and Order Act by which several tribal officers, including Appellee Naumann, received Special Law Enforcement Commissions granting them federal law enforcement powers.[4] This includes the power to arrest and investigate crimes encompassed by 18 U.S.C. §§ 1152 and 1153. Then in September 2018, Mille Lacs County and the Mille Lacs Band entered into a new cooperative agreement that restored the Band's police department state law enforcement

[4] These events and record cites are found at page 16 of Appellants' Brief filed April 2, 2021.

authority.[5] Walsh then revoked his 2016 opinion. *See* Walsh Dec. at ¶14.[6]

The *Cooley* opinion reversed one of the conclusions Walsh reached in his opinion: that tribes have no criminal jurisdiction over non-Indians (except under the Violence Against Women Act). Walsh Dec. ¶15 and Ex. B. at 14. While *Cooley* did not overrule *Oliphant*,[7] the decision expanded a tribe's inherent criminal authority to stop and investigate a non-Indian for possible state and federal law violations within Indian country. The Ninth Circuit opinion likened the tribal officers' power over a non-Indian to the common law right to make a citizen's arrest, where the crime had to be committed in the officer's presence. *See* 919 F.3d at 1146-47. That was the position Walsh also took in his opinion. Walsh Dec. Ex. B. at 7-8. *Cooley* rejects that limitation. In short, as Walsh makes plain in his affidavit filed with this motion to dismiss, this key part of his 2016 opinion is no longer good law and he would not reissue his opinion and protocol should the 2018

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[5] Minnesota law requires a cooperative agreement between the Mille Lacs County Sheriff and the Mille Lacs Band in order to confer state law enforcement authority on its tribal police department. Minn. Stat. § 626.90, subd. 2(b).

[6] The importance of 2018 cooperative agreement was its restoration of the Band's state law enforcement authority under Minn. Stat. § 626.90. The Band's lawsuit against Walsh and Lorge was over their alleged interference with Band's inherent and federal law enforcement powers.

[7] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)(holding tribes had no criminal jurisdiction over non-Indians).

agreement terminate. Walsh Dec. ¶16. And for his part, Sheriff Lorge affirms that his department would follow the lead of the County Attorney. Declaration of Don Lorge dated August 31, 2021 at ¶6.

The mootness doctrine goes to a federal court's subject matter jurisdiction. There must be an active, real controversy at all times during a federal case. "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)).

Normally, the defendant bears the burden of showing mootness. "[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* 528 U.S. 167, 190 (2000).

This case, however, is not governed by the voluntary cessation rule, where a defendant ends its allegedly unlawful conduct after being sued. Here, Walsh revoked his 2016 opinion, not because the Band sued him, but because the Band and Mille Lacs County had negotiated a new cooperative agreement. Walsh Dec. ¶14. That agreement satisfied the requirement in

Minn. Stat. §626.90 for such an agreement and granted the Band's police department state law enforcement authority. That authority alleviated Walsh's concerns expressed in his opinion about evidence being used in a prosecution that an appellate court would deem inadmissible. *See Walsh Dec.* ¶¶13, 16.

It is settled law that subsequent developments may moot a case. Here, an intervening Supreme Court decision—*Cooley*—is such a development. The same result attained in *Winsness v. Yocom*, 433 F.3d 727 (10th Cir. 2006), where the prosecuting attorneys stated they had no intention to prosecute the plaintiff for flag desecration, in view of Supreme Court decisions extending First Amendment protection to such activity. *Id.* at 736-37. Similarly, legislative changes can moot a challenge to a statute. In *Teague v. Cooper*, 720 F.3d 973 (8th Cir. 2013), this Court held that the Arkansas legislature's repeal of the statute being challenged mooted the plaintiffs' case:

> [W]e agree with the Fourth Circuit "that statutory changes that discontinue a challenged practice are usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed."

Id. at 977 (quoting *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 116 (4th Cir. 2000)).

The representations of Walsh and Lorge that the alleged offending

conduct will not recur are also entitled to deference. In *Defunis v. Odegaard*, 416 U.S. 312 (1974), the Court observed that:

> [I]t has been the settled practice of the Court, in contexts no less significant, fully to accept representations such as these as parameters for decision.

Id. at 317 (citing precedent). In *Prowse v. Payne*, 984 F.3d 700, 703 (8th Cir. 2021), this Court afforded deference to a public official's statement that the challenged conduct would not recur.[8] *See Troiano v. Supervisor of Elections in Palm Beach Cnty.*, 382 F.3d 1276, 1283 (11th Cir. 2004) ("When government laws or policies have been challenged, the Supreme Court has held almost uniformly that cessation of the challenged behavior moots the suit."); *Moore v. Brown*, 868 F.3d 398, 406-07 (5th Cir. 2017) (public servants afforded presumption of good faith); 13C Wright & Miller, FED. PRAC. & PROC. JURISDICTION § 3533.7 (3d ed.); *cf. N. Virginia Women's Medical Center v. Balch*, 617 F.2d 1045, 1049 (4th Cir. 1980) (commonwealth's attorney's renunciation of practice of not prosecuting trespassers at clinic performing abortions mooted clinic's claim against attorney for failing to prosecute trespassers).

It would be rank speculation to argue that Walsh and Lorge's alleged

[8] In *Prowse*, the issue of mootness arose at oral argument. 984 F.3d at 701.

misconduct will recur.[9] First, the 2018 cooperative agreement must have terminated, and the parties failed to renegotiate a new agreement within the 90-day notice of termination requirement. Then, the Minnesota Attorney General must again refuse to provide Walsh or his successor an opinion on the Band's state law enforcement authority. The statutory provisions granting the Band's police state law enforcement authority must also remain unchanged. This level of uncertainty over what the future may bring cannot "keep an otherwise moot controversy alive." *St. Louis Fire Fighters Ass'n Int'l Ass'n of Fire Fighters Local 73 v. City of St. Louis*, 96 F.3d 323, 329 (8th Cir. 1996); *accord Beaulieu v. Ludeman*, 690 F.3d 1017, 1024 (8th Cir. 2012) (plaintiffs offered only "speculation and conjecture" the allegedly offending conduct would recur). When the response to a mootness claim rests on speculation, this Court can find "the allegedly wrongful behavior could not reasonably be expected to recur." *SEC v. Medical Comm. of Human Rights*, 404 U.S. 403, 406 (1972) (quotation omitted). Thus, this case is moot.

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[9] Of course, Walsh and Lorge continue to deny any misconduct in 2016 and thereafter. Walsh and Lorge cannot be held to the impossible standard of predicting the results of future Supreme Court decisions. As noted in the Ninth Circuit proceedings in *Cooley*, there was no circuit conflict or applicable Supreme Court precedent over the scope of inherent tribal authority over non-Indians. *See* 947 F.3d at 1216.

II. In the alternative, this Court should refer the question of whether Walsh and Lorge act on behalf of the State when exercising their law enforcement powers.

Should the Court deny Walsh's and Lorge's motion to dismiss, they request the Court certify[10] to the Minnesota Supreme Court the following question:

> Whether county attorneys and sheriffs act on behalf of the State in an official capacity when exercising their state-delegated law-enforcement powers.

Walsh and Lorge argued below that they were State actors covered by Eleventh Amendment immunity. They make that same argument here on appeal. The question Walsh and Lorge want certified is the precise question on which the Minnesota Supreme Court granted review in *Walsh, et al. v. State of Minnesota*, Dkt. A20-1083, a case they brought in state court pursuant to Minn. Stat. § 3.736, subd. 9 for indemnification of their costs of defense in this federal case.[11] While the Eleventh Amendment issue may be broader than the question now before the Minnesota Supreme Court, that question relates to factors this Court must consider in determining whether Walsh and Lorge are entitled to Eleventh Amendment immunity. *See*

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[10] Minnesota's version of the Uniform Certification of Questions of Law is found at Minn. Stat. § 480.065 (2020).

[11] The Minnesota Supreme Court granted review on July 20, 2021. The case should be fully briefed by November 3, 2021. A copy of Walsh's and Lorge's Petition for Review is attached to this motion as Exhibit 2.

generally Thomas v. St. Louis Bd. of Police Comm'rs, 447 F.3d 1082, 1084 (8th Cir. 2006) (reviewing factors). While this Court has articulated a general rule of not certifying a question an appellant did not prevail upon in district court, that rule recognizes there may be circumstances where certification is nonetheless appropriate. *See Perkins v. Clark Equipment Co.*, 823 F.2d 207, 210 (8th Cir. 1987). The issue Walsh and Lorge want certified is the issue to which the Minnesota Supreme Court granted review. If Walsh and Lorge prevail before the Minnesota Supreme Court on this question, there would be grounds for reversal of the district court's ruling.

Certification now will avoid a potential conflict of laws. It would be anomalous for this Court to hold that Walsh and Lorge do not act for the State of Minnesota if the Minnesota Supreme Court were to hold they do act for the State of Minnesota. Certification here will thus assure "a cooperative judicial federalism." *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974).

CONCLUSION

In *Cooley*, the Supreme Court addressed an issue central to the opinion and protocol Walsh prepared in 2016 that is the primary basis for the Band's lawsuit against him and Lorge. Because the change in law as articulated in *Cooley*, Walsh would not reissue his 2016 opinion should the County and Band be unable to reach a cooperative agreement in the event the current agreement terminates. Accordingly, the case against them is moot.

While Walsh and Lorge prefer the case against them be dismissed, as alternative relief, they request this Court certify the state law question to the Minnesota Supreme Court.

Respectfully submitted,

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Dated: August 31, 2021

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CERTIFICATE OF BRIEF LENGTH

The undersigned counsel for Appellants Walsh and Lorge certifies that this brief complies with the requirements of Fed. R. App. P. 32(a) in that it is printed in 14 point, proportionately spaced typeface utilizing Microsoft Word 2016 and contains 2,414 words, including headings, footnotes and quotations and that the brief has been scanned for viruses and is virus-free.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2021, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Mille Lacs Band of Ojibwe, a federally recognized Indian Tribe; Sara Rice, in her official capacity as the Mille Lacs Band Chief of Police; and Derrick Naumann, in his official capacity as Sergeant of the Mille Lacs Police Department, Plaintiffs, v. County of Mille Lacs, Minnesota; Joseph Walsh, individually and in his official capacity as County Attorney for Mille Lacs County; and Don Lorge, individually and in his official capacity as Sheriff of Mille Lacs County, Defendants.	Case No. 17-cv-5155 (SRN/LIB) **MEMORANDUM OPINION AND ORDER**

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SUSAN RICHARD NELSON, United States District Judge

This matter comes before the Court on Plaintiffs' Motion for Summary Judgment on Standing, Ripeness, and Mootness [Doc. No. 146], Defendants Joseph Walsh and Donald Lorge's Motion for Summary Judgment [Doc. No. 162], and Defendants County of Mille Lacs, Walsh, and Lorge's Motion to Strike and for Sanctions [Doc. No. 182]. For the reasons set forth below, Plaintiffs' Motion for Summary Judgment on Standing, Ripeness, and Mootness is **GRANTED**; Defendants Walsh and Lorge's Motion for Summary Judgment is **DENIED**; and Defendants County of Mille Lacs, Walsh, and Lorge's Motion to Strike and for Sanctions is **DENIED**.

I. BACKGROUND

This case involves important and complex issues regarding the boundaries of the Mille Lacs Indian Reservation and, consequently, the extent of the Mille Lacs Band's sovereign law enforcement authority within those boundaries. The present motions before the Court, however, do not seek to resolve these issues at this time. Rather, the present motions address: (1) this Court's subject matter jurisdiction; (2) threshold justiciability issues, including standing, ripeness, and mootness; and (3) certain defenses of immunity. Accordingly, the Court will limit its discussion of the facts to only those necessary to explain its rulings.

A. The Parties and the Mille Lacs Indian Reservation

The Plaintiffs are the Mille Lacs Band of Ojibwe (the "Band"), a federally recognized Indian tribe; Sara Rice, the Chief of Police of the Band; and Derrick Naumann,

a Sergeant in the Band's Police Department (collectively, "Plaintiffs"). (Compl. [Doc. No. 1]; *see* 85 Fed. Reg. 5462, 5464 (Jan. 30, 2020); Baldwin Decl. [Doc. No. 150] Ex. A at 7, Ex. B at 6, Ex. C at 6.) The Defendants are the County of Mille Lacs (the "County"); Joseph Walsh, the Mille Lacs County Attorney; and Don Lorge, the Mille Lacs County Sheriff (collectively, "Defendants"). (*See* Compl. [Doc. No. 1].) In March 2019, Magistrate Judge Brisbois substituted Lorge for Brent Lindgren, a former County Sheriff, after Lindgren left his position and Lorge became the new Sheriff. (Order on Stipulation [Doc. No. 63].)

Article 2 of the 1855 Treaty between the Minnesota Chippewa Tribe and the United States established the Mille Lacs Indian Reservation, which comprises about 61,000 acres of land. (10 Stat. 1165 (Feb. 22, 1855); Quist Decl. [Doc. No. 160] ¶ 3.) In Plaintiffs' view, the Reservation established by the 1855 Treaty has never been diminished or disestablished. (*See generally* Compl. [Doc. No. 1].) Within the Reservation, there are approximately 3,600 acres that the United States holds in trust for the benefit of the Band, the Minnesota Chippewa Tribe, or individual Band members. (Quist Decl. [Doc. No. 160] ¶ 4.) The Band owns in fee simple about 6,000 acres of the Reservation, and individual Band members own in fee simple about 100 acres of the Reservation. (*Id.* ¶¶ 5-6.) In Defendants' view, the Reservation established by the 1855 Treaty was diminished or disestablished by way of subsequent federal treaties, statutes, and agreements. (*See generally* County Answer [Doc. No. 17]; Walsh Answer [Doc. No. 18]; Lindgren Answer [Doc. No. 19].) Although the Court does not wade into this core issue today, it is important to recognize that this case rests on this boundary dispute.

B. The Opinion and Protocol

On June 21, 2016, the County terminated the 2008 law enforcement agreement ("2008 Agreement") it had with the Band and County Sheriff. (Baldwin Decl. [Doc. No. 150] Ex. H.) The 2008 Agreement allowed Band officers to exercise concurrent jurisdiction with the Mille Lacs County Sheriff's Department to enforce Minnesota state law, as provided in Minn. Stat. § 626.90. (*Id.*)

On July 18, 2016, County Attorney Walsh issued the "Mille Lacs County Attorney's Office Opinion on the Mille Lacs Band's Law Enforcement Authority." (Baldwin Decl. [Doc. No. 150] Ex. I (hereafter, "Opinion").) In general, the Opinion outlines Walsh's views regarding the scope of the Band's law enforcement authority after the termination of the 2008 Agreement. (*Id.*) The Opinion concludes, *inter alia*, that the Band's "[i]nherent tribal jurisdiction is limited to 'Indian Country,'" which "is limited to tribal trust lands." (*Id.* at 14.) Moreover, the Opinion concludes that investigations conducted by Band officers outside Pine County are unlikely to be admissible in state court. (*Id.* at 8.) The Opinion explains that:

> As all investigations of state law violations must be completed by a peace officer within his or her state law jurisdiction, either the Mille Lacs County Sheriff's Office or the police department of a municipality must take possession of all evidence gathered regarding that investigation to ensure its admissibility in state court.

(*Id.* at 9.)

The "Northern Mille Lacs County Protocol" further clarifies Walsh's position on Band officers' sovereign law enforcement authority and "is intended to guide law enforcement officers regarding the lawful authority of law enforcement officers" within

the Reservation. (Baldwin Decl. [Doc. No. 150] Ex. J (hereafter, "Protocol").) According to the Protocol, the Band's "inherent tribal criminal authority doesn't extend (1) outside of trust lands or (2) to non-members of the Mille Lacs Band." (*Id.* (emphasis omitted).) The Protocol provides that Band officers "are peace officers of the State of Minnesota with state law enforcement jurisdiction within Pine County only." (*Id.* (emphasis omitted).) Under the Protocol, in Mille Lacs County, Band officers have certain arrest powers, but "must turn over arrested persons without delay to a Mille Lacs County peace officer so an investigation admissible in state court may be conducted." (*Id.* (emphasis omitted).)

Further, the Protocol provides that Band officers "[m]ay [n]ot [l]awfully … [c]onduct investigations regarding violations of state law including statements, investigative stops, traffic stops, and gathering evidence." (*Id.* (emphasis omitted).) Moreover, the Protocol provides that Band officers "[m]ay [n]ot [l]awfully … [i]mpersonate a state peace officer, obstruct justice, or engage in the unauthorized practice of a peace officer, primarily by interfering with investigations within Mille Lacs County." (*Id.*) In a footnote, the Protocol clarifies that Band officers "may conduct investigations where they have tribal jurisdiction (e.g., civil/regulatory citations to Band members and investigations related to inherent tribal criminal authority)." (*Id.*) And the Protocol warns that "State Peace Officers [m]ay [n]ot [l]awfully … [a]uthorize or knowingly allow the unauthorized practice of a peace officer." (*Id.*)

C. Alleged Interference By Defendants with the Band's Sovereign Law Enforcement Authority In Response to the Opinion and Protocol

The record evidence makes clear that Walsh fully expected Band officers to comply with the Opinion and Protocol. The record is also replete with evidence that, pursuant to the Opinion and Protocol, County law enforcement officers repeatedly interfered with law enforcement measures undertaken by Band officers. In fact, Walsh testified that he never "suggested [compliance with the Protocol] was voluntary." (Baldwin Decl. [Doc. No. 150] Ex. K, Walsh Dep. at 305.) In an email to the Band's former Chief of Police Jared Rosati on July 25, 2016, Walsh stated he "trust[s] that [the Protocol] has been provided to all of your officers and that they have been directed to follow it." (*Id.*, Ex. M.) In an August 23, 2016, email to Rosati, after quoting the Protocol, Walsh stated that a Band officer did not have "inherent tribal criminal authority" to investigate a non-Native suspect on the Reservation. (*Id.*, Ex. P at 5.) In an August 25, 2016, letter to Rosati, Walsh wrote that Band officers' conduct in violation of the Opinion and Protocol "could … constitute obstruction of justice and the unauthorized practice of a law enforcement officer." (*Id.*, Ex. N at 2; *see id.*, Ex. K, Walsh Dep. at 297-98 (stating that Band officers' violations of the Opinion and Protocol could constitute violations of state criminal law).)

There is no evidence in the record that compliance with the Opinion and Protocol was voluntary. In a September 20, 2016, letter to Band Police Officer Kintop, Walsh wrote that he "expect[s] all tribal police officers to follow the [Opinion and Protocol] for as long as [they are] in place." (*Id.*, Ex. O at 1.) He told Officer Kintop that "[i]f you wish for controlled substance offenders to be prosecuted in Minnesota District Court in the future, … please comply with the Opinion and Protocol as long as [they are] in effect to ensure that the investigations conducted will be admissible in state court." (*Id.* at 2.) Kali Gardner,

a former Assistant County Attorney under Walsh, testified that she understood that Walsh expected Band officers "to adhere to the prohibitions and the opinion in the [P]rotocol," and that "other officers were advised that they could arrest tribal police officers if they" violated the Protocol. (*Id.*, Ex. L, Gardner Dep. at 60.)

After Walsh issued the Opinion and Protocol, then-Sheriff Lindgren "instructed [his] staff and deputies to follow the County Attorney's Opinion and Protocol." (Lindgren Decl. [Doc. No. 180] ¶ 3.) Indeed, Lindgren's employees all received the Opinion and Protocol and, according to Lindgren, began to follow them. (Baldwin Decl. [Doc. No. 150] Ex. P at 2.) Further, the Sheriffs' deputies monitored Band officers' compliance with the Protocol and tracked violations. (*See id.*, Ex. U (email from County Sergeant Daniel Holada to Lindgren summarizing interactions with Band police over a weekend and listing alleged violations of the Protocol); Ex. V (email from Lindgren instructing Sheriff's deputies to "continue to keep your direct supervisors apprised of day to day operations involving cooperation of Band Officers following County Attorney Opinion and Protocol").) In a June 21, 2016, letter, Lindgren wrote that, when the 2008 Agreement was terminated, "previously dispatched calls for service to the … Band Police Department will be handled by the … County Sheriff's Office." (*Id.*, Ex. W.)

Lindgren made clear that the Opinion and Protocol would be enforced. In an August 22, 2016, email, Lindgren told Band Chief of Police Rosati that the "Sheriff's deputy in charge of the Sheriff's office has the ultimate discretion to control any designated crime scene" and that Lindgren appreciated Rosati's "willingness to undertake [a deputy's] direction and control" on a particular evening. (*Id.*, Ex. P at 6.) In an August 26, 2016,

email, Lindgren directed Sheriff's deputies "to complete independent investigations consistent with the … Opinion and Protocol" and advised that "Band Police are to notify [deputies] before any investigation takes place regarding evidence of criminal activity." (*Id.*, Ex. X.) Lindgren also stated that if Band officers are conducting a civil or regulatory stop of a Band member on trust lands, Band officers' "role in any joint investigation is over" once the civil or regulatory stop is completed, "unless and until [Band officers] are given direction by [Sheriff's deputies] to provide assistance." (*Id.*) In a November 21, 2016, email, a Sheriff's Captain told a Sheriff's deputy that he must take a recorded statement from a Band officer "every time a [B]and officer becomes involved in a criminal investigation and either handles evidence or collects information needed during a criminal investigation." (*Id.*, Ex. Y.)

Sheriff's deputies at times took control of crime scenes from Band officers and repeated investigations that Band officers had completed. Ashley Burton, a former Band officer, described an encounter with a Sheriff's deputy on August 24, 2016, after an arrest of a Band member. (A. Burton Decl. [Doc. No. 154] at ¶¶ 12-16.)[1] She arrested a Band

[1] Defendants move the Court to strike the declarations of Ashley Burton (formerly "Stavish"), Bradley Gadbois, and Scott Heidt, on the grounds that Plaintiffs violated Rules 26(a)(1)(A)(i), 26(e)(1)(A), and 33(b) of the Federal Rules of Civil Procedure. Defendants seek to exclude consideration of these declarations on the grounds that the declarants' identities were not disclosed in Plaintiffs' Rule 26(a) disclosure or in any supplemental disclosure. Plaintiffs respond by noting that the identities of these declarants were in fact disclosed several times during discovery. (*See* Baldwin Decl. [Doc. No. 191] Exs. 1, 2; Kelley Decl. [Doc. No. 185] Ex. 2.) Moreover, Plaintiffs note that Defendants received notice of the incidents described in these declarations and the exhibits attached to the declarations in discovery.

member on trust lands, found drugs and drug paraphernalia on the member, and planned to send that evidence to the Band Solicitor General's office, but the Sheriff's deputy demanded that she turn over the evidence, and she complied. (*Id.*) Moreover, on August 9, 2016, Burton responded to a call involving a domestic dispute on trust lands. (*Id.* ¶¶ 8-11.) After Burton arrived on the scene, a Sheriff's deputy arrived, informed Burton that she was a civilian, and requested a statement from her so that he could arrest the suspect. (*Id.*) Burton declined to give the deputy a statement, and the deputy allowed the suspect to leave. (*Id.*)

A current Band officer, Dusty Burton, stated in his declaration that, on September 2, 2016, he was assisting Crow Wing County deputies with a vehicle pursuit that ended on trust lands. (D. Burton Decl. [Doc. No. 155] ¶¶ 8-10.) While at the scene, he began to interview a passenger in the suspect vehicle, who was providing information about the location of another person with a felony warrant. (*Id.*) In the middle of the interview, a Sheriff's deputy arrived and directed the passenger away from Burton, leaving him unable to complete the investigation. (*Id.*) On November 20, 2016, after Burton responded to a call involving a recent death at a home on Band-owned fee land, a Sheriff's deputy arrived on the scene and told Burton not to search anything and to leave the scene until Sheriff's Office investigators arrived. (*Id.* ¶¶ 15-20.)

The Court denies Defendants' Motion to Strike. On a number of occasions, not only were the identities of these declarants disclosed to Defendants in discovery, evidence of these incidents was also disclosed.

A former Band officer, Scott Heidt, described a further incident on September 8, 2016, when he and another Band officer were investigating a stabbing on trust lands. (Heidt Decl. [Doc. No. 159] ¶¶ 8-11.) During their investigation, they took a taped statement from a witness, but a Sheriff's deputy asked the other Band officer to "hold off on taking the statement." (*Id.*) Heidt allowed the other Band officer to finish taking his statement, and then the Sheriff's deputy took his own taped statement. (*Id.*)

Plaintiff Sergeant Naumann testified about an incident that occurred during the revocation period[2] when he and other Band officers initiated a traffic stop, located a Department of Corrections fugitive, removed noncompliant passengers from the vehicle, and found a firearm within the vehicle. (Baldwin Decl. [Doc. No. 150] Ex. Z, Naumann Dep. at 82.) While Band officers were searching the vehicle, a Sheriff's deputy arrived and "was yelling at us telling us to stop searching the vehicle and basically getting in the way of my investigation, preventing me from conducting a thorough investigation." (*Id.*) In a subsequent email on October 24, 2017 to then-Sheriff Lindgren, the Sheriff's deputy involved stated that he "took control of the scene." (*Id.*, Ex. AA.)

Bradley Gadbois, a current Band investigator who worked as a Band officer in 2017, described an incident on September 29, 2017, when he investigated a car and suspect on the Reservation. (Gadbois Decl. [Doc. No. 158] ¶¶ 10-18.) After Gadbois searched the car and interviewed the driver, a Sheriff's deputy arrived on the scene and conducted his own

[2] The Court uses the term "revocation period" to refer to the period of time from the County's termination of the 2008 Agreement until the time the Band, County, and Sheriff entered into the 2018 Agreement, discussed *infra*.

search and interview. (*Id.*) On another occasion, on November 3, 2017, Gadbois was investigating a parked vehicle containing a driver and a passenger, who was showing signs of an opioid overdose. (*Id.* ¶¶ 20-25.) After Gadbois administered Narcan to the passenger, which revived him, two Sheriff's deputies arrived on the scene, and a methamphetamine pipe was found in the vehicle. (*Id.*) Gadbois wanted to conduct a drug investigation of the vehicle, but was prevented from doing so under the Protocol without the cooperation of the Sheriff's deputies. (*Id.*) The deputies neither arrested the driver nor took custody of the vehicle. (*Id.*)

James West, the Band's Deputy Police Chief, testified that "there was an interruption in [Band] officers' investigations" and that "[w]hen [Band officers] show up on a scene, domestic or whatever it might be, they start talking to a victim or holding a suspect, and a sheriff's deputy arrives and butt right in and take over the interview, or take possession of somebody that's technically not under arrest." (Baldwin Decl. [Doc. No. 150] Ex. BB, West Dep. at 47-48.) Moreover, Band Sergeant Naumann testified that Band officers "had to just stand by and let [Sheriff's deputies] take over our scene." (*Id.*, Ex. Z, Naumann Dep. at 94.)

At the Band's Rule 30(b)(6) deposition, Michael Dieter, a Sergeant in the Band's Police Department, testified that "[o]ften times county deputies would try to take statements from officers as witnesses rather than just relying on our reports. They would often take multiple statements. If we took a statement from a witness, they might take a second statement from the same witness." (*Id.*, Ex. CC, Rule 30(b)(6) Band Dep. at 182-83.) Former Assistant County Attorney Gardner testified that Band police "were treated as

witnesses and not as law enforcement officers" and that Sheriff's "deputies were instructed to take statements from" Band officers. (*Id.*, Ex. L, Gardner Dep. at 42, 61-62.)

D. The Band's Compliance with the Opinion and Protocol

Todd Matha, as the Band's Solicitor General, supervised the Band's police department. (Baldwin Decl. [Doc. No. 150] Ex. DD, Matha Dep. at 205-09.) Matha disagreed with Walsh's mandates, as set forth in the Opinion and Protocol, but Matha nonetheless directed Band officers to follow them, out of fear that Band officers would face criminal and civil penalties if they disobeyed them. (Baldwin Decl. [Doc. No. 150] Ex. DD, Matha Dep. at 205.) Matha also wanted to avoid disputes between the Band and the County that might serve to undermine law enforcement in the area. (*Id.* at 205-09.) Similarly, Band Chief of Police Rosati directed Band officers to follow the Opinion and Protocol in light of the potential imposition of criminal and civil penalties on them and to avoid endangering the prosecutions of any suspects that Band officers investigated. (*Id.*, Ex. EE, Rosati Dep. at 92-93, 102, 116-17, 211.)

After Rice became the Band's Police Chief, she continued to ensure that Band officers followed the Protocol because she did not want to jeopardize the career of any Band officer and feared that Band officers would "go to jail." (*Id.*, Ex. GG, Rice Dep. at 150-51.) Rice was especially concerned about the restrictions that the Protocol imposed on Band officers' ability to use force: "What if we were to have to arrest somebody or something happened, or use of force issue, or even deadly force? That was my concern. So I just didn't—we just made sure we abided by [the Protocol]." (*Id.* at 151.) Band Sergeant Craig Nguyen testified to a similar concern: "There are circumstances when it comes to

officers' personal safety when officers need to use a fire[arm], not to discharge it but to gain control of certain subjects involving crimes that are high violence in nature involving weapons, drugs, gangs, so on and so forth. [The Protocol] restrict[s] us not being able to do that." (*Id.*, Ex. HH, Nguyen Dep. at 46.)

Rice testified that, although County Sheriff Lindgren told her informally that Band officers would not be arrested or prosecuted, she did not trust his assurances because he was committed to following the mandates of the Protocol. (*Id.*, Ex. GG, Rice Dep. at 157, 204-05.) Rice acknowledged that no one had yet been arrested but she believed that was so "[b]ecause we followed the [P]rotocol." (*Id.* at 205.) Assistant County Attorney Gardner testified that County "officers were advised that they could arrest tribal police officers if they" violated the Protocol. (*Id.*, Ex. L, Gardner Dep. at 60.) The Band's Deputy Police Chief West testified that "[t]here was a lot of fear within the officers regarding getting arrested for impersonating officers" under the Protocol. (*Id.*, Ex. BB, West Dep. at 37-38.) West confirmed that "[o]fficers followed the [P]rotocol." (*Id.* at 42.)

According to Band Sergeant Naumann, "[the Protocol] caused [Band officers] to not be able to effectively do [their] jobs because guys were afraid to proactively patrol and initiate traffic stops." (*Id.*, Ex. Z, Naumann Dep. at 92.) Naumann elaborated that "your career is potentially in jeopardy if someone decides to prosecute you for doing your job that you've done for years, and we weren't able to do our jobs." (*Id.*) Accordingly, Naumann concluded that "[b]ased on the Northern Protocol trying to restrict our ability to do our job … the only thing that we felt safe without being charged with a crime or prosecuted for doing our jobs was arrest people on warrants." (*Id.* at 84-86.)

In a December 2016 letter to the United States Attorney's Office in Minnesota and the Department of Justice in D.C., Walsh wrote that "the Mille Lacs County Sheriff's Office has taken on all state law enforcement services provided in the entirety of Mille Lacs County" and that a "tenuous status quo has been followed by the Mille Lacs County Sheriff's Office and the Mille Lacs Band Police Department based on my Opinion and Protocol." (*Id.*, Ex. JJ; *see id.*, Ex. KK, Walsh Dep. at 378.) In his deposition, Walsh conceded that the letter was not in fact entirely accurate, notably failing to advise federal officials that the County Sheriff's Office had taken on the role of investigating all violations of state law on trust lands and had assumed responsibility for responding to all calls and investigating all violations of state law on non-trust lands. (Baldwin Decl. [Doc. No. 150] Ex. KK, Walsh Dep. at 377-78.)

E. The Decline in Morale in the Mille Lacs Band Police Department and the Resignations of Several Band Officers

Band Solicitor General Matha testified that "[Band officers] took offense at … being relegated to essentially witnesses at a scene that had no more authority in relation to a criminal action than would often times just a bystander," and that this contributed to "a decrease in morale and just this lack of understanding as to how it was that they were to perform their job." (Baldwin Decl. [Doc. No. 150] Ex. DD, Matha Dep. at 201-02.)

According to Naumann, the Opinion "in not so many words [said Walsh] was going to threaten to arrest and prosecute our officers for doing our jobs. It was insulting, demeaning, threatening …. [and] terrible." (*Id.*, Ex. Z, Naumann Dep. at 20.) He testified that Band officers "were deterred from protecting our community," "[could]n't do

anything," and were "[n]othing more than glorified security guards." (*Id.* at 92, 98.) Moreover, he testified that during the revocation period "[w]e lost officers because of not having a cooperative agreement. We had officers leaving. Morale went down. It was pretty terrible for the most part. It was the worst two and a half years of law enforcement in my career." (*Id.* at 101.) Rice testified that she was injured "[p]rofessionally because of the Northern Protocol" and that the Protocol "deterred [her] from doing [her] job completely." (*Id.*, Ex. GG, Rice Dep. at 11-12, 187.)

Former Band Officer Dusty Burton stated that the Sheriff's deputies' interference with his investigations "undermined [his] credibility as a police officer within the community and negatively affected my morale and that of my fellow Tribal Police officers." (D. Burton Decl. [Doc. No. 155] ¶ 21.) Similarly, Band Officer Gadbois noted that the Sheriff's Office's practice of repeating investigations completed by Band officers in front of criminal suspects "undermined the credibility, authority and morale" of Band officers. (Gadbois Decl. [Doc. No. 158] ¶ 19.)

Several Band officers consequently resigned from their jobs. Heidt explained that "[o]ne of the reasons why I left the Tribal Police Department was because of the restrictions that the County Attorney's Protocol placed on me as a licensed peace officer." (Heidt Decl. [Doc. No. 159] ¶ 13.) Similarly, Ashley Burton stated she "left the Tribal Police Department because of the restrictions that the County Attorney's Northern Protocol placed on me as a licensed peace officer. I wanted to exercise my full authority as a Tribal Police Officer and serve the Mille Lacs Reservation communities to the fullest." (A. Burton Decl. [Doc. No. 154] ¶ 25.) Gardner testified that "[s]everal [Band] officers left their department.

I know of at least a handful that went to completely different agencies because they were not allowed to be police officers, and that's what they wanted their career to be." (Baldwin Decl. [Doc. No. 150] Ex. L, Gardner Dep. at 46-47.)

F. Lack of County Law Enforcement Response to Criminal Activity on the Reservation

Band Chief of Police Rosati testified that, after Walsh issued the Opinion and Protocol, "life as a patrol cop ceased to exist. We didn't feel we had the authority to go out and do our jobs, like make arrests. Like if we rolled up on a DWI, we wouldn't be able to make that arrest. Our protocol was to have the county come deal with it." (Baldwin Decl. [Doc. No. 150] Ex. EE, Rosati Dep. at 101.) Rosati explained that "[o]nce … the criminal element on the reservation found out that we no longer had authority, they knew it. And they would blatantly say it to our officers, 'You can't even arrest me.'" (*Id.* at 103; *see* Gadbois Decl. [Doc. No. 158] ¶¶ 26-29 (describing encounter on March 21, 2018, where suspect refused to comply with Band officer's instruction because, according to suspect, Band officer was "not a cop").)

Rosati further testified that the termination of the 2008 Agreement made it more difficult for Band officers to address drug crimes and overdoses: "[t]he people know when you're not making arrests or doing what we normally did, that word traveled pretty quick, so it made it pretty difficult for my officers to continue our normal course of action, as far as combatting those overdoses." (Baldwin Decl. [Doc. No. 150] Ex. EE, Rosati Dep. at 197.) He testified that Band officers "[m]ade every effort to attempt or tried to follow the

[P]rotocol," which "limit[ed] their ability to investigate crime on non-trust land" and "limit[ed] their ability to investigate crime on trust lands." (*Id.* at 211.)

Band Chief of Police Rice testified that:

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

(*Id.*, Ex. GG, Rice Dep. at 176.)

Band Sergeant Nguyen testified that Band officers "driving around and being present" was no longer a deterrent to criminal activity because people "knew we didn't have law enforcement authority when they saw a tribal cop." (*Id.*, Ex. HH, Nguyen Dep. at 76.) And that, in Ngyuen's view, "increased the drug availability, and people from out of town, people who we did not know came and with them they brought drugs, and the gang activity also increased." (*Id.*)

Similarly, former Assistant County Attorney Gardner testified that Band officers' "credibility amongst the community deteriorated very quickly, because the community members knew that they, [Band] officers, were not allowed to do anything." (*Id.*, Ex. L, Gardner Dep. at 46.)

According to Rosati, after the County terminated the 2008 Agreement, he did not believe the Sheriff's deputies stationed "within [the Band] community knew the people

like [Band officers] knew our people." (*Id.*, Ex. EE, Rosati Dep. at 123.) He noted that Band officers "actually understand the family trees within the community." (*Id.* at 213.) Naumann testified that "statements [were] being taken from victims twice and from people that aren't familiar with the community that don't know the community, the community members, and the family structure." (*Id.*, Ex. Z, Naumann Dep. at 100.)

In the view of former Assistant County Attorney Gardner, Band officers' knowledge of and connections in the Band community were "absolutely important and priceless" from a law enforcement perspective. (*Id.*, Ex. L, Gardner Dep. at 23-24; *cf id.* at 27 (explaining that some Sheriff's deputies had some knowledge of the Band community, but they had less knowledge than Band officers).) According to Band member Colin Cash, Band officers "know the Band community and they care about the community. They also know who belongs in the community and who is an outsider. … When Sheriff's deputies took over for Band police, they did not know the people or the area. It became free [rein] for people using drugs and committing crimes. … The Sheriff's deputies didn't know the drug houses or the dealers. It was an open market for drugs." (Cash Decl. [Doc. No. 156] ¶¶ 8-9, 11.)

Several witnesses noted a decline in police work after the revocation of the 2008 Agreement. Rosati testified that Band officers engaged in very proactive policing before the 2008 Agreement was revoked, but he did not observe Sheriff's deputies engaging in proactive policing after the revocation. (Baldwin Decl. [Doc. No. 150] Ex. EE, Rosati Dep. at 213.) Gardner testified that "deputies, when they were on the north end during the revocation, did not proactively patrol the reservation. Instead, they waited at the north end sheriff's station for a call to come in." (*Id.*, Ex. L, Gardner Dep. at 69.) According to

Naumann, the Protocol "caused us to not be able to effectively do our jobs because guys were afraid to proactively patrol and initiate traffic stops," and Sheriff's deputies "weren't conducting proactive patrols." (*Id.*, Ex. Z, Naumann Dep. at 92, 101.) During the Band's Rule 30(b)(6) deposition, Band Sergeant Dieter testified that the Protocol deterred patrol officers "from wanting to go out and be proactive under the idea if they were proactive and violated the Northern Protocol that they could be arrested for it." (*Id.*, Ex. CC, Rule 30(b)(6) Band Dep. at 210-11.)

After the termination of the 2008 Agreement, the Sheriff's Office hired additional deputies. (Flaherty Decl. [Doc. No. 178] Ex. 15, Mott Dep. at 16-17; Lindgren Decl. [Doc. No. 180] ¶ 10.) Rice testified that, although the Sheriff's Office hired more deputies during the revocation period, "there was nothing being done" because "tribal police were proactive" while Sheriff's deputies were "all reactive." (Baldwin Decl. [Doc. No. 150] Ex. GG, Rice Dep. at 180-81.) Rice elaborated that the Reservation became a "police free zone" when "people saw the traffic stops and nothing happened. There [weren't] any search warrants being executed on the reservation. There was police presence, but they knew we were limited. You had deputies running around telling them we're not cops." (*Id.* at 182.)

G. Impact on Public Safety

Wade Lennox, a State Corrections Officer who works with felony offenders on the Reservation, testified regarding the impact of the Opinion and Protocol on public safety. (*See* Baldwin Decl. [Doc. No. 150] Ex. SS, Lennox Dep.) Lennox testified that he saw Band officers "out interacting with the community members. It was clear that part of their

mission work was to be available, regardless of the need." (*Id.* at 17.) However, Lennox observed several changes that he noted in an April 4, 2017, email to Rice:

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

(Baldwin Decl. [Doc. No. 150] Ex. TT.) Former Assistant County Attorney Gardner testified that Lennox's observations in this email were accurate. (*Id.*, Ex. L, Gardner Dep. at 67-68.)

In an October 10, 2017, email to Walsh, Lennox wrote that "there simply is not the law enforcement presence on the Reservation there had been and that has dramatically impacted our probationary work" and that he "see[s] County [Sheriff's deputies] patrolling, but not even remotely close to what was being done." (*Id.*, Ex. UU.) According to Lennox, after the termination of the 2008 Agreement, "[t]he general perception from the offenders we were working with at the time was [kind of] free rein." (*Id.*, Ex. SS, Lennox Dep. at 15.) "[T]here was a general sense that [the Reservation] became almost a safe haven [for drug trafficking]." (*Id.* at 27-28.)

In November 2017, then United States Secretary of the Interior, Ryan Zinke, traveled to the Reservation. (Dieter Decl. [Doc No. 157] ¶ 7.) Because of the high levels

of drug trafficking, use, and overdoses on the Reservation, the Office of Justice Services in the Bureau of Indian Affairs ("BIA") "temporarily assigned BIA Special Agents to conduct saturation patrols and work with Band police officers to help address these problems." (*Id.*) The BIA Special Agents and Band officers carried out joint drug investigations in 2018. (*Id.* ¶ 9.) Band officers notified Sheriff's deputies of these investigations before they occurred. (*Id.* ¶ 10.)

H. Special Law Enforcement Commissions ("SLECs")

On January 8, 2016, under the Tribal Law and Order Act of 2010 ("TLOA"), Pub. L. No. 111-211, 124 Stat. 2258, the United States agreed to assume concurrent federal criminal jurisdiction over the Band's Indian country, effective January 1, 2017. (Baldwin Decl. [Doc. No. 150] Ex. LL.) On December 20, 2016, the BIA and the Band entered into a Deputation Agreement, allowing the BIA to issue SLECs to qualified Band officers. (*Id.*, Ex. MM.) The Deputation Agreement allowed Band officers who held SLECs, such as Naumann, to enforce federal law within the Band's Indian country. (*Id.*; *see id.*, Ex. NN (Band officers' SLEC cards), Ex. Z, Naumann Dep. at 38.)

Walsh acknowledged that his view was that Band officers holding SLECs could not exercise SLEC authority on non-trust lands within the 1855 Treaty boundaries. (Baldwin Decl. [Doc. No. 150] Ex. KK, Walsh Dep. at 384-85.) In an email to a Band officer, Walsh explained that, although the Protocol predated the issuance of the SLECs, the Protocol remained in force and should be followed to avoid any challenges to jurisdiction. (*Id.*, Ex. OO at 2-3.)

I. The 2018 Agreement

In September 2018, the Band, County, and then County Sheriff Lindgren entered into a "Mutual Aid/Cooperative Agreement." (Baldwin Decl. [Doc. No. 150] Ex. AAA.) Under this Agreement, on a temporary basis, the parties agreed that the Band has concurrent jurisdiction with the Sheriff under Minn. Stat. § 626.90: (1) over all persons on trust lands; (2) over all Band members within the boundaries of the 1855 Treaty; and (3) over any person committing or attempting to commit a crime in the presence of a Band officer within the boundaries of the 1855 Treaty. (*Id.* ¶ 4(a).) However, the Agreement provides that:

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

(*Id.* ¶ 25(c).)

II. PROCEDURAL HISTORY

On November 17, 2017, the Band, Rice, and Naumann sued the County, Walsh, and Lindgren, seeking declaratory and injunctive relief, as well as costs and attorneys' fees. (Compl. [Doc. No. 1] at 7-8.) First, Plaintiffs seek a declaration that, under federal law, the Band has:

> inherent sovereign authority to establish a police department and to authorize Band police officers to investigate violations of federal, state and tribal law within the Mille Lacs Indian Reservation as established in [the 1855 Treaty], and, in exercising such authority, to apprehend suspects (including Band and

> non-Band members) and turn them over to jurisdictions with prosecutorial authority.

(*Id.* at 7.)

> Second, Plaintiffs seek a declaration that:
>
> Pursuant to 18 U.S.C. § 1162(d), 25 U.S.C. §§ 2801 and 2804, the Deputation Agreement between the Band and the [BIA], and the SLECs issued to Band police officers by the [BIA], Band police officers have federal authority to investigate violations of federal law within the Mille Lacs Indian Reservation as established in [the 1855 Treaty], and, in exercising such authority, to arrest suspects (including Band and non-Band members) for violations of federal law.

(*Id.*)

Finally, Plaintiffs seek to enjoin Defendants from taking any actions that interfere with Band officers' authority, as determined by this Court. (*Id.* at 8.)

On April 27, 2020, Magistrate Judge Brisbois entered the Third Amended Pretrial Scheduling Order, which, *inter alia*, granted the parties leave to file early dispositive motions "only so far as are outlined in their Joint Motion for Leave to File Early Dispositive Motions." (Third Am. Pretrial Scheduling Order [Doc. No. 138] at 6.) In their Joint Motion, the parties only sought leave to file the following dispositive motions: "(1) Plaintiffs' motion for summary judgment that they have standing and that their claims are ripe and not moot; (2) the Defendant County Attorney and County Sheriff's motion for summary judgment on their immunity defenses; and (3) the Defendant County Attorney's motion for summary judgment that the Court lacks subject matter jurisdiction." (Jt. Mot. [Doc. No. 132] at 1-2.)

III. DISCUSSION

A. Standard of Review

Summary judgment is appropriate if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A fact is 'material'" if it may affect the outcome of the lawsuit. *TCF Nat'l Bank v. Mkt. Intelligence, Inc.*, 812 F.3d 701, 707 (8th Cir. 2016). Likewise, an issue of material fact is "genuine" only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The moving party bears the burden of establishing a lack of any genuine issue of material fact in dispute, *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), and the Court must view the evidence and any reasonable inferences in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

Walsh and Lorge move for summary judgment alleging that this Court lacks subject matter jurisdiction over this matter or, alternatively, that they are nevertheless immune from suit. Plaintiffs move for summary judgment on three threshold issues of justiciability: standing, ripeness, and mootness.

The Court first considers Walsh's and Lorge's challenge to subject matter jurisdiction.

B. Subject Matter Jurisdiction

Defendants Walsh and Lorge contend that there is no basis under federal law for the Court to exercise federal question subject matter jurisdiction over any of Plaintiffs' claims of interference with the Band's sovereign law enforcement authority. (Walsh and Lorge Mem. in Supp. of Mot. for Summ. J. ("Ind. Defs.' Mem. Summ. J.") [Doc. No. 164] at 14-31.) Defendants further argue that Congress's enactment of the TLOA precludes the Court from applying federal common law to the issues raised in this case.[3] (*Id.* at 21-22.) In response, Plaintiffs contend that the Court may exercise federal question subject matter jurisdiction over each of its claims under federal common law, 28 U.S.C. § 1331 and § 1362, 25 U.S.C. § 2804, and under certain treaties. (Pls.' Mem. in Opp'n to Mot. for Summ. J. ("Pls.' Opp'n Summ. J.") [Doc. No. 173] at 12-24.)

Federal courts are "courts of limited jurisdiction" and only possess those powers authorized by the Constitution and by statute. *Gunn v. Minton*, 568 U.S. 251, 256 (2013) (internal quotations and citation omitted). Under 28 U.S.C. § 1331, federal district courts "shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." To determine whether a claim "arises under" federal law, federal courts apply the "well-pleaded complaint" rule. *Great Lakes Gas Transmission Ltd. P'ship v. Essar Steel Minn. LLC*, 843 F.3d 325, 329 (8th Cir. 2016). This rule "provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Id.* (quoting *Caterpillar Inc. v. Williams*, 482 U.S.

[3] The parties debate whether the TLOA provides a private right of action. However, since the Plaintiffs have not plead any cause of action under the TLOA, the Court declines to address this issue.

386, 392 (1987)). "Federal question jurisdiction exists if the well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Id.* (quoting *Williams v. Ragnone*, 147 F.3d 700, 702 (8th Cir. 1998)).

It is well established that questions of federal common law can serve as a basis for the exercise of federal question subject matter jurisdiction under § 1331. *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972); *see Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985). Indeed, in the context of federal Indian law, federal courts apply federal common law "as a necessary expedient when Congress has not spoken to a *particular* issue." *United States v. Lara*, 541 U.S. 193, 207 (2004) (discussing *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 233-37 (1985)) (internal quotations and citations omitted) (emphasis in original).

Federal courts have often treated the scope of a tribe's inherent sovereign authority as a matter of federal common law. *See Lara*, 541 U.S. at 205-07; *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206, 212 (1978); *United States v. Terry*, 400 F.3d 575, 579-80 (8th Cir. 2005) (citing *Strate v. A-1 Contrs.*, 520 U.S. 438, 456 n.11 (1997); *Duro v. Reina*, 495 U.S. 676, 696-97 (1990)); *see also Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1321 (9th Cir. 1983) ("Increasingly, the legal boundaries of tribal sovereignty are being defined by case law."); 1 Cohen's Handbook of Federal Indian Law § 7.04 (2019) ("Federal question jurisdiction … extends to claims based on federal common law, including cases involving … challenges to the exercise of state authority in Indian country."); *id.* § 7.04 n.9 (collecting cases).

Consistent with the above authority, the Ninth Circuit has specifically held that the scope of a tribe's inherent sovereign law enforcement authority is a matter of federal common law. *See Bishop Paiute Tribe v. Inyo Cnty.*, 863 F.3d 1144, 1151-52 (9th Cir. 2017). In that case, the Bishop Paiute Tribe brought a declaratory judgment action against a county, a sheriff, and a district attorney, seeking, *inter alia*, a declaration that the Tribe had "the authority on its Reservation to stop, restrain, investigate violations of tribal, state and federal law, detain, and transport or deliver a non-Indian violator to the proper authorities." *Id.* at 1150. The Ninth Circuit held that it had subject matter jurisdiction under § 1331 because the Tribe "allege[d] that federal common law grants the Tribe the authority to 'investigate violations of tribal, state, and federal law, detain, and transport or deliver a non-Indian violator to the proper authorities'" and that the "[t]he Defendants' arrest and charging of [a tribal officer]" allegedly violated such federal common law. *Id.* at 1152.

Here, Plaintiffs similarly allege that the scope of the Band's sovereign law enforcement authority is defined by federal common law, hence raising a federal question sufficient to confer subject matter jurisdiction on this Court. Specifically, Plaintiffs allege that, "[a]s a matter of federal common law, the Band possesses inherent sovereign authority to establish a police force and to authorize Band police officers to investigate violations of federal, state and tribal law within the Reservation." (Compl. [Doc. No. 1] ¶ H.) Plaintiffs further allege that, "[a]lso as a matter of federal common law, the Band possesses inherent sovereign authority to authorize its police officers to apprehend suspects and turn them over to jurisdictions with criminal prosecutorial authority." (*Id.*) In support of their allegations that Defendants have interfered with their sovereign law enforcement authority,

Plaintiffs cite to the County Attorney's threats of prosecution and arrest against Band officers as well as the County's instructions to the Sheriff's deputies not to arrest suspects apprehended by Band police officers. (*See id.* ¶¶ M-Q.) Accordingly, Plaintiffs have raised issues of federal common law on the face of their well-pleaded Complaint. As a result, they have adequately pleaded a federal question over which this Court has subject matter jurisdiction under § 1331.

Defendants rely primarily on the decision of the Eighth Circuit in *Longie v. Spirit Lake Tribe*, 400 F.3d 586 (8th Cir. 2005), to support their claim that the issues raised in this case are matters of tribal and/or state law, not federal law. (Ind. Defs.' Mem. Summ. J. at 19.) However, *Longie* is inapposite. It involved a disputed land transfer between a tribe and a member of that tribe. *Longie*, 400 F.3d at 590-91. The resolution of that dispute turned on whether there was a contract or other legal basis to force the tribe to effectuate the transfer under tribal law. *Id.* Unlike the disputed land transfer in *Longie* between the tribe and its member that raises issues under tribal law, the instant case raises issues of sovereign authority as between the Band and the County under federal common law. In fact, the Eighth Circuit made that very distinction in *Longie* when it described the United States Supreme Court's decision in *Nat'l Farmers Union Ins. Cos.* as "finding jurisdiction under section 1331 because federal common law establishes the limits of tribal sovereignty." *Id.* at 590 (citing *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985)).

Moreover, Walsh and Lorge's argument that Congress has already acted in the area of tribal law enforcement authority by enacting the TLOA, thus precluding the Court from

applying federal common law, is unavailing. While congressional legislation can displace federal common law under certain circumstances, "[t]he test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute 'speak[s] directly to [the] question' at issue." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423-24 (2011). Importantly, the TLOA does not speak to the scope of the Band's sovereign law enforcement authority. Rather, it creates a federal program through which certain tribal officers may assist federal authorities in the enforcement of federal criminal law in Indian country. *See* 25 U.S.C. § 2804. Accordingly, Congress has not displaced federal common law that serves to define the scope of a tribe's sovereign law enforcement authority.

Plaintiffs have raised issues of federal common law on the face of their well-pleaded Complaint, sufficient to confer federal question subject matter jurisdiction on this Court as to each of Plaintiffs' claims.

C. Justiciability

Next, the Court considers Plaintiffs' motion for summary judgment on three threshold justiciability doctrines: standing, ripeness, and mootness. According to Plaintiffs, the record evidence establishes that they have standing and that their claims are ripe and not moot. The Court considers each of these issues in turn.

1. Standing

Article III of the Constitution limits the jurisdiction of federal courts to certain "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. "One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue."

Clapper v. Amnesty Int'l U.S.A., 568 U.S. 398, 408 (2013). To establish Article III standing, a plaintiff must show—as an "irreducible constitutional minimum"—the existence of three elements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). First, there must be an "injury in fact." *Id.* Second, "there must be a causal connection between the injury and the conduct complained of," such that the injury is "fairly trace[able] to the challenged action of the defendant." *Id.* Third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (quotations and citation omitted). Standing "in no way depends on the merits of the plaintiffs' contention that particular conduct is illegal." *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

First, the Court considers whether Plaintiffs have suffered an injury in fact. Plaintiffs allege that they have suffered several related injuries in fact that establish standing: (1) interference with and infringement of the Band's sovereign law enforcement authority; (2) resulting injuries to Plaintiffs Rice and Naumann's abilities to practice their chosen professions; (3) harm to morale causing several officers to resign; and (4) a resulting decline in effective law enforcement and public safety. (Pls.' Mem. in Supp. of Mot. for Partial Summ. J. ("Pls.' Mem. Summ. J.") [Doc. No. 148] at 27-32.) Walsh and Lorge argue, to the contrary, that none of these injuries are sufficient to confer standing. (Walsh and Lorge Mem. in Opp'n to Mot. for Partial Summ. J. ("Ind. Defs.' Opp'n Summ. J.") [Doc. No. 176] at 29-45.)

"To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016)

(quoting *Lujan*, 504 U.S. at 560). Importantly, courts have long recognized that tribes have legally protected rights in their sovereignty and, accordingly, that infringement of those rights confers standing. *See Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 468 n.7 (1976) (a tribe's "discrete claim of injury" to "tribal self-government" can "confer standing" in a case involving a state's imposition of taxes); *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 463 (2d Cir. 2013) ("actual infringements on a tribe's sovereignty constitute a concrete injury sufficient to confer standing"); *Quapaw Tribe of Okla. v. Blue Tee Corp.*, 653 F. Supp. 2d 1166, 1179 (N.D. Okla. 2009) ("Indian tribes, like states and other governmental entities, have standing to sue to protect sovereign or quasi-sovereign interests."). Indeed, a tribe has a legally protected interest in exercising its inherent sovereign law enforcement authority. *Bishop Paiute Tribe v. Inyo County*, 863 F.3d 1144, 1153 (9th Cir. 2017); *see also Confederated Tribes & Bands of the Yakama Nation v. Yakima Cnty.*, 963 F.3d 982, 989 (9th Cir. 2020). In *Bishop Paiute Tribe*, for example, the Ninth Circuit found that a tribe has a legally protected interest in its "inherent sovereign authority to restrain, detain, and deliver to local authorities a non-Indian on tribal lands that is in violation of both tribal and state law." 863 F.3d at 1153. Consistent with this authority, the Court finds that the Band has a legally protected interest in exercising its inherent sovereign law enforcement authority.

As discussed earlier, the evidence in the record reveals numerous actual, concrete, and particularized incidents in which the Band's police officers have been restricted from carrying out their law enforcement duties pursuant to the Opinion and Protocol. The County concedes as much but argues that it is justified in doing so and challenges the extent

and scope of the Band's sovereign law enforcement authority. The resolution of this issue is for another day. For purposes of Article III standing, however, those injuries in fact are actual, concrete, and particularized and therefore confer standing on the Band to challenge the County's conduct.

Second, the Court considers whether Plaintiffs' injuries are fairly traceable to the challenged actions of Defendants in issuing and enforcing the Opinion and Protocol. "When government action or inaction is challenged by a party who is a target or object of that action, as in this case, 'there is ordinarily little question that the action or inaction has caused him injury.'" *Minn. Citizens Concerned for Life v. FEC*, 113 F.3d 129, 131 (8th Cir. 1997) (quoting *Lujan*, 504 U.S. at 561-62).

Plaintiffs argue that their injuries are fairly traceable to Defendants' conduct for three reasons. First, they argue that the evidence of record is clear that compliance with the Opinion and Protocol, despite being titled as such, was mandatory. (Pls.' Mem. Summ. J. at 32.) Second, Plaintiffs argue that Walsh clearly communicated to the Band police department that violations of the Opinion and Protocol could result in criminal and/or civil liability. (*Id.*) Finally, Plaintiffs note that Lindgren and his deputies repeatedly enforced the Opinion and Protocol. (*Id.*)

Walsh and Lorge contend that Plaintiffs' injuries are not fairly traceable to Defendants' actions for several reasons. First, they argue that the Opinion and Protocol did not actually restrict the Band's law enforcement authority because the Band "chose to cooperate with" the Opinion and Protocol on the advice of its Solicitor General, Matha. (Ind. Defs.' Opp'n Summ. J. at 33-34.) Second, they argue that Walsh never actually

threatened a Band officer with prosecution and Lindgren never actually threatened a Band officer with arrest. (*Id.* at 34-35.)

The Court finds that Plaintiffs' injuries are fairly traceable to Defendants' challenged conduct. The record is replete with evidence that County law enforcement and Band officials alike understood that compliance with the Opinion and Protocol was mandatory. Walsh made clear that violations of the Opinion and Protocol could result in criminal and/or civil enforcement. (*See, e.g.*, Baldwin Decl. [Doc. No. 150] Ex. N at 2.) And, as discussed earlier, Lindgren and his deputies enforced the Opinion and Protocol by actively interfering in the Band's criminal investigations, even on trust lands.

The Court finds unavailing the Defendants' argument that the Band's decision to follow the Opinion and Protocol, on the advice of its Solicitor General, to avoid potential criminal and civil liability, is the actual and intervening cause of these injuries. That argument "wrongly equates injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation." *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997). Indeed, "[a] plaintiff is not deprived of standing merely because he or she alleges a defendant's actions were a contributing cause instead of the lone cause of the plaintiff's injury." *City of Wyo. v. P&G*, 210 F. Supp. 3d 1137, 1151-52 (D. Minn. 2016) (collecting cases).

Defendants' arguments that they never actually threatened prosecution or arrest also miss the mark. First, Walsh made it clear that the Opinion and Protocol was to be enforced. Second, this lawsuit does not seek tort damages for prosecution or arrest under the Opinion and Protocol. Rather, it seeks a declaratory judgment that the Band's sovereign authority

has been infringed. The particularized injury that confers standing in this case is that very interference with the Band's sovereign law enforcement authority. Accordingly, the Court finds that Plaintiffs' injuries are "fairly traceable" to Defendants' alleged unlawful conduct.

Finally, in order to confer standing, the Court must find that it will be likely that the injury will be redressed by a favorable decision. In this case, the declaratory and injunctive relief sought is specifically designed to do just that—to recognize and restore the Band's sovereign law enforcement authority.

Accordingly, the Court finds that Plaintiffs have met their burden of establishing standing to pursue these claims.

2. Ripeness

Next, Plaintiffs seek summary judgment on the issue of ripeness. Whether a claim is ripe depends on "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Public Water Supply Dist. No. 10 v. City of Peculiar*, 345 F.3d 570, 572-73 (8th Cir. 2003) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). A plaintiff must satisfy both elements "at least to a minimal degree." *Id.* (citing *Nebraska Pub. Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1039 (8th Cir. 2000)). Under the "fitness for judicial decision" prong of the analysis, whether a case is fit "depends on whether it would benefit from further factual development." *Id.* at 573. A case "is more likely to be ripe if it poses a purely legal question and is not contingent on future possibilities." *Id.* Under the hardship prong, the plaintiff must have "sustained or is immediately in danger of sustaining some direct injury as the result of the challenged" conduct. *Id.* (quoting *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)).

Plaintiffs contend that their claims are ripe because the mandates of the Opinion and Protocol, as enforced by the County and the Sheriff, have repeatedly infringed on their sovereign law enforcement authority. (Pls.' Mem. Summ. J. at 35.) In response, Defendants argue that the Band has not in fact suffered a cognizable injury. (Ind. Defs.' Opp'n Summ. J. at 46-51.)

Plaintiffs satisfy both prongs of the ripeness analysis. This case is clearly fit for judicial decision. And under the "hardship prong," Plaintiffs have presented a record with sufficient evidence that they have sustained a direct injury to their sovereign law enforcement authority as a result of the challenged conduct.

3. Mootness

Finally, Plaintiffs move for summary judgment on the issue of mootness, contending that the 2018 Agreement, which temporarily granted the Band the same law enforcement powers that it possessed before the County revoked the 2008 Agreement, does not moot this case. A case can become moot by a party's voluntary cessation of the challenged conduct if it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Wright v. RL Liquor*, 887 F.3d 361, 363 (8th Cir. 2018) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). The party asserting that a case is moot bears a "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again." *Friends of the Earth*, 528 U.S. at 189 (internal quotations and citation omitted).

Defendants fail to meet this burden. If this case is dismissed, on mootness grounds, the 2018 Agreement will, by its very terms, terminate, and it is highly probable that the

parties will continue to dispute the extent of the boundaries of the Reservation and the extent of the Band's sovereign law enforcement authority. It is certainly not "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 189 (citation omitted).

D. Walsh and Lorge's Defenses of Immunity

Next, the Court considers Defendants Walsh's and Lorge's defenses of immunity from suit. Specifically, they argue: (1) that the Tenth Amendment bars this action because Plaintiffs unlawfully seek to control Walsh's prosecutorial discretion; (2) that *Younger* abstention is appropriate and principles of federalism and comity preclude the Court from awarding injunctive relief; (3) that the Eleventh Amendment immunizes Walsh and Lorge from this suit; and (4) that absolute prosecutorial immunity insulates Walsh and Lorge from this suit. (*See* Ind. Defs.' Mem. Summ. J. at 31-46.) The Court considers each of these arguments in turn.

1. Tenth Amendment and Prosecutorial Discretion

The gravamen of Defendants' claims of immunity under the Tenth Amendment rest on their prosecutorial discretion. Walsh and Lorge argue that Plaintiffs seek to interfere with that discretion and that Plaintiffs improperly ask this Court to review their charging decisions. (Ind. Defs.' Mem. Summ. J. at 31-36.) Plaintiffs respond that Defendants fundamentally misunderstand their claims. Plaintiffs argue that they do not seek to interfere with any charging decision. (Pls.' Opp'n Summ. J. at 25.) Rather, they seek clarity as to their sovereign law enforcement authority and they ask for an order preventing Walsh and Lorge from interfering with that authority. (*Id.*)

The Court is not aware of any authority, nor do Defendants cite any authority, for the proposition that a judicial declaration of the scope of a tribe's sovereign law enforcement authority or a judicial order prohibiting interference with that authority runs afoul of the Tenth Amendment.

It is well established that the Tenth Amendment does not foreclose federal courts from preventing state (or local) officials from infringing upon rights secured by federal law. *See Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 828-29 (10th Cir. 2007); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 928 n.44 (8th Cir. 1997), *aff'd*, 526 U.S. 172 (1999). For instance, when the Mille Lacs Band sought to prevent Minnesota officials from interfering with the Band's treaty-based rights to hunt, fish, and gather, the Eighth Circuit rejected a Tenth Amendment defense because the "case [was] about state law infringing on rights guaranteed by federal law, and there is no question that federal courts have the power to order state officials to comply with federal law." *Mille Lacs Band*, 124 F.3d at 928 n.44 (citations omitted). Accordingly, Walsh and Lorge's defense of immunity based on their prosecutorial discretion under the Tenth Amendment fails.

2. *Younger* Abstention and Principles of Federalism and Comity

Walsh and Lorge urge the Court to dismiss them from this case under the *Younger* abstention doctrine, and they contend that the Court cannot issue an injunction under the principles of federalism articulated in *Rizzo v. Goode*, 423 U.S. 362 (1976), and *O'Shea v. Littleton*, 414 U.S. 488 (1974).

The *Younger* abstention doctrine arose out of principles of comity articulated by the United States Supreme Court in *Younger v. Harris*, 401 U.S. 37 (1971). Under that doctrine, federal courts must "abstain from taking jurisdiction over federal constitutional claims that involve or call into question ongoing state proceedings." *Diamond "D" Const. Corp. v. McGowan*, 282 F.3d 191, 198 (2d Cir. 2002) (citing *Younger*, 401 U.S. at 43-44). Specifically, the Court is required to abstain when: "(1) there is an ongoing state proceeding, (2) that implicates important state interests, and (3) that provides an adequate opportunity to raise any relevant federal questions." *Tony Alamo Christian Ministries v. Selig*, 664 F.3d 1245, 1249 (8th Cir. 2012) (citing *Plouffe v. Ligon*, 606 F.3d 890, 894-95 (8th Cir. 2010)). If these three conditions are satisfied, "principles of comity and federalism preclude federal actions seeking injunctive or declaratory relief." *Id.*

"Circumstances fitting within the *Younger* doctrine ... are 'exceptional'; they include … 'state criminal prosecutions,' 'civil enforcement proceedings,' and 'civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions.'" *Sprint Communs., Inc. v. Jacobs*, 571 U.S. 69, 73 (2013) (quoting *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 367-68 (1989)). Unless the case is deemed to be "exceptional," however, the general rule applies—"the pendency of an action in [a] state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910)).

Defendants Walsh and Lorge argue that this Court must abstain from hearing this case under the *Younger* abstention doctrine. Specifically, they argue that the effect of injunctive relief in this case would be to improperly enjoin pending or threatened criminal prosecutions. (Ind. Defs.' Mem. Summ. J. at 36-38.) Plaintiffs respond that there is no pending state court proceeding in which the Band's sovereign law enforcement authority will be adjudicated, let alone one that qualifies as "exceptional" under Supreme Court precedent. They note that this Court has previously held that *Younger* abstention would be inappropriate in a case seeking a determination of the extent of the Band's treaty rights relating to hunting, fishing, and gathering, even in the presence of pending criminal prosecutions. (Pls.' Opp'n Summ. J. at 30 (citing *Mille Lacs Band of Chippewa Indians v. Minn. Dep't of Nat. Res.*, 853 F. Supp. 1118, 1132 (D. Minn. 1994))).

The Court agrees with the Plaintiffs. *Younger* abstention is simply not applicable in the absence of both a state and federal proceeding considering the same federal constitutional claims. Therefore, Defendants' motion for summary judgment based on the *Younger* abstention doctrine is denied.

Next, Walsh and Lorge contend that federalism and comity principles under *Rizzo v. Goode*, 423 U.S. 362 (1976), and *O'Shea v. Littleton*, 414 U.S. 488 (1974), preclude the Court from granting injunctive relief in this case.

In *Rizzo*, the Supreme Court struck down an injunction revising the internal procedures of the Philadelphia police department based, in part, on principles of federalism. 423 U.S. at 377-81. The Court explained that "[w]here … the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the special delicacy of

the adjustment to be preserved between federal equitable power and State administration of its own law." *Id.* at 378 (internal quotations and citations omitted). Further, the Court noted that such federalism concerns "have applicability where injunctive relief is sought … against those in charge of an executive branch of an agency of state or local governments." *Id.* at 380. In *O'Shea*, the Court struck down an injunction that sought to control and prevent specific events that might occur during state prosecutions, which, according to the Court, constituted "an ongoing federal audit of state criminal proceedings." 414 U.S. at 491, 500.

Walsh and Lorge contend that an injunction in this case would run afoul of the principles of federalism and comity under *Rizzo* and *O'Shea*. They warn that the Court "could be forced to referee jurisdictional disputes between the Sheriff and tribal police" and "the injunction would require continuous supervision by the federal courts over the administration of state executive functions." (Ind. Defs.' Mem. Summ. J. at 36-38.) In response, Plaintiffs argue that this case does not raise federalism concerns under *Rizzo* and *O'Shea* because here, Plaintiffs seek only a declaration as to the scope of their sovereign law enforcement authority. (Pls.' Opp'n Summ. J. at 31-35.) Nothing, they contend, in *Rizzo* or *O'Shea* bars such relief. (*Id.*)

The Court agrees that federalism principles under *Rizzo* and *O'Shea* do not preclude injunctive relief in this case. The Eighth Circuit has recognized that the federalism concerns in *Rizzo* only apply in "quite narrow circumstances." *Chambers v. Marsh*, 675 F.2d 228, 232 (8th Cir. 1982), *rev'd on other grounds*, *Marsh v. Chambers*, 463 U.S. 783 (1983). Unlike the injunction in *Rizzo*, Plaintiffs do not request an order "revising the internal

procedures" of the County Attorney's Office or Sheriff's Office. Rather, Plaintiffs seek to enjoin interference with their sovereign law enforcement authority, a matter of federal law. Accordingly, although federal courts must be cognizant of federalism concerns under *Rizzo*, "they must, and do, retain power to enforce compliance with" federal law. *Youakim v. Miller*, 562 F.2d 483, 491 (7th Cir. 1977).

Likewise, the federalism concerns articulated in *O'Shea* do not exist here. Unlike the plaintiffs in *O'Shea*, Plaintiffs do not seek an "ongoing federal audit" of any state proceedings. *See* 414 U.S. at 500. Rather, they ask this Court to define the extent of their sovereign law enforcement authority and enjoin any interference with that authority. *O'Shea* has no applicability to this case.

Accordingly, to the extent that Defendants move for summary judgment based on principles of federalism and comity articulated in *Rizzo* and *O'Shea*, the motion is denied.

3. Eleventh Amendment Immunity

Next, Walsh and Lorge argue that the Eleventh Amendment renders them immune from Plaintiffs' "official capacity" claims. Under the Eleventh Amendment, however, "only States and arms of the State possess immunity from suits authorized by federal law." *N. Ins. Co. v. Chatham Cnty.*, 547 U.S. 189, 193 (2006). The Supreme Court has consistently declined to extend Eleventh Amendment immunity to counties, even when "such entities exercise a 'slice of state power.'" *Id.* at 193-94 (quoting *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979)); *see Greenwood v. Ross*, 778 F.2d 448, 453 (8th Cir. 1985) ("It is settled that a suit against a county, a municipality, or other lesser governmental unit is not regarded as a suit against a

state within the meaning of the Eleventh Amendment." (quoting *Gilliam v. City of Omaha*, 524 F.2d 1013, 1015 (8th Cir. 1975))).

Whether an agency qualifies as an "arm of the state" under the Eleventh Amendment is a question of federal law that requires an analysis of the "provisions of state law that define the agency's character." *Thomas v. St. Louis Bd. of Police Comm'rs*, 447 F.3d 1082, 1084 (8th Cir. 2006) (quoting *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 n.5 (1997)). Specifically, courts must analyze "the agency's degree of autonomy and control over its own affairs and, more importantly, whether a money judgment against the agency will be paid with state funds." *Id.*

Applying the analytical framework in *Thomas*, the Court finds that Eleventh Amendment immunity does not shield Walsh and Lorge from liability here, because they are not "arms of the state." First, under Minnesota law, the County Attorney and Sheriff have wide autonomy and control over their affairs, wholly apart from the state. *See Thomas*, 447 F.3d at 1084. For example, the County Attorney and the Sheriff are not subject to state control in the execution of their statutory duties. Minn. Stat. § 388.051 (establishing County Attorney's duties); *id.* § 387.03 (establishing Sheriff's powers and duties). Moreover, the County Attorney and Sheriff are both elected positions. *Id.* § 382.01. And as elected county officials, the County Attorney and Sheriff can be removed through a petition containing the signatures of at least 25 percent of the number of people who voted in the last election for the county office that is the subject of the petition. *Id.* §§ 351.15-23; *see id.* § 351.14, subd. 5. Also, the County Board, not the state, sets and pays the salary of the County Attorney. *Id.* § 388.18, subd. 2, 5; *id.* § 388.22 subd. 1, 2. Likewise, the County

Board sets the Sheriff's salary. *Id.* § 387.20, subd. 2(a). Accordingly, the County Attorney and the Sheriff have significant autonomy and control over their affairs apart from the state.

Second, and "more importantly," *Thomas*, 447 F.3d at 1084, Minnesota law provides that a money judgment against Walsh and Lorge would be paid with county, not state, funds. Specifically, Minnesota law provides that "[w]hen a judgment is recovered against … a county officer, in an action … against the officer officially … the judgment shall be paid from funds in the [county] treasury," and if such funds are unavailable in the county treasury, "the unpaid amount of the judgment shall be levied and collected as other county charges." Minn. Stat. § 373.12. Thus, although Plaintiffs do not seek a money judgment in this case, a money judgment against Walsh and Lorge would be paid by the county.

Walsh and Lorge note that several of their duties and powers arise from Minnesota state statutes, such as Walsh's duty to enforce state water laws and Lorge's power to pursue and apprehend persons suspected of criminal activity. (*See* Ind. Defs.' Mem. Summ. J. at 41.) However, this demonstrates that Walsh and Lorge exercise, at most, "slices of state power" but does not establish that they are acting as "arms of the state" under the Eighth Circuit's framework in *Thomas*.

Accordingly, the Eleventh Amendment does not bar Plaintiffs' "official capacity" claims against Walsh and Lorge.

4. Absolute Prosecutorial Immunity

Next, Walsh and Lorge seek dismissal from this case on the ground of absolute prosecutorial immunity. Absolute prosecutorial immunity protects prosecutors from suits

for damages "arising out of their official duties in initiating and pursuing criminal prosecutions." *Saterdalen v. Spencer*, 725 F.3d 838, 842 (8th Cir. 2013) (quoting *Williams v. Hartje*, 827 F.2d 1203, 1208 (8th Cir. 1987)). However, absolute prosecutorial immunity does not extend to "[a] prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings." *Stockley v. Joyce*, 963 F.3d 809, 817 (8th Cir. 2020) (quoting *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993)). Specifically, "prosecutors are not entitled to absolute immunity for their actions in giving legal advice to the police," because providing advice to the police is "not a function 'closely associated with the judicial process.'" *Buckley v. Fitzsimmons*, 509 U.S. 259, 271 (1993) (quoting *Burns v. Reed*, 500 U.S. 478, 495 (1991)).

According to Walsh, the conduct at issue in this case—his "alleged, threatened prosecution of" Plaintiffs—relates to his prosecutorial function, and thus he should be immune from suit. (Ind. Defs.' Mem. Summ. J. at 43-44.) If Walsh is entitled to prosecutorial immunity, Defendants argue that Lorge is likewise entitled to immunity for following Walsh's "legal advice." (*Id.* at 46.) In response, Plaintiffs contend that Walsh's and Lorge's conduct at issue in this case does not fall within the scope of prosecutorial immunity and that, in any event, prosecutorial immunity cannot shield Walsh and Lorge because Plaintiffs do not seek money damages. (Pls.' Opp'n Summ. J. at 44-47.)

As a threshold matter, although prosecutors enjoy absolute prosecutorial immunity from damages liability in certain circumstances, absolute prosecutorial immunity does not extend to actions for declaratory and injunctive relief. *See Supreme Court v. Consumers*

Union of United States, 446 U.S. 719, 736 (1980) ("Prosecutors enjoy absolute immunity from damages liability, but they are natural targets for § 1983 injunctive suits" (citation omitted)); *Heartland Acad. Cmty. Church v. Waddle*, 427 F.3d 525, 531 (8th Cir. 2005) (citing and quoting *Consumers Union* for the proposition that "prosecutors, as state enforcement officers, are 'natural targets for § 1983 injunctive suits'"); *Bishop Paiute Tribe v. Inyo Cnty.*, No. 1:15-cv-00367-DAD-JLT, 2018 U.S. Dist. LEXIS 4643, at *21 (E.D. Cal. Jan. 10, 2018) (holding that absolute prosecutorial immunity defense was unavailable in suit arising under federal common law and seeking only injunctive and declaratory relief).

District Courts within the Eighth Circuit have also held that absolute prosecutorial immunity does not apply in an action for declaratory and injunctive relief. *See, e.g.*, *Richter v. Smith*, No. C16-4098-LTS, 2018 U.S. Dist. LEXIS 215431, at *21 (N.D. Iowa Dec. 21, 2018) ("absolute immunity bars recovery of money damages only"); *Kurtenbach v. S.D. AG*, 2018 U.S. Dist. LEXIS 53208, at *7 (D.S.D. Mar. 29, 2018) ("Immunities, i.e., absolute, prosecutorial or qualified immunity are not a bar to plaintiffs action for injunctive and declaratory relief under Section 1983." (internal quotations and citations omitted)); *Oglala Sioux Tribe v. Hunnik*, 993 F. Supp. 2d 1017, 1033 (D.S.D. 2014) (holding that State's Attorney was "not entitled to prosecutorial immunity for prospective injunctive or declaratory relief" where plaintiff did not seek money damages); *Hayden v. Nev. Cnty.*, No. 08-4050, 2009 U.S. Dist. LEXIS 22004, at *11 (W.D. Ark. Mar. 6, 2009) ("absolute immunity does not protect a prosecutor from claims for injunctive relief"). Here, Plaintiffs do not seek money damages—they seek only declaratory and injunctive relief.

Accordingly, Walsh and Lorge are not entitled to dismissal from this suit on the ground of absolute prosecutorial immunity.

5. Walsh and Lorge's Remaining Arguments

Walsh and Lorge raise several other arguments. First, they seek dismissal of the "official capacity" claims asserted against them on the ground that such claims are redundant. Second, they seek dismissal of the "individual capacity" claims asserted against them on the grounds that (1) equitable relief cannot be obtained against government officials in their individual capacities and (2) Plaintiffs have failed to state "individual capacity" claims against Walsh and Lorge because their allegations all involve official conduct. Third, they request a ruling that qualified immunity bars Plaintiffs from seeking costs and attorney's fees from Walsh and Lorge in their individual capacities and that there is no statutory basis to award Plaintiffs costs and attorney's fees against Walsh and Lorge in their individual capacities. (*See* Ind. Defs.' Mem. Summ. J. at 46-55.)

The Court declines to consider these arguments at this time. The Third Amended Scheduling Order did not authorize Walsh and Lorge to seek summary judgment on these issues through an early dispositive motion. (Third Am. Pretrial Scheduling Order [Doc. No. 138] at 6; *see* Jt. Mot. [Doc. No. 132] at 1-2.) Walsh and Lorge may raise these arguments again, if and when it is appropriate to do so.

IV. CONCLUSION

Based on the foregoing, and the entire file and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Plaintiffs' Motion for Summary Judgment on Standing, Ripeness, and Mootness [Doc. No. 146] is **GRANTED**;
2. Defendants Walsh and Lorge's Motion for Summary Judgment [Doc. No. 162] is **DENIED**;
3. Defendants County of Mille Lacs, Walsh, and Lorge's Motion to Strike and for Sanctions [Doc. No. 182] is **DENIED**.

IT IS SO ORDERED.

Dated: December 21, 2020

s/Susan Richard Nelson
SUSAN RICHARD NELSON
United States District Judge

FILED
June 9, 2021
OFFICE OF APPELLATE COURTS

NO. A20-1083
SUPREME COURT OF MINNESOTA

JOSEPH WALSH, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS COUNTY ATTORNEY FOR MILLE LACS COUNTY; DON LORGE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SHERIFF OF MILLE LACS COUNTY,
Petitioners,

vs.

STATE OF MINNESOTA,
Respondents.

PETITION FOR REVIEW

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BALDWIN DECLARATION - EXHIBIT I

EXHIBIT 2

ISSUE FOR REVIEW

Whether county attorneys and sheriffs act on behalf of the State in an official capacity when exercising their state-delegated law-enforcement powers, as this Court held in *House*, *Lemmer*, and implicitly in *Zillgitt*, or whether they do not, as the court of appeals held below.

CRITERIA FAVORING REVIEW

Review is warranted because the issue presented is important: the court of appeals so departed from the accepted and usual course of justice as to call for an exercise of the Court's supervisory powers; and a decision by the Court will help develop, clarify, or harmonize the law on a novel question of statewide impact. Minn. R. Civ. P. 117, subd. 2(a), 2(c), 2(d)(1)-(2).

STATEMENT OF THE CASE

Petitioners are defendants in a federal lawsuit brought by the Mille Lacs Band of Ojibwe. That lawsuit challenges County Attorney Walsh's and Sheriff Lorge's prosecutorial and law-enforcement actions taken on behalf of the State in their official capacities, and seeks recognition of a reservation the Band ceded in 1863 and 1864 treaties.

The Minnesota Legislature has enacted a statute specifically for the Band to exercise state law-enforcement powers. *See* Minn. Stat. § 626.90. This statute grants the Band state law-enforcement powers if the Band enters into a cooperative agreement with the Sheriff defining and regulating

the law enforcement activities required by this statute. *Id.*, subd. 2(b). In 2016, the Mille Lacs County Board of Commissioners voted to revoke the cooperative agreement between the County and the Band. County Attorney Walsh sought the opinion of Attorney General Lori Swanson on whether—post revocation—the Band's police department remained a state law enforcement agency and whether the Band's police officers remained peace officers. The Attorney General, speaking through a subordinate, denied Walsh's request. Accordingly, Walsh prepared an opinion and protocol to guide his office's prosecutorial discretion and the Sheriff's office in investigating criminal activity in the disputed area.

Specifically, the federal complaint asserts Walsh threatened Band police officers with arrest and prosecution, and refused to prosecute cases resulting from Band-led criminal investigations. (PFR.Add.40-41.) The federal complaint asserts Walsh and Lorge instructed sheriff deputies not to arrest suspects apprehended by Band police. (PFR.Add.41.) The Band asserts Walsh's and Lorge's actions interfered with its rights to investigate federal, state, and tribal law violations within the ceded reservation. (PFR.Add.40-41.)

After the federal case commenced, Walsh and Lorge contacted the Attorney General to request indemnification pursuant to Minn. Stat. § 3.736, subdivision 9, providing indemnification for an "employee of the state,"

defined to include "persons acting on behalf of the state in an official capacity, temporarily or permanently, with or without compensation." Minn. Stat. § 3.732, subd. 1(2). The Attorney General denied their request.

After this denial, they filed the present action. The State successfully moved to dismiss. The court of appeals affirmed.

First, the court held that despite using "include" in § 3.732, subd. 1(1), the statutory definition was "specifically tailored" to only the entities listed. (PFR.Add.12-13.) Second, the court held when county attorneys prosecute crimes on behalf of the State—and when sheriffs exercise their state-delegated powers—they act on behalf of the county, not the State. (PFR.Add.13.)

ARGUMENT

I. The question presented is important.

All parties here agree the question presented is novel and important. The State's brief sought a precedential decision: "local government officials seeking defense and indemnification from the State of Minnesota is a novel legal issue that significantly affects the public fisc." (Resp. Br. 19.)

II. Contradictory precedent created below warrants review.

A. The court of appeals' holding contradicts long-standing precedent.

Repeatedly this Court has described how county attorneys and sheriffs act on behalf of the State. In *Dept. of Public Safety v. House*, 192 N.W.2d 93 (1971), this Court addressed whether the county attorneys act for the State in criminal prosecutions and got the answer right. *House* involved a license revocation proceeding. The defendant pleaded guilty to careless driving in exchange for the county attorney's promise that the defendant's license would not be revoked. 192 N.W.2d at 94. Despite the deal, the Commissioner commenced license-revocation proceedings. This Court held that although the county attorney acted for the State in criminal cases, the county attorney did not act for the State in civil cases, and thus could not bind the Commissioner in a license-revocation action. *Id.* at 95.

House is no aberration. In *State v. Lemmer,* this Court again reaffirmed county attorneys act for the State. 736 N.W.2d 650, 662-63 (Minn. 2007)("The state specifically delegates the duties of prosecuting crimes to the offices of county attorneys…. With respect to the prosecution of crimes, the state acts almost exclusively through county attorneys or city attorneys.").

The same rule also applies to sheriffs. In *Vanderhyde v. Dodge Cty.*, 255 N.W.2d 39, 42 (Minn. 1977), this Court wrote "the Sheriff acts as an

officer of the judicial branch of government in addition to his duties as a member of the executive branch." In *Zillgitt v. Goodhue Cty Bd of Comm'rs*, 202 N.W.2d 378, 380 (Minn. 1972) this Court stated that "the county attorney's duties made him a quasi-judicial officer. The sheriff and his deputies are also officers of the court."[1]

This Court has long recognized county attorneys and sheriffs act for the state in an official capacity when exercising state-delegated duties. Counties cannot prosecute crimes nor arrest felons. Counties were not delegated those powers. Those powers were delegated to county attorneys and sheriffs—law enforcement officers selected by the same sovereign that chooses governors, judges, and legislators, Minn. Const. Art. I. § 1 ("the people, in whom all political power is inherent") and whom counties can neither fire nor hire.

B. The decision below creates a conflict in the law of statutory interpretation.

This Court's caselaw directs that the word "includes" or "including" should be read as inclusive, not exhaustive. It enlarges, not restricts. *LaMont v. Indep. Sch. Dist. No. 728*, 814 N.W.2d 14, 19 (Minn. 2012) ("[U]se of the word 'includes' does not narrow claims…. The word 'includes' is not

[1] The current Attorney General admits that the State Legislature has delegated authority to county attorneys and sheriffs. *See* https://www.ag.state.mn.us/Consumer/Protection/Default.asp (last visited June 8, 2021).

exhaustive or exclusive."); *Irongate Enterprises, Inc. v. County of St. Louis*, 736 N.W.2d 326, 329 (Minn. 2007). Court of appeals' caselaw likewise holds "includes" or "including" should be read as inclusive, not exhaustive. *Peterson v. City of Minneapolis*, 878 N.W.2d 521, 525 (Minn. App. 2016), *aff'd* 892 N.W.2d 824 (Minn. 2017).

But the court of appeals below held that use of the term "includes" in defining "state" was a term of restriction creating a "specific, tailored meaning" in the statute. (PFR.Add.13.)

That decision conflicts with this Court's statutory-construction cases holding that "includes" introduces an inclusive list, not an exhaustive or narrowly-tailored list. Members of the bar now can now cherry-pick precedent when convenient: cite *LaMont* or *Peterson* to urge a district court to expansively interpret a statutory list, or cite the precedential decision below to advocate specific tailoring of items listed in a statute. This unpredictability can be resolved by granting review.

C. Though the Court is not one of error correction, other errors support review.

Courts, not county boards, control the purse. The court of appeals stated "the county sets their budgets." (Slip op. 12.) The district court, not county board, has ultimate control over their budgets. Minn. Stat. §§ 387.20, subd. 7 & 388.18, subd. 6; *Matter of Year 2019 Salary of Freeborn County*

Sheriff, 955 N.W.2d at 923 ("[W]hen reviewing a salary determination for quasi-judicial officers, such as county sheriffs, the district court [*de novo* review] is necessarily vested with wide discretion." (quotation omitted)).

Independence from county boards shows State, not county, action. The court of appeals reasoned lack of State-agency control over a county attorney or sheriff means they do not act on behalf of the State. (Slip op. 12.) *Lemmer* contradicts this reasoning, observing no State agency controls a county attorney, and the county attorney acts *for the State*, not an agency. 736 N.W.2d at 661. Lack of control defeated privity between the State and one of its agencies. Likewise, county sheriffs have broad, independent authority to exercise State law duties independently from the county board. *Gramke v. Cass County*, 453 N.W.2d 22, 26 (Minn. 1990).

III. Avoidance of precedent calls for exercise of the Court's supervisory powers.

House is controlling and was cited repeatedly to the court of appeals. (App. Br. 15-17; Reply 1, 5-6.) *House* was the lead case identified in Appellants' brief as apposite authority. (App. Br. 1.) Respondent's brief

identified *no* competing apposite case law. (Resp Br. 1.) The court of appeals avoided even mentioning it.[2] That was improper.

Perhaps it thought *House*'s holding that "the state is represented by the county attorney" was mere dicta. *House*, 192 N.W.2d at 95.[3] The bench and bar will never know. Regardless of what the panel believed, it should not have ignored *House*.

IV. The decision below endangers county attorneys' and sheriffs' federal protections.

Much more than indemnification is at stake here—resolution of this petition holds implications for federal immunities claimed by county attorneys and sheriffs.[4]

In *McGhee v. Pottawattamie County*, 547 F.3d 922, 930-32 (8th Cir. 2008), the Eighth Circuit held that Iowa county attorneys have Eleventh Amendment immunity because they were defined as "state employees" meaning "persons acting on behalf of the state … in any official capacity,

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[2] The panel also did not mention the other case cited as apposite authority *State v. Manypenny*, 682 N.W.2d 143, 150 (Minn. 2004).

[3] This seems unlikely: the court of appeals recently presented a firm defense of its own dicta's power to bind lower courts. *State v. Chauvin*, A21-0201, slip op. 13 (Mar. 5, 2021)("Unlike obiter dictum, judicial dictum is entitled to much greater weight and should not be lightly disregarded.").

[4] Pending before the Eighth Circuit is Walsh and Lorge's Eleventh Amendment immunity appeal. If this Court grants review, Walsh and Lorge intend to ask the Eighth Circuit promptly to certify the question of state law to this Court under 28 U.S.C. § 1254(2).

temporarily or permanently in the service of the state of Iowa." Iowa and Minnesota county attorneys have near-identical delegations of criminal power. *Compare* Iowa Code § 331.756(1)-(3) *with* Minn. Stat. § 338.051, subd. 1. Allowing the decision below to stand greatly increases the risk the Eighth Circuit will deny Minnesota county attorneys the immunity that similarly situated Iowa county attorneys possess.

Likewise for county sheriffs. A state supreme court's interpretation of state law on whether sheriffs act for the State or county is critical to whether county sheriffs enjoy Eleventh Amendment immunity. *See McMillian v. Monroe County, Ala.,* 520 U.S. 781, 789 (1997); *accord Manders v. Lee*, 338 F.3d 1304, 1319, 1328 (11th Cir. 2003).

The Eighth Circuit's "'arm of the state' jurisprudence" looks generally to three factors: "(1) an agency's powers and characteristics under state law; (2) an agency's relationship to the state—its autonomy from the state and degree of control over its own affairs; and (3) whether any award would flow from the state treasury." *Gorman v. Easley*, 257 F.3d 738, 743 (8th Cir. 2001), *rev'd on other grounds sub nom., Barnes v. Gorman*, 536 U.S. 181 (2002).

The Court's review is critically needed to clarify whether county sheriffs act on behalf of the state or county when acting in a law-enforcement capacity, and likewise county attorneys with respect to criminal prosecutions.

BALDWIN DECLARATION - EXHIBIT I

EXHIBIT 2

CONCLUSION

Unless review is granted, two contradictory sets of precedent will coexist: one from this Court holding county attorneys and sheriffs act on behalf of the State in an official capacity when exercising their state-delegated law-enforcement powers; another from the court of appeals holding county attorneys and sheriffs do not act for the State and have not been delegated state powers. Confusion will flow from these conflicting precedents. All parties agree this appeal is important and novel. This Court should grant review.

Dated: June 9, 2021

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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 SUPPLEMENTAL MEMORANDUM OF LAW ON MOOTNESS

BALDWIN DECLARATION - EXHIBIT J

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INTRODUCTION

Defendants Joseph Walsh and Donald Lorge submit their supplemental memorandum to the Court that the case against them has been mooted by a change in law effected by the Supreme Court. In its 2020 summary judgment brief, Plaintiffs sought a declaration their case against Walsh and Lorge was not moot. (ECF 146 at 2-3.) In response, Walsh and Lorge argued that Plaintiffs' case against them had become moot because it was premised on claims arising out of advice Walsh gave Lorge's predecessor in 2016 after a law enforcement cooperative agreement with the Band had terminated. (ECF 176 at 51-55.) In 2018 the County, the Sheriff and the Band negotiated a new cooperative agreement providing the Band's police officers with state law enforcement authority under Minn. Stat. § 626.90. Walsh then revoked his 2016 Opinion and Protocol. *See* Walsh Dec. at ¶14. This Court nevertheless rejected Walsh's and Lorge's argument that the 2018 cooperative agreement mooted Plaintiffs' claims against them, reasoning that Walsh and Lorge could again allegedly interfere with the Band's inherent law enforcement authority. (ECF 217 at 35-36.)

Walsh and Lorge appealed the Court's ruling regarding subject matter jurisdiction and denial of their absolute, Tenth and Eleventh Amendment immunity defenses. Then in June 2021, while their appeal on these issues

was pending, the Supreme Court decided *United States v. Cooley*, 141 S.Ct. 1638, which held that tribal law enforcement officers have inherent tribal authority to conduct a limited investigation into criminal activity and to detain non-Indian suspects until local law enforcement officers arrive. Because this holding directly impacted the claims against Walsh and Lorge in this lawsuit, they moved the Eighth Circuit to dismiss their appeal solely on mootness grounds. *Cooley* addressed the scope of tribal law enforcement authority within Indian country, which was the central issue Walsh confronted in 2016 when the cooperative agreement terminated. Their mootness argument went directly to the Eighth Circuit's subject matter jurisdiction.

In September 2021, the Eighth Circuit granted Walsh and Lorge's motion to dismiss and issued a judgment and mandate without filing an opinion explaining its reasoning. Here, Walsh and Lorge will first explicate the *Cooley* decision, to provide context to both what the Eighth Circuit did and what is now before this Court. They then will examine the proceedings in the Eighth Circuit. Finally, Walsh and Lorge will explain why, regardless of what the Eighth Circuit did, Plaintiffs' case against them is moot, and this Court must dismiss them from this lawsuit.

ARGUMENT

I. In *Cooley*, the Supreme Court applied for the first time the second *Montana* exception to a criminal setting.

Like Walsh and Lorge's appeal, *Cooley* involved tribal law enforcement authority. Around 1:00 a.m. in February 2016, a Crow tribal police officer saw a truck parked along a public highway within the Crow Reservation. *United States v. Cooley*, 919 F.3d 1135, 1139 (9th Cir. 2019). The officer ordered Cooley, the driver, out of the car, conducted a pat down search and called for tribal and county assistance. *Id.* at 1139-40. Two semi-automatic rifles were visible in the truck, and on further searches of the vehicle, the tribal officer found methamphetamine and drug paraphernalia. *Id.* at 1140. The district court ordered the evidence suppressed because the tribal police officer lacked authority to investigate non-apparent violations of state law by a non-Indian.[1] *Id.* at 1140-41. The Ninth Circuit affirmed in a unanimous panel opinion, ruling that because tribes cannot exclude non-Indians from public rights of way, tribal police do not have "the ancillary power to investigate non-Indians who are using such public rights-of-way." *Id.* at 1141.

The Ninth Circuit denied the government's request for an *en banc*

[1] This holding, affirmed by the Ninth Circuit, is remarkably similar to Walsh's concerns regarding admissibility of evidence that guided his drafting of his 2016 Opinion and Protocol. *See* Declaration of Joseph J. Walsh dated August 27, 2021 at ¶ 13 (citing *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020)).

rehearing. 947 F.3d 1215, 1216 (2020). While concurring in that decision, two circuit judges addressed the judges who dissented from the denial of rehearing. They wrote:

> There is no conflict among the circuits regarding the question presented here, the opinion is not in conflict with a Supreme Court decision, and the practical implications are limited.

Id.

The Supreme Court, however, granted certiorari and reversed without dissent. *United States v. Cooley*, 141 S. Ct. 1638 (2021). The Court held that tribes and their tribal officers had inherent tribal authority to detain and investigate non-Indians traveling on a public right-of-way within a reservation for violations of federal or state law. *Id* at 1641. This authority did not depend on a tribal power to exclude, which would not apply to public highways, but on retained inherent tribal authority to protect a tribe's safety and welfare. *Id.* The Court recognized that although tribes "lack inherent sovereign power to exercise criminal jurisdiction over non-Indians," there were exceptions. *Id.* at 1643. The Court looked to the so-called second *Montana* exception, which held that a tribe retained "inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the

tribe." *Id.* at 1643 (quoting *Montana v. United States*, 450 U.S. 544, 566 (1981).

The Court reasoned that denying a tribal officer authority to search and detain for a reasonable time any person who the officer believes has committed or may commit a crime would make it difficult for a tribe to protect itself against ongoing threats. *Id.* Consequently, the tribal officer was properly exercising his inherent tribal law enforcement authority when he detained Cooley and searched his truck. *Cooley*, 141 S. Ct. at 1645. Cooley's possession of two semi-automatic rifles presented a sufficiently serious threat to invoke the second exception, the first time Court has done so in the criminal context. *See generally*, Note, 135 HARV. L. REV. 411 (2021) (discussing *Cooley*). *Cooley* establishes that in some circumstances, a tribal officer has inherent tribal law enforcement authority to detain a non-Indian suspect in Indian country.

The Court did not address the scope of any such authority beyond the facts of the case, leaving it to the lower courts to work out what would be a reasonable use of that authority.[2] For example, a Texas court affirmed the suppression of evidence seized by tribal officers because, first, violations of a

[2] Justice Alito conditioned joining the opinion on his interpretation of its limited holding. *See* 141 S. Ct. at 1646.

tribe's civil code did not grant authority to arrest a non-Indian, and second, a delay of nearly four hours before bringing in local law enforcement exceeded the authority afforded by *Cooley*. *State v. Astorga*, 2021 WL 4988310 (Tx. Ct. App. Oct. 27, 2021). The North Dakota Supreme Court affirmed a conviction for drunken driving, where the defendant was detained within the Fort Berthold Reservation by a federal law enforcement officer until a county law enforcement officer arrived. *State v. Suelzle*, 965 N.W.2d 855 (N.D. 2021). Conversely, in *United States v. Sherwood*, 2021 WL 5050357, (N.D. Ok. Nov. 1, 2021), the court construed *Cooley* to authorize a Tulsa police officer to stop and detain a tribal member on a public roadway in Tulsa to determine if there was a potential violation of federal or tribal law. And in *Hartsell v. Schaaf*, 2021 WL 3620064, (N.D. Ind. Aug. 16, 2021), the court distinguished inherent tribal authority sanctioned by *Cooley* and authority conferred by a cross-deputization agreement with county law enforcement. Section 1983 claims applied only to the latter use of authority. *Id*. at *2.[3]

[3] The Supreme Court remanded Cooley's case back to the lower courts. As of the filing of this memorandum, the district court had not yet ruled on Cooley's suppression motion. *See United States v. Cooley*, No. 16-cr-42-BLG-SPW (D. Mont.)

II. Despite the Court of Appeals granting Walsh's and Lorge's motion, this Court should address their mootness arguments and dismiss them accordingly.

On August 31, 2021, Walsh and Lorge moved the Eighth Circuit to dismiss their appeal on mootness grounds. Mootness was the only ground for dismissal, and Walsh and Lorge requested to be heard on the merits of their appeal if the court disagreed with their mootness argument. *See Mille Lacs Band et al. v. Walsh et al.*, No. 21-1138 (8th Cir.), Appellants' Mot. to Dismiss at 12 (filed Aug. 31, 2021). The Eighth Circuit granted the motion only 10 days later, issuing a judgment of dismissal and the court's mandate. The judgment did not mention mootness nor direct dismissal of Walsh and Lorge on that basis. Counsel for Walsh and Lorge have been unable to find precedent where justiciability was challenged and a case dismissed without explanation.

Walsh and Lorge postulate that because the motion to dismiss the appeal was granted, the Eighth Circuit must have affirmed the merits of their motion, similarly to the way an appellate court may issue without opinion a summary affirmance, or judgment order, affirming a lower court ruling. *See Dia v. Ashcroft,* 353 F.3d 228, 240 n.7 (3d Cir. 2003); *accord Taylor v. McKeithen*, 407 U.S. 191, 194 n.4 (1972) (noting appellate courts have wide

discretion to issue summary affirmances without opinion).[4] The only basis for dismissal stated in Walsh and Lorge's motion was mootness, and the Eighth Circuit's judgment granting that motion did not specify another substantive basis. Moreover, the only colorable discrepancy between the terms of the court's judgment and the terms of Defendants' motion are terms they never mentioned: costs.[5] Allocation of costs is not a basis for dismissal; mootness is. Walsh and Lorge argued they should be dismissed from this case because Plaintiffs' claims against them became moot pending appeal. The Eighth Circuit granted that motion. Walsh and Lorge should thus be dismissed.

The decision in *Terkel v. Centers for Disease Control and Prevent*ion, 15 F.4th 683 (5th Cir. 2021), shows that when an appellate court wants to avoid ruling on mootness, the court will so state. In *Terkel*, appellees challenged the CDC's constitutional authority to issue a nation-wide moratorium on evictions. Appellant CDC moved to dismiss on mootness

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[4] In contrast, summary *denials* of lower court rulings may require an opinion. *See Taylor*, 407 U.S. at 194 n.4.

[5] As Plaintiffs' conceded in their response to Walsh and Lorge's motion to dismiss the Eighth Circuit appeal, the specific language "on terms fixed by the Court" referred only to costs. *Mille Lacs Band et al. v. Walsh et al.*, No. 21-1138 (8th Cir.), Appellees' Response to Appellants' Mot. to Dismiss at 1 (filed Sept. 10, 2021) ("The Court fixed the terms by providing that each side would bear its own costs.").

grounds, because the most recent moratorium version had expired. The Fifth Circuit granted the motion but specifically found it "unnecessary to decide mootness" because "the government maintains that the CDC has constitutional authority to issue the moratorium." *Id.* at 684. The appellate court wanted to leave the district court's order in full force and effect, as the CDC had acceded to the finality of another district court's order invalidating the moratorium. *Id.* (citing *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Services*, 2021 WL 1779292 (D.D.C. May 5, 2021).

Notwithstanding, in the absence of any clear direction from the appellate court, Walsh and Lorge believe the prudent course is for this Court to address in the first instance the changed legal and factual landscape they believe moots Plaintiffs' case against them.

III. Plaintiffs' case against Walsh and Lorge has become moot.

Justiciability questions, including mootness, go to a federal court's subject matter jurisdiction. *Miller v. Redwood Toxicology Lab., Inc.*, 688 F.3d 928, 934 (8th Cir. 2012). There must be an active, real controversy at all times during a federal case. "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)).

Walsh and Lorge agree that a defendant moving for dispositive relief on mootness grounds bears a high burden of persuasion. "[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* 528 U.S. 167, 190 (2000). But Plaintiffs' case against Walsh and Lorge has become moot for several reasons. First, The County and the Band have a cooperative agreement in place, and, accordingly, Walsh has revoked his 2016 Opinion and Protocol. Second, the *Cooley* decision represents a change in law, which Walsh states would preclude him from reissuing an opinion and protocol like what he provided in 2016, another basis for finding mootness. Finally, a holding that the case against Walsh and Lorge is not moot pushes this Court into rank speculation over what either Walsh or Lorge, or their successors, would do if a cooperative agreement was no longer in place.

A. Walsh's revocation of his 2016 Opinion and Protocol came after the Band sued him and the Sheriff, which negates the voluntary cessation exception to mootness.

It is beyond peradventure that Walsh did not revoke his Opinion and Protocol because Plaintiffs sued him and then-Sheriff Lindgren. Here, Walsh revoked his 2016 Opinion, not because Plaintiffs sued him, but because the Band and Mille Lacs County negotiated a new cooperative agreement.[6] Walsh Dec. ¶14. As noted above, that 2018 agreement satisfied the requirement in Minn. Stat. § 626.90 for such an agreement and granted the Band's police department state law enforcement authority. That authority alleviated Walsh's concerns—expressed in his 2016 Opinion—about evidence being used in a prosecution that a Minnesota appellate court would subsequently deem inadmissible. *See* Walsh Dec. ¶¶13, 16.

Plaintiffs have argued, and this Court previously agreed, that Walsh's voluntary revocation of the 2016 Opinion and Protocol did not moot Plaintiffs' case against him and Lorge. This case, however, is not controlled by the voluntary cessation exception to the mootness doctrine. The voluntary cessation exception operates to prevent a defendant from manipulating his or her conduct to invent a mootness argument. Not so here.

[6] Plaintiffs brought this suit on November 17, 2017. The County and the Band entered into a new cooperative agreement nearly a year later, in September 2018.

In a recent case in this district, the Court addressed a challenge to the Governor's use of emergency powers to restrict youth sports activities. While these restrictions were gradually removed, the plaintiffs asserted the voluntary cessation exception because the restrictions could be reinstated. Rejecting that argument, the court held "there [was] no indication that Defendants lifted the restrictions to evade judicial review in this case." *Let Them Play MN v. Walz,* No. 21-cv-79 (ECT/DTS), 2021 WL 3741486 at *7 (D. Minn. Aug. 24, 2021); *see County of Butler v. Governor*, 8 F.4th 226, 230 (3d Cir. 2021) (COVID restrictions "expired by their own terms"). The same holding should attain here.

Walsh and Lorge's representations that the alleged offending conduct will not recur are also entitled to substantial deference. In *Defunis v. Odegaard*, 416 U.S. 312 (1974), which involved law school admissions policies, the Court observed that:

> [I]t has been the settled practice of the Court, in contexts no less significant, fully to accept representations such as these as parameters for decision.

Id. at 317 (citing precedent).

The Eighth Circuit recently adhered to that precedent. *See Prowse v. Payne*, 984 F.3d 700 (8th Cir. 2021). In *Prowse*, an inmate challenged Arkansas prison authorities' refusal to provide hormone therapy to the

inmate. During the pendency of the inmate's appeal, the state began providing such therapy. In deeming the case now moot, the Eighth Circuit accepted the state's assurances that "the unconstitutional conduct Prowse alleges 'could not reasonably be expected to recur.'" *Id.* at 703 (quoting *Friends of the Earth*, 528 U.S. at 189). Other federal appellate courts have adhered to the holding of *Defunis* as well. *See Troiano v. Supervisor of Elections in Palm Beach Cnty.*, 382 F.3d 1276, 1283 (11th Cir. 2004) ("When government laws or policies have been challenged, the Supreme Court has held almost uniformly that cessation of the challenged behavior moots the suit."); *Moore v. Brown*, 868 F.3d 398, 406-07 (5th Cir. 2017) (public servants afforded presumption of good faith); 13C Wright & Miller, FED. PRAC. & PROC. JURISDICTION § 3533.7 (3d ed.); *cf. N. Virginia Women's Medical Center v. Balch*, 617 F.2d 1045, 1049 (4th Cir. 1980) (renunciation of practice of not prosecuting trespassers at clinic performing abortions mooted clinics claim against commonwealth's attorney for failing to prosecute trespassers).

There is no meaningful distinction between the prison administrator's statement in *Prowse* and what Walsh has stated in support of their motion. Indeed, Walsh and Lorge have a more compelling case for mootness. In *Prowse*, the state changed its practice during the lawsuit. Walsh revoked his

2016 Opinion and protocol because there was a new cooperative agreement that obviated his 2016 Opinion and Protocol. And with *Cooley*, there has been a change in applicable law, which was not so in *Prowse*.

B. The change in law effected by *Cooley* moots the case against Walsh and Lorge.

It is also settled law that subsequent legal developments may moot a case. An intervening Supreme Court decision was the foundation for a mootness holding in *Winsness v. Yocom*, 433 F.3d 727 (10th Cir. 2006). There, the state's attorneys said they had no intention of prosecuting the plaintiff for flag desecration in view of Supreme Court decisions extending First Amendment protection to such activity. *Id.* at 736-37. In *Texas v. Johnson*, 491 U.S. 397 (1989), the Court held a Texas flag desecration statue violated the defendant's First Amendment right to burn the American flag as a form of protest. The Court extended that holding to the federal flag protection law in *United States v. Eichman*, 496 U.S. 310 (1990).

Of like import is the *Cooley* opinion, which reversed one of the conclusions Walsh reached in his Opinion: that tribes lack criminal jurisdiction over non-Indians (except under the Violence Against Women Act). Walsh Dec. ¶15 and Ex. B. at 14. While *Cooley* did not overrule

Oliphant,[7] the decision expanded a tribe's inherent criminal authority to investigate a non-Indian for possible state and federal law violations within Indian country. The Ninth Circuit opinion likened the tribal officers' power over a non-Indian to the common law right to make a citizen's arrest, where the crime had to be committed in the officer's presence. *See Cooley*, 919 F.3d at 1146-47. That was the position Walsh took in his Opinion. Walsh Dec. Ex. B. at 7-8. *Cooley* rejects that limitation.

Similarly, legislative changes can moot a challenge to a statute. In *Teague v. Cooper*, 720 F.3d 973 (8th Cir. 2013), this Court held that the Arkansas legislature's repeal of a race-based limitation on inter-school district transfers mooted the plaintiffs' case challenging that limitation:

> [W]e agree with the Fourth Circuit "that statutory changes that discontinue a challenged practice are usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed."

Id. at 977 (quoting *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 116 (4th Cir. 2000)). This Court also noted in *Let Them Play MN* that the Minnesota Legislature had terminated the peacetime emergency which underlay the Governor's executive orders. 2021 WL 3741486 at *6.

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[7] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)(holding tribes had no criminal jurisdiction over non-Indians).

C. Speculation Cannot Revive a Moot Case.

Allowing Plaintiffs' case against Walsh and Lorge to proceed after these developments requires this Court to base its jurisdiction on a hypothetical legal question. First, the 2018 cooperative agreement must have terminated, *and* the parties must fail to renegotiate a new agreement within 90-days of termination. Then, the Minnesota Attorney General must again refuse to provide Walsh or his successor an opinion on the Band's state law enforcement authority in the absence of a cooperative agreement. The statutory provisions granting the Band's police state law enforcement authority must also remain unchanged. The Mille Lacs County Attorney must then issue an opinion the Band opposes. This level of uncertainty over what the future may bring cannot "keep an otherwise moot controversy alive." *St. Louis Fire Fighters Ass'n Int'l Ass'n of Fire Fighters Local 73 v. City of St. Louis*, 96 F.3d 323, 329 (8th Cir. 1996); *accord Beaulieu v. Ludeman*, 690 F.3d 1017, 1024 (8th Cir. 2012) (plaintiffs offered only "speculation and conjecture" that the allegedly offending conduct would recur); *Clark v. Forte*, 2021 WL 3671567, at *2 (W.D. Mo. Aug. 18, 2021) (reinstatement of COVID restrictions "too speculative to qualify as a demonstrated probability").

When the response to a mootness claim rests on speculation, this Court should find "the allegedly wrongful behavior could not reasonably be expected to recur." *SEC v. Medical Comm. of Human Rights*, 404 U.S. 403, 406 (1972) (quotation omitted). Thus, this case is moot. "Federal courts adjudicate specific disputes, not hypothetical legal questions. *Clark*, 2021 WL 3671567 at *2 (citing *Flast v. Cohen,* 392 U.S. 83. 96-97 (1968); *see United Public Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947) (Article III courts "do not render advisory opinions," even in actions for declaratory relief). It would be rank speculation to argue that Walsh and Lorge's alleged misconduct will recur.[8] Plaintiffs' claims for relief must arise in a fact-specific context—here they do not.

In short, as Walsh makes plain in his declaration filed with this supplemental brief, the key part of his 2016 Opinion is no longer good law and he would not reissue his Opinion and Protocol should the 2018 agreement terminate. Walsh Dec. ¶16. Sheriff Lorge affirms that his department would follow the lead of the County Attorney. *See* Declaration of

[8] Of course, Walsh and Lorge continue to deny any misconduct in 2016 and thereafter. Walsh and Lorge cannot reasonably be held to the impossible standard of predicting the results of future Supreme Court decisions. As noted in the Ninth Circuit proceedings in *Cooley*, there was no circuit conflict or applicable Supreme Court precedent over the scope of inherent tribal authority over non-Indians. *See* 947 F.3d at 1216.

Don Lorge dated August 31, 2021 at ¶6.

CONCLUSION

Plaintiffs' case against Walsh and Lorge premised on the 2016 Opinion and Protocol is now moot. *Cooley* effected a change in law that vitiates the underlying reasoning in Walsh's 2016 Opinion and Protocol. His declaration to that effect meets the operative standard to defeat the voluntary cessation exception to mootness. Accepting Plaintiffs' argument to the contrary will otherwise force this Court into the unbounded universe of pure speculation as to what *might* happen should the current cooperative agreement go away.

Dated: December 13, 2021

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Mille Lacs Band of Ojibwe, a federally recognized Indian Tribe; Sara Rice, in her official capacity as the Mille Lacs Band Chief of Police; and Derrick Naumann, in his official capacity as Sergeant of the Mille Lacs Police Department, Plaintiffs, v. County of Mille Lacs, Minnesota; Joseph Walsh, individually and in his official capacity as County Attorney for Mille Lacs County; and Don Lorge, individually and in his official capacity as Sheriff of Mille Lacs County, Defendants.	Case No. 17-cv-05155 (SRN/LIB) **JOINT MOTION TO DEFER DISPOSITIVE MOTIONS REGARDING THE SCOPE OF THE BAND'S LAW ENFORCEMENT AUTHORITY**

All parties jointly move the Court to defer the filing of dispositive motions regarding the scope of the Mille Lacs Band's law enforcement authority pending resolution of issues relating to the status the 1855 Mille Lacs Indian Reservation. The parties have scheduled a hearing on dispositive motions for March 15, 2021. However, the parties believe that limiting the dispositive motions to be heard at the March 15, 2021, hearing to the issues regarding the status of the 1855 Reservation, and deferring dispositive motions regarding the Band's law enforcement authority and the *Daubert* issue on law enforcement officers as expert witnesses described in Doc. No. 134 at 4, would facilitate the orderly and

expeditious resolution of this case. This is because of the complexity of the issues relating to the status of the 1855 Reservation and because resolution of those issues may significantly affect the nature and extent of the parties' dispute regarding the Band's law enforcement authority. This motion is supported by the parties' joint memorandum of law filed herewith and the papers and files herein.

DATED: November 11, 2020

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Mille Lacs Band of Ojibwe, a federally recognized Indian Tribe; Sara Rice, in her official capacity as the Mille Lacs Band Chief of Police; and Derrick Naumann, in his official capacity as Sergeant of the Mille Lacs Police Department, Plaintiffs, v. County of Mille Lacs, Minnesota; Joseph Walsh, individually and in his official capacity as County Attorney for Mille Lacs County; and Don Lorge, individually and in his official capacity as Sheriff of Mille Lacs County, Defendants.	Case No. 17-cv-05155 (SRN/LIB) **MEMORANDUM OF LAW IN SUPPORT OF JOINT MOTION TO DEFER DISPOSITIVE MOTIONS REGARDING THE SCOPE OF THE BAND'S LAW ENFORCEMENT AUTHORITY**

All parties jointly submit this memorandum in support of their joint motion to defer dispositive motions regarding the scope of the Mille Lacs Band's law enforcement authority pending resolution of issues relating to the status of the 1855 Mille Lacs Reservation.

In this lawsuit, plaintiffs seek declaratory and injunctive relief regarding the scope of the Band's inherent and federally delegated law enforcement authority within the Mille Lacs Indian Reservation as established in 1855. Complaint (Doc. No. 1) at 7-8. Plaintiffs assert that the boundaries of the 1855 Mille Lacs Indian Reservation have never been

disestablished or diminished and, therefore, all lands within the 1855 Reservation boundaries comprise Indian country under 18 U.S.C. § 1151. *Id.* at 3. Plaintiffs further assert that the Band possesses inherent sovereign authority to establish a police force and to authorize Band police officers to investigate violations of federal, state and tribal law within the Reservation and to apprehend suspects and turn them over to jurisdictions with criminal prosecutorial authority. *Id*. at 4. Plaintiffs also assert that Band officers holding Special Law Enforcement Commissions issued by the Bureau of Indian Affairs have federally delegated authority to investigate violations of federal law throughout the Reservation and to arrest suspects (including Band members and non-Band members) as federal law enforcement officers. *Id.*

Defendants assert that the 1855 Reservation has been disestablished or diminished and that plaintiffs are estopped from asserting otherwise. *E.g.* County Answer (Doc. No. 17) at 3-4, 9-10. Furthermore, defendants assert that plaintiffs' claims are barred by affirmative defenses including the jurisdictional and time bar of the Indian Claims Commission Act. Consequently, defendants assert that the only lands comprising Indian country within Mille Lacs County are lands held in trust by the United States, and that the Band has no inherent *or* federally delegated law enforcement authority except on trust lands. *E.g. id.* at 5-6.

The parties have conducted extensive fact and expert discovery regarding the status of the 1855 Reservation, including discovery relating to the 1855 Treaty; treaties made in 1863, 1864 and 1867 with the Mille Lacs Band; an 1884 Act of Congress; the 1889 Nelson

Act and an agreement entered into under that Act; 1893 and 1898 congressional resolutions; multiple decisions and orders of the United States Department of the Interior relating to lands within the 1855 Reservation; a 1902 Act of Congress and an agreement entered into under that Act; litigation before the United States Claims Court and the United States Supreme Court; a 1914 Act of Congress; and the subsequent history of the 1855 Reservation to present times.

On October 22, 2020, after completing discovery regarding these matters, the parties met and conferred regarding (among other things) the filing of dispositive motions regarding the status of the 1855 Reservation. All parties intend to file such motions and, in accordance with the Court's Third Amended Scheduling Order (Doc. No. 138 at 6), timely contacted the Court's Courtroom Deputy to schedule a hearing on such motions. The hearing has been scheduled for March 15, 2021.

Resolution of the issues relating to the status of the 1855 Reservation may significantly affect the nature and extent of the parties' dispute regarding the scope of the Band's inherent and federally delegated law enforcement authority. If the Court were to determine that the 1855 Reservation has not been disestablished or diminished, the Band's inherent and federally delegated law enforcement authority will extend, at least to some extent, to all lands within the Reservation, including Band-owned and non-Band-owned fee lands, and it will be necessary to determine the precise extent of the Band's authority on such lands (as well as trust lands). On the other hand, if the Court were to determine that the 1855 Reservation has been disestablished, the dispute regarding the scope of the

Band's law enforcement authority will largely, if not entirely, be confined to the extent of such authority on trust lands.

Because of the factual and legal complexity of the issues relating to the status of the 1855 Reservation, and because the resolution of those issues may significantly affect the nature and extent of the parties' dispute regarding the scope of the Band's law enforcement authority, the parties believe it would facilitate the orderly and expeditious resolution of this case to address the issues sequentially. Specifically, the parties propose to first file dispositive motions on the issues relating to the status of the 1855 Reservation and, then, upon resolution of those issues, to file dispositive motions regarding the scope of the Band's law enforcement authority.

The "courts maintain the inherent authority 'to manage their own affairs so as to achieve the orderly and expeditious disposition of cases[,]'" including the authority to determine "the sequence and timing in which courts consider motions[.]" *In re NHL Players' Concussion Injury Litig.*, No. 14-2551 (SRN/BRT), 2017 U.S. Dist. LEXIS 115159, at *5 (D. Minn. July 24, 2017) (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (internal quotation omitted)); *see also Zerger & Mauer LLP v. City of Greenwood*, 751 F.3d 928, 931 (8th Cir. 2014). Here, providing for sequential motions that first address the issues relating to the status of the 1855 Reservation and then the issues relating to the Band's law enforcement authority is well within the Court's inherent authority and will facilitate the orderly and expeditious disposition of this case.

For these reasons, the parties respectfully request that the Court grant their joint motion to defer dispositive motions regarding the scope of the Band's law enforcement authority pending resolution of the issues relating to the status of the 1855 Reservation.

DATED: November 11, 2020

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Mille Lacs Band of Ojibwe, a federally recognized Indian Tribe; Sara Rice, in her official capacity as the Mille Lacs Band Chief of Police; and Derrick Naumann, in his official capacity as Sergeant of the Mille Lacs Police Department, Plaintiffs, v. County of Mille Lacs, Minnesota; Joseph Walsh, individually and in his official capacity as County Attorney for Mille Lacs County; and Don Lorge, individually and in his official capacity as Sheriff of Mille Lacs County, Defendants.	Case No. 17-cv-05155 (SRN/LIB) **ORDER**

This matter is before the Court on parties' joint motion to defer dispositive motions regarding the scope of the Mille Lacs Band's law enforcement authority pending resolution of issues relating to the status of the 1855 Mille Lacs Indian Reservation [Doc. No. 206].

As stipulated by all parties, **IT IS HEREBY ORDERED** that the parties' joint motion is **GRANTED** and:

1. Dispositive motions regarding the Band's law enforcement authority and the *Daubert* issue on law enforcement officers as expert witnesses described in Doc.

No. 134 at 4 shall be deferred pending resolution of issues relating to the status of the 1855 Mille Lacs Indian Reservation.

2. Within 30 days after the Court rules on summary judgment motions relating to the status of the 1855 Mille Lacs Indian Reservation, the parties shall meet and confer and inform the Court by letter of their positions regarding the orderly and expeditious resolution of the remaining issues regarding the Band's law enforcement authority and the *Daubert* issue on law enforcement officers as expert witnesses described in Doc. No. 134 at 4.

Dated: November 16, 2020

s/Susan Richard Nelson
SUSAN RICHARD NELSON
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Mille Lacs Band of Ojibwe, a federally recognized Indian Tribe; Sara Rice, in her official capacity as the Mille Lacs Band Chief of Police; and Derrick Naumann, in his official capacity as Sergeant of the Mille Lacs Police Department, Plaintiffs, v. County of Mille Lacs, Minnesota; Joseph Walsh, individually and in his official capacity as County Attorney for Mille Lacs County; and Donald J. Lorge, individually and in his official capacity as Sheriff of Mille Lacs County, Defendants.	Case No. 17-cv-05155 (SRN/LIB) **ORDER**

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SUSAN RICHARD NELSON, United States District Judge

In their Motion for Partial Summary Judgment [Doc. No. 223], Plaintiffs alerted the Court to a potential jurisdictional defect arising from Defendant Joseph Walsh and Donald Lorge's Notice of Appeal [Doc. No. 218]. Plaintiffs assert that Walsh and Lorge's interlocutory appeal, taken from this Court's Order [Doc. No. 217] denying their Motion for Summary Judgment on certain immunity defenses, divests this Court of jurisdiction to consider the pending summary judgment cross-motions regarding cession of the Mille Lacs Reservation. The Court heard argument on this jurisdictional issue at the March 15, 2021 motion hearing, and ordered supplemental briefing from the parties. (Order [Doc. No. 275].) Having fully considered the parties' arguments and submissions herein, and for the reasons that follow, the Court finds that it lacks subject-matter jurisdiction over the pending cross-motions, and will therefore stay this matter until the resolution of Walsh and Lorge's appeal.

I. BACKGROUND

Plaintiffs are the Mille Lacs Band of Ojibwe, Mille Lacs Band Chief of Police Sara Rice, and Sergeant Derrick Naumann (collectively, "the Band"). The Band brought suit against the County of Mille Lacs, Mille Lacs County Attorney Joseph Walsh, and Sheriff Donald Lorge (collectively, "the County") seeking declaratory and injunctive relief regarding the Band's law enforcement authority within the Mille Lacs Reservation. (*See*

generally Compl. [Doc. No. 1].) An integral part of the parties' dispute concerns whether the Mille Lacs Reservation was disestablished by various treaties and statutes in the late 1800s.

On December 21, 2020, the Court ruled on several early summary judgment motions filed by the parties. (*See* Mem. Op. & Order [Doc. No. 217].) In the December 21 Order, the Court found that it has federal-question jurisdiction over this matter, and that the Band's claims are justiciable. (*Id.* at 25-35.) The Court also found that Walsh and Lorge are not entitled to immunity from suit under the Tenth or Eleventh Amendment, that absolute prosecutorial immunity does not apply to the Band's claims, and that *Younger* abstention and federalism and comity principles do not bar the Band's suit against Walsh and Lorge. (*Id.* at 36-46.) Walsh and Lorge appealed the Court's December 21 Order to the Eighth Circuit Court of Appeals under the collateral order doctrine. (*See* Notice of Appeal [Doc. No. 218].)

Subsequently, the parties filed cross-motions for summary judgment regarding whether the Mille Lacs Reservation has been disestablished or diminished. In its motion, the Band raised its concern that Walsh and Lorge's Notice of Appeal divests this Court of jurisdiction to rule on the disestablishment issue. (Mot. for Partial Summ. J. [Doc. No. 223], at 1 n.1.) The Court heard argument on the jurisdictional question, invited supplemental briefing, and now must determine whether it retains subject-matter jurisdiction over the pending summary judgment motions despite Walsh and Lorge's appeal.

II. DISCUSSION

As a general rule, "[a] federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *United States v. Ledbetter*, 882 F.2d 1345, 1347 (8th Cir. 1989) (quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam)). Once a notice of appeal has been filed, "the federal district court cannot take any action that would 'alter the status of the case as it rests before the Court of Appeals.'" *Knutson v. AG Processing, Inc.*, 302 F. Supp. 2d 1023, 1030 (N.D. Iowa 2004) (quoting *Dayton Indep. Sch. Dist. v. U.S. Mineral Prods. Co.*, 906 F.2d 1059, 1063 (5th Cir. 1990)); *see generally* Allan Ides, *The Authority of a Federal District Court to Proceed After A Notice of Appeal Has Been Filed*, 143 F.R.D. 307, 308 (1992) ("Stated broadly, the district court may not take any action that would 'alter the status of the case as it rests before the Court of Appeals.' Thus, once a notice of appeal has been filed, a district court may not grant leave to amend a complaint, grant a motion for summary judgment, reconsider a prior disposition of a motion, dismiss a case pursuant to a stipulation of settlement, enjoin a state court action, materially amend an opinion or order, vacate a dismissal, and so forth." (footnotes and citations omitted)).

The Eighth Circuit has explained that this jurisdictional transfer principle serves two purposes: "First, it promotes judicial economy for it spares a trial court from considering and ruling on questions that possibly will be mooted by the decision of the court of appeals. Second, it promotes fairness to the parties who might otherwise have to fight a confusing

'two front war' for no good reason, avoiding possible duplication and confusion by allocating control between forums." *Ledbetter*, 882 F.2d at 1347 (citation omitted).

But the jurisdictional transfer principle is not absolute. Importantly, "the 'principle does not divest the district court of all jurisdiction—but rather, *only jurisdiction over the matters appealed*.'" *Follis v. Minnesota*, No. CIV. 08-1348 (JRT/RLE), 2008 WL 5424127, at *3 (D. Minn. Dec. 29, 2008) (adopting report and recommendation) (quoting *Knutson*, 302 F. Supp. 2d at 1031) (emphasis added). Thus, "[t]he district court retains jurisdiction to adjudicate matters collateral, or tangential, to the appeal." *Id.* (same). *Compare Harmon v. U.S. Through Farmers Home Admin.*, 101 F.3d 574, 587 (8th Cir. 1996) (holding that the district court retained jurisdiction to consider an award of attorney's fees because the issue of attorney's fees was not the basis for the appeal, and was not before the appellate court), *with Follis*, 2008 WL 5424127 (holding, where the plaintiff appealed the court's order denying the plaintiff's motion for a temporary restraining order and permanent injunction, that the court lacked jurisdiction to consider the defendant's motion to dismiss, which asserted (in part) that the order denying the permanent injunction rendered the Complaint *res judicata*).

In the case of interlocutory appeals, an appeal from an interlocutory order under the collateral order doctrine generally does not wholly deprive the district court of jurisdiction to proceed in the case—so long as subsequent motions do not threaten to disturb the "status of the case on appeal," such as by presenting the same issues involved in the appeal.[1] Where

[1] *See W. Pub. Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1229 (8th Cir. 1986) ("[T]he pendency of an interlocutory appeal from an order granting or denying a

the interlocutory appeal is premised on a claim to immunity, however, district courts generally must stay any ruling on the merits of the case pending resolution of the appeal. As the Eighth Circuit observed in *Johnson v. Hay*, "[o]nce a notice of appeal has been filed in a case in which there has been denial of a summary judgment motion raising the issue of qualified immunity, the district court should then stay its hand. Jurisdiction has been vested in the court of appeals and the district court should not act further." 931 F.2d 456, 459 n.2 (8th Cir. 1991). Consistent with that instruction, district courts often stay proceedings once a defendant has appealed the district court's denial of a claim to immunity—even where the case involves co-defendants without a claim to immunity.[2]

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preliminary injunction does not wholly divest the District Court of jurisdiction over the entire case.") (dicta); *Janousek v. Doyle*, 313 F.2d 916, 920 (8th Cir. 1963) ("[W]here . . . the appeal is from an interlocutory order denying a motion for preliminary injunction, . . . the filing of the notice of appeal from such an order does not ipso facto divest the district court of jurisdiction to proceed with the cause with respect to any matter not involved in the appeal, or operate to automatically stay other proceedings in the cause pending the appeal."); *see also Chambers v. Pennycook*, 641 F.3d 898, 903 (8th Cir. 2011) (holding that the district court retained jurisdiction to consider a motion for summary judgment on the merits notwithstanding a pending interlocutory appeal from a motion denying appointment of counsel); *Liddell by Liddell v. Bd. of Educ. of City of St. Louis*, 73 F.3d 819, 823 (8th Cir. 1996) (reasoning that the defendant's appeal of the denial of attorneys' fees under 42 U.S.C. § 1988 divested the district court of jurisdiction to consider a second motion for attorneys' fees under a different theory); *Minnesota Voters All. v. Walz*, No. 20-CV-1688 (PJS/ECW), 2020 WL 6042398, at *1 (D. Minn. Oct. 13, 2020) (holding, where the plaintiff appealed the denial of a preliminary injunction and the defendant subsequently moved to dismiss, that the court lacked jurisdiction to consider the motion to dismiss because it raised the same arguments that the defendant raised in opposing the injunction; and that, even if jurisdiction existed, a stay pending appeal was warranted as an exercise of the court's discretion).

[2] *See, e.g.*, *Mallak v. Aitkin Cty.*, No. 13-CV-2119 (DWF/LIB), 2015 WL 13187116, at *6 (D. Minn. Oct. 14, 2015) (finding, where municipal employee defendants had appealed the denial of summary judgment based on qualified immunity, that a stay of discovery with respect to the municipal defendant was appropriate); *In re Nat'l Arb. F.*

The justification for this practice is two-fold. First, the legal and factual issues raised by a claim to immunity may often overlap with the merits of a case.[3] Where the immunity and merits issues are intertwined, any determination of the merits risks altering the status of the case on appeal, and the jurisdictional transfer principle therefore bars the district court from making such determinations. Second, a defendant's interlocutory appeal of an order denying an immunity is typically permitted because the immunity embodies an immunity from suit, rather than simply an immunity from damages. *See Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) ("[T]he denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action."). Thus, where a defendant appeals an interlocutory order denying an

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Trade Practices Litig., No. CIV09-1939 PAM/JSM, 2010 WL 1485959, at *1 (D. Minn. Apr. 12, 2010) ("There is also little question that such an appeal [of a motion to dismiss premised on qualified immunity] often requires a stay of the underlying litigation. Even without a stay, of course, this Court may not make any determinations regarding the issues on appeal." (citations omitted)); *Root v. Liberty Emergency Physicians, Inc.*, 68 F. Supp. 2d 1086, 1089 (W.D. Mo. 1999) (noting that "[m]any district courts, faced with a similar appeal and motion to stay after having denied immunity [on a motion to dismiss], determine that a stay of *all* proceedings is required pending the outcome of appeal," and staying proceedings pending the outcome of a defendant's appeal on the issue of sovereign immunity—even though other defendants in the case did not raise an immunity defense).

[3] By way of illustration, consider a suit brought against a police officer for an unconstitutional use of force under 42 U.S.C. § 1983. The elements of the police officer's claim to qualified immunity overlap with the merits of the plaintiff's claims: The plaintiff can succeed on the merits only if the officer violated her constitutional rights; and the plaintiff can overcome qualified immunity only if the court finds both that the officer violated her constitutional rights, and that those rights were clearly established. *See Atkinson v. City of Mountain View*, 709 F.3d 1201, 1207, 1211 (8th Cir. 2013) (succinctly stating the tests for a § 1983 claim and qualified immunity).

immunity from suit, for the district court to proceed to the merits of the case before resolution of the appeal would destroy the defendant's right to be free of the burdens of discovery and trial. *See* 16A Fed. Prac. & Proc. Juris. § 3949.1 (Wright & Miller, 5th ed.) ("But if further district court proceedings would violate the very right being asserted in the appeal taken under the collateral order doctrine—as is the case with claims of qualified immunity or double jeopardy—then the pendency of the appeal does oust the district court of authority to proceed . . . .").

The County argues that "[w]here an interlocutory appeal is taken on the grounds of immunity, a district court is not required to issue a stay." (Mem. in Response [Doc. No. 288], at 9.) But the cases the County cites are inapposite. The cases involve the question whether to stay *an order* while an appeal *of that order* is pending—the cases do not address whether the district court retains jurisdiction to issue further orders, following an interlocutory appeal on an immunity issue, under the jurisdictional transfer principle. *See Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 575 F. Supp. 2d 201 (D.D.C. 2008) (analyzing whether to stay an order requiring the defendants to respond to a Congressional subpoena, where the defendants appealed that order on immunity grounds); *Miccosukee Tribe of Indians of Fla. v. United States*, No. 10-23507-CV, 2011 WL 5508802 (S.D. Fla. Nov. 8, 2011) (analyzing whether to stay an order requiring the Miccosukee Tribe to produce documents to the Internal Revenue Service, in light of the Tribe's appeal of that order on sovereign immunity grounds). As explained above, the rule is to the contrary: a district court is generally without jurisdiction to consider the merits of a case while a defendant's interlocutory appeal on an immunity issue remains pending, at

least where the issues on appeal overlap with the merits or proceeding to the merits would destroy the very right asserted on appeal.

In this case, for the Court to proceed to consider the reservation disestablishment question while Walsh and Lorge's appeal remains pending would violate the jurisdictional transfer principle. To be sure, the factual and legal issues presented in the pending motions are largely distinct from those addressed in the Court's December 21 Order. As the County rightly notes, a party may immediately appeal the denial of an immunity defense under the collateral order doctrine in part because that issue is *collateral* to the merits of the action. *See Mitchell*, 472 U.S. at 524–25. In that sense, the pending motions do not involve "those aspects of the case involved in the appeal." *Ledbetter*, 882 F.2d at 1347. However, by appealing this Court's ruling on their immunity defenses, Walsh and Lorge have necessarily brought their challenges to this Court's subject-matter jurisdiction before the Court of Appeals.[4] Consequently, to exercise jurisdiction over the pending motions would violate the very rights asserted in the appeal. And, importantly, any ruling on the pending motions would be mooted should the Court of Appeals find that this Court lacks subject-matter jurisdiction over the claims against Walsh and Lorge. Thus, judicial economy—a core justification for the jurisdictional transfer principle—weighs against considering the pending motions. *See Ledbetter*, 882 F.2d at 1347 (explaining that the jurisdictional

[4] *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." (quotation omitted)).

transfer principle "promotes judicial economy for it spares a trial court from considering and ruling on questions that possibly will be mooted by the decision of the court of appeals"). Because the Court's jurisdiction is an issue raised on appeal, and the resolution of Walsh and Lorge's appeal therefore might moot the Court's ruling on the disestablishment question, the Court finds that the pending motions for summary judgment are not collateral to the appeal.[5] Thus, the jurisdictional transfer principle divests the Court of jurisdiction over the motions.

Having found that the Notice of Appeal divests this Court of jurisdiction to consider the pending motions, at least with respect to Walsh and Lorge, the Court must determine how to proceed. The Band raises the possibility that the Court limit its ruling on the pending motions to the County, thereby proceeding with respect to the County but not the defendants involved in the appeal. However, the Band identifies many problems with this possibility, not least of which is that it is questionable whether the Band has standing to assert its claims against the County—premised as they are on conduct by Walsh and Lorge—should the claims against Walsh and Lorge be dismissed on appeal.[6] (*See generally*

[5] The County points out that only Walsh and Lorge—not the County itself—dispute this Court's jurisdiction on appeal. Thus, should Walsh and Lorge prevail, the Court's ruling on the disestablishment question would be mooted only as to Walsh and Lorge, and not the County. But for the reasons discussed in the next paragraph, the Court finds it would be inappropriate to proceed until the Court's ability to resolve the disestablishment question with respect to all defendants is assured.

[6] The Court here expresses no view on whether, should the Band's claims against Walsh and Lorge be dismissed, the Band's claims against the County would likewise need to be dismissed. It suffices to note, for purposes of the jurisdictional issue presented, that the Band's ability to proceed against the County should Walsh and Lorge prevail on their

Suppl. Mem. in Supp. of Pls.' Mot. for Summ. J. [Doc. No. 286], at 21-23.) The Court agrees with the Band, and like many other courts, finds that it would be improper to proceed against one defendant while the other defendants' interlocutory appeal remains pending. *Cf., e.g.*, *Mallak v. Aitkin Cty.*, No. 13-CV-2119 (DWF/LIB), 2015 WL 13187116, at *6 (D. Minn. Oct. 14, 2015) (staying discovery with respect to a defendant who was not involved in an interlocutory appeal concerning co-defendants' immunity defenses); *Root v. Liberty Emergency Physicians, Inc.*, 68 F. Supp. 2d 1086, 1089 (W.D. Mo. 1999) ("Many district courts, faced with a similar appeal and motion to stay after having denied immunity [on a motion to dismiss], determine that a stay of *all* proceedings is required pending the outcome of appeal.").

Accordingly, the Court will stay these proceedings until the Court of Appeals issues its decision and returns jurisdiction to this Court.

III. CONCLUSION

Based on the submissions and the entire file and proceedings herein, **IT IS HEREBY ORDERED** that this matter is **STAYED** pending the resolution of Defendant Walsh and Lorge's appeal to the Eighth Circuit Court of Appeals, and the Court shall defer ruling on the parties' Cross-Motions for Summary Judgment [Doc. Nos. 223 & 239] until that time.

IT IS SO ORDERED.

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appeal is sufficiently doubtful that the Band itself is uncertain whether it would lack standing to proceed.

Dated: April 14, 2021

s/Susan Richard Nelson
SUSAN RICHARD NELSON
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-1138

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

Plaintiffs - Appellees

v.

County of Mille Lacs, Minnesota

Defendant

Joseph Walsh, individually and in his official capacity as County Attorney for Mille Lacs County

Defendant - Appellant

Brent Lindgren, individually and in his official capacity as Sheriff of Mille Lacs County

Defendant

Donald J. Lorge, individually and in his official capacity as Sheriff of Mille Lacs County

Defendant - Appellant

Appeal from U.S. District Court for the District of Minnesota
(0:17-cv-05155-SRN)

JUDGMENT

Before SMITH, Chief Judge, WOLLMAN, and LOKEN, Circuit Judges.

Appellants' motion to dismiss on terms fixed by the court is granted. Fed. R. App. P. 42(b). Each side will bear its own costs on appeal. See Fed. R. App. P. 39(a)(4). The Court's mandate shall issue forthwith.

September 10, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Mille Lacs Band of Ojibwe, a federally recognized Indian Tribe; Sara Rice, in her official capacity as the Mille Lacs Band Chief of Police; and Derrick Naumann, in his official capacity as Sergeant of the Mille Lacs Police Department, Plaintiff, v. County of Mille Lacs, Minnesota; Joseph Walsh, individually and in his official capacity as County Attorney for Mille Lacs County; and Donald J. Lorge, individually and in his official capacity as Sheriff of Mille Lacs County, Defendants.	Case No. 17-cv-05155 (SRN/LIB) **ORDER**

Anna Brady, Beth Ann Baldwin, Marc D. Slonim, and Wyatt Golding, Ziontz Chestnut, 2101 Fourth Avenue, Suite 1230, Seattle, WA 98121; and Arielle Wagner, Charles N. Nauen, and David J. Zoll, Lockridge Grindal Nauen P.L.L.P., 100 Washington Avenue South, Suite 2200, Minneapolis, MN 55401, for Plaintiffs.

Brett D. Kelley, Kelley, Wolter & Scott, P.A., 431 South Seventh Street, Suite 2530, Minneapolis, MN 55415; Courtney E. Carter and Randy V. Thompson, Nolan Thompson Leighton & Tataryn PLC, 1011 First Street South, Suite 410, Hopkins, MN 55343; and Scott M. Flaherty and Scott G. Knudson, Taft Stettinius & Hollister LLP, 80 South Eighth Street, Suite 2200, Minneapolis, MN 55402, for Defendant County of Mille Lacs, Minnesota.

Scott M. Flaherty and Scott G. Knudson, Taft Stettinius & Hollister LLP, 80 South Eighth Street, Suite 2200, Minneapolis, MN 55402, for Defendant Joseph Walsh.

Brett D. Kelley, Douglas A. Kelley, Stacy Lynn Bettison, and Steven E. Wolter, Kelley, Wolter & Scott, P.A., 431 South Seventh Street, Suite 2530, Minneapolis, MN

55415; and Scott M. Flaherty and Scott G. Knudson, Taft Stettinius & Hollister LLP, 80 South Eighth Street, Suite 2200, Minneapolis, MN 55402, for Defendant Donald J. Lorge.

SUSAN RICHARD NELSON, United States District Judge

This matter is before the Court on the Motion to Dismiss for Lack of Jurisdiction Based on Mootness [Doc. No. 303] filed by Defendants Donald Lorge and Joseph Walsh.[1] Based on a review of the files, submissions, and proceedings herein, and for the reasons below, the Court denies the motion.

I. BACKGROUND

A. Facts Giving Rise to the Lawsuit

Plaintiffs are the Mille Lacs Band of Ojibwe, Mille Lacs Band Chief of Police Sara Rice, and Sergeant Derrick Naumann (collectively, "the Band"). The Band brought suit against the County of Mille Lacs, Mille Lacs County Attorney Joseph Walsh, and Sheriff Donald Lorge (collectively, "the County") seeking declaratory and injunctive relief regarding the Band's law enforcement authority within the Mille Lacs Reservation. (*See generally* Compl. [Doc. No. 1].)

The Court incorporates by reference the factual background set forth in its December 21, 2020 Order [Doc. No. 217]. As the Court recounted in that Order, Article 2 of the 1855 Treaty between the Minnesota Chippewa Tribe and the United States

[1] Also pending before the Court are the parties' Cross-Motions for Partial Summary Judgment [Doc. Nos. 223 & 239]. The Court will address these motions in a separate, forthcoming order.

established the Mille Lacs Indian Reservation, which comprises about 61,000 acres of land. (Dec. 21, 2020 Order at 3.) Plaintiffs contend that the Reservation established by the 1855 Treaty has never been diminished or disestablished. (*Id.*) If the Reservation has been disestablished, which they contend it has not, the Band maintains only a temporary right of occupancy insufficient to constitute a "reservation" in the term's legal sense. Within the Reservation, the United States holds approximately 3,600 acres in trust for the benefit of the Band, the Minnesota Chippewa Tribe, or individual Band members. (*Id.*) The Band owns in fee simple about 6,000 acres of the Reservation, and individual Band members own in fee simple about 100 acres of the Reservation. (*Id.*)

In Defendants' view, however, the Reservation established by the 1855 Treaty was diminished or disestablished by way of subsequent federal treaties, statutes, and agreements. (*Id.*)

In 2008, the Band and the County entered into a cooperative law enforcement agreement ("2008 Agreement") that allowed Band law enforcement officers to exercise concurrent jurisdiction with the Mille Lacs County Sheriff's Department to enforce Minnesota state law, as provided in Minn. Stat. § 626.90. (*Id.*)

In June 2016, however, the County terminated the 2008 Agreement, primarily due to a dispute regarding the Reservation's boundaries, which impacted the scope of the Band's law enforcement authority. (*Id.*; *see also* Baldwin Decl. [Doc. No. 150], Ex. KK (Walsh Dep.) at 318:23–319:3; *id.*, Ex. VV (June 22, 2016 Sheriff Staff Mtg. Minutes) at 8; *id.*, Ex. WW (June 15, 2016 Sheriff Staff Mtg. Minutes) at 2, 5.) In July 2016, County Attorney Walsh asked then-Minnesota Attorney General Lori Swanson for an opinion

regarding the dispute, which she denied for several reasons, and recommended that Walsh advise the County as he deemed appropriate. (*See* Aug. 2021 Walsh Decl. [Doc. No. 306-1] ¶¶ 7–8].)

Shortly thereafter, Walsh issued an Opinion and Protocol (the "2016 Opinion and Protocol") that addressed the Band's state law enforcement authority. (*See* Dec. 21, 2020 Order at 4–5.) Walsh also opined that the Band's inherent law enforcement authority under federal law did not extend to non-trust lands within the 1855 Reservation, and did not include the authority to investigate state-law violations by Indians or non-Indians, even on trust lands. (*Id.*)

Under the 2016 Opinion and Protocol, Band officers who contravened their scope of authority would be subject to criminal and civil penalties for unauthorized use of force, obstruction of justice, and impersonating a peace officer. (*Id.* at 5.) The Sheriff's Office enforced the 2016 Opinion and Protocol by "interfere[ing] with law enforcement measures undertaken by Band officers." (*Id.* at 6, 7–11.) Morale declined among Band officers, several of whom resigned. (*Id.* at 14–15.) Band officers found that due to their diminished authority, they were unable to respond to increasingly visible criminal activity, particularly involving drugs, on the Reservation. (*Id.* at 16.)

In January 2016, the Band and the Bureau of Indian Affairs ("BIA") entered into an agreement, effective January 1, 2017, by which Band officers were deputized and issued Special Law Enforcement Commissions ("SLECs") to enforce federal law within the Band's Indian country. (*Id.* at 21.) Despite the issuance of the SLECs, Walsh maintained that the 2016 Opinion and Protocol remained in force. (*Id.*)

Plaintiffs filed this lawsuit in November 2017. (*Id.* at 22.) In September 2018, the Band, County, and former Mille Lacs County Sheriff Brent Lindgren entered into an interim law enforcement agreement (the "2018 Agreement"). (*Id.*) On a temporary basis, the 2018 Agreement grants the Band concurrent jurisdiction with the Sheriff over all persons on trust lands, all Band members within the boundaries of the 1855 Treaty, and any person who commits or attempts to commit a crime within the presence of a Band officer within the boundaries of the 1855 Treaty. (*Id.*) Under its own terms, the 2018 Agreement automatically terminates 90 days after the final resolution of this case. (*Id.*)

The parties proceeded to file early dispositive motions on several issues. On December 21, 2020, the Court issued a ruling on several of the parties' motions, granting Plaintiffs' Motion for Summary Judgment on Standing, Ripeness, and Mootness; denying Defendants Walsh and Lorge's Motion for Summary Judgment; and denying Defendants' Motion to Strike and for Sanctions. (*Id.* at 47.)

B. Defendants' Interlocutory Appeal

On January 19, 2021, Walsh and Lorge filed an interlocutory appeal [Doc. No. 218], challenging certain aspects of this Court's December 21, 2020 ruling. Specifically, they argued that the Court lacked jurisdiction over Plaintiffs' claims under 28 U.S.C. § 1331, that Plaintiffs lacked a "cause of action" against them, and that they were immune from suit pursuant to various immunity doctrines. (Baldwin Decl. [Doc. No. 309], Ex. B (W&L Opening 8th Cir. Brief).) Walsh and Lorge did not challenge this Court's ruling on mootness.

On August 31, 2021, after the parties had filed their memoranda with the Eighth Circuit and were awaiting oral argument, Walsh and Lorge moved to dismiss their appeal on mootness grounds, citing the Supreme Court's June 1, 2021decision in *United States v. Cooley*, 141 S. Ct. 1638 (2021). (Baldwin Decl. [Doc. No. 309], Ex. C (W&L 8th Cir. Mot. to Dismiss) at 1.) They also argued that their appeal was moot because it would be speculative to find the challenged conduct would recur. (*Id*. at 8–9.) Accordingly, Walsh and Lorge asked the Eighth Circuit to "direct the district court to dismiss [Plaintiffs'] claims against [them]." (*Id*.)

Alternatively, if the Eighth Circuit declined to dismiss their appeal, Walsh and Lorge asked the court to refer the question of whether they were state actors to the Minnesota Supreme Court. (*Id*. at 10–11.)

On September 10, 2021, the Eighth Circuit ruled on the Motion to Dismiss, stating, "Appellants' motion to dismiss on terms fixed by the court is granted. Each side will bear its own costs on appeal. The Court's mandate shall issue forthwith." (8th Cir. J. [Doc. No. 292]) (citing Fed. R. App. P. 42(b); Fed. R. App. P. 39(a)(4)). The Eighth Circuit issued its mandate that same day, returning jurisdiction to this Court. (8th Cir. Mandate [Doc. No. 292].)

Later on September 10, Plaintiffs filed their response to Walsh and Lorge's Motion to Dismiss, even though the Eighth Circuit had just issued its judgment and mandate. (Baldwin Decl. [Doc. No. 309], Ex. D (Pls.' Resp. to 8th Cir. Mot. to Dismiss).) Plaintiffs explained that nevertheless, they were making a timely response "in the event there are any further proceedings before [the Eighth Circuit] under [Fed. R. App. P.] 40 or Eighth Circuit

Rule 27A(d)," i.e., proceedings for rehearing or reconsideration of the Eighth Circuit's disposition of the appeal. (*Id*. at 2.) Plaintiffs expressed the view that while the Eighth Circuit had dismissed the appeal, the court had not ruled on the merits of Walsh and Lorge's motion. (*Id*. at 1–2.) Thus, they argued, the matter was not moot, and the case was once again subject to the district court's jurisdiction. (*Id*.)

On September 17, 2021, Walsh and Lorge filed a "reply" memorandum in the Eighth Circuit in support of their Motion to Dismiss, stating that if the appellate court had concluded that Plaintiffs' case was moot, "it should say so[.]" (Baldwin Decl. [Doc. No. 309], Ex. E (W&L Sept. 17, 2021 8th Cir. Reply) at 2.) Walsh and Lorge requested that the Eighth Circuit either certify the question of whether *Cooley* mooted their appeal to the Minnesota Supreme Court, or address the merits of their appeal. (*Id*. at 4.) Thus, they "suggest[ed]" that the Eighth Circuit recall the mandate and explain whether *Cooley* mooted the case against them. (*Id.*)

The Eighth Circuit issued no ruling in response to Walsh and Lorge's memorandum, prompting Walsh and Lorge to file a Motion to Recall the Mandate on October 15, 2021, seeking to confirm that "*Cooley* moots the case against them." (Baldwin Decl. [Doc. No. 309], Ex. F (W&L 8th Cir. Mot. to Recall Mandate).) On October 19, 2021, Plaintiffs filed their opposition to the motion, noting the failure of Walsh and Lorge to timely file a motion for rehearing or reconsideration. (Baldwin Decl. [Doc. No. 309], Ex. G (Pls.' 8th Cir. Opp'n to Mot. to Recall Mandate).) The following day, in a one-sentence order, the Eighth Circuit summarily denied the Motion to Recall the Mandate. (Baldwin Decl. [Doc. No. 309], Ex. H (Oct. 20, 2021 8th Cir. Order).)

C. November 15, 2021 Status Conference and Supplemental Briefing

On November 15, 2021, the Court held a status conference in this case, and directed the parties to submit supplemental briefing to address the procedural impact of the Eighth Circuit's dismissal of Walsh and Lorge's interlocutory appeal. (Baldwin Decl. [Doc. No. 309], Ex. I (Nov. 15, 2021 Tr.) at 17–18.) In addition, the Court directed the parties to address whether the case was moot, in the event this Court found that the Eighth Circuit had not ruled on the question of mootness and had given no direction to this Court to dismiss the case. (*Id*.)

Walsh and Lorge submitted their supplemental memorandum, along with the instant motion "for an order dismissing them from the case pursuant to" their supplemental memorandum. (W&L Mot. to Dismiss at 1.) Although they maintain that the Eighth Circuit granted their Motion to Dismiss on mootness grounds, they nevertheless argue that this Court should address their mootness arguments and dismiss them from the case. (W&L Supp'l Mem. [Doc. No. 305] at 7–10.) In support of their position, they also submit the August 2021 Declarations of Joseph J. Walsh [Doc. No. 306-1] and Donald Lorge [Doc. No. 306-2], which were filed with Defendants' initial Eighth Circuit interlocutory appeal. (*See* Knudson Decl. [Doc. No. 306] ¶¶ 2–3.)

In response, Plaintiffs argue that the Eighth Circuit did not direct this Court to dismiss the case or otherwise rule on Walsh and Lorge's mootness arguments. (Pls.' Supp'l Opp'n [Doc. No. 308] at 17–20.) They contend that this Court correctly ruled in December 2020 that the parties' 2018 law enforcement agreement did not moot Plaintiffs' claims, and Walsh and Lorge present no valid reason for the Court to reconsider the issue. (*Id*. at 20–

25.) In addition, Plaintiffs maintain that neither *Cooley* nor Walsh and Lorge's August 2021 Declarations demonstrate that this case is moot. (*Id*. at 25–33.) Finally, they urge the Court to reject Walsh and Lorge's contention that the possibility of recurring conduct is merely speculative. (*Id*. at 33–35.)

II. DISCUSSION

A. Effect of Eighth Circuit's Dismissal

The Eighth Circuit's Judgment, quoted earlier, dismissed Walsh and Lorge's interlocutory appeal under Federal Rule of Appellate Procedure 42(b). (8th Cir. J. at 1.) Rule 42(b) provides for the voluntary dismissal of an appeal, stating, as relevant here, that "[a]n appeal may be dismissed on the appellant's motion on terms . . . fixed by the court." Fed. R. App. P. 42(b). The "terms" fixed by the Eighth Circuit required each side to bear its own costs related to the appeal. (8th Cir. J. at 1.)

Walsh and Lorge concede that the Eighth Circuit's Judgment did not mention mootness, nor did it direct dismissal on that basis. (W&L Supp'l Mem. at 7.) They further state, "Counsel for Walsh and Lorge have been unable to find precedent where justiciability was challenged and a case dismissed without explanation." (*Id.*) Instead, they postulate that because the Eighth Circuit granted their motion to dismiss the appeal, "the Eighth Circuit must have affirmed the merits of their motion, similarly to the way an appellate court may issue without opinion a summary affirmance, or judgment order, affirming a lower court ruling." (*Id*.) They further note that mootness was their only basis for seeking dismissal, and the Eighth Circuit "did not specify another substantive basis" for dismissal.

(*Id*. at 8.) And they assert that "when an appellate court wants to avoid ruling on mootness, the court will so state." (*Id*. at 8–9) (citing *Terkel v. CDC*, 15 F.4th 683 (5th Cir. 2021)).

However, contrary to Walsh and Lorge's arguments, the Eighth Circuit *did* provide an explanation for its dismissal by treating the motion as one for voluntary dismissal under Rule 42(b), and granting it on that basis. Consequently, the court had no reason to address mootness. If Walsh and Lorge disagreed with the Eighth Circuit's dismissal order, finding that it misconstrued their Motion to Dismiss the Appeal, they could have timely sought rehearing or reconsideration with the Eighth Circuit. They did not.

In fact, Walsh and Lorge realized that the Eighth Circuit had not ruled on mootness, and twice asked the court to recall its mandate and substantively rule on the issue or to certify a question to the Minnesota Supreme Court. (Baldwin Decl. [Doc. No. 309], Ex. E (W&L 8th Cir. Reply) at 3; *id.*, Ex. F (W&L 8th Cir. Mot. to Recall Mandate) at 5.) Since Walsh and Lorge made their first request in a reply memorandum, the Eighth Circuit issued no response, but the court summarily denied their second request, made in their Motion to Recall the Mandate. (Baldwin Decl. [Doc. No. 309], Ex. H (8th Cir. Oct. 20, 2021 Order).)

Ultimately, Walsh and Lorge appear to agree that "in the absence of any clear direction from the appellate court, . . . the prudent course is for this Court to address in the first instance the changed legal and factual landscape they believe moots Plaintiffs' case against them." (W&L's Supp'l Mem. at 9.) Accordingly, the Court proceeds to discuss Walsh and Lorge's current mootness arguments.

B. Mootness

The Constitution limits federal courts' jurisdiction to actual "Cases" or "Controversies." U.S. Const. art. III, § 2, cl. 1. If "'the issues presented are no longer live,' . . . a case or controversy under Article III no longer exists because the litigation has become moot." *Brazil v. Ark. Dep't of Human Servs*., 892 F.3d 957, 959 (8th Cir. 2018) (quoting *Already, LLC v. Nike, Inc*., 568 U.S. 85, 91 (2013)). In general, a case becomes moot "when changed circumstances already provide the requested relief and eliminate the need for court action." *Hillesheim v. Holiday Stationstores, Inc*., 903 F.3d 786, 791 (8th Cir. 2018) (citing *McCarthy v. Ozark Sch. Dist.*, 359 F.3d 1029, 1035 (8th Cir. 2004)). If an action becomes moot, the court must dismiss it for lack of jurisdiction. *Ali v. Cangemi*, 419 F.3d 722, 723 (8th Cir. 2005).

In some instances, a defendant may argue that a case is automatically moot because the defendant has voluntarily ceased to engage in the challenged conduct. Such "voluntary cessation" does not necessarily moot a case, however, since the defendant is "free to return to his old ways." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc*., 528 U.S. 167, 189 (2000) (citation omitted). A case can become moot by the defendant's voluntary cessation only if it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Wright v. RL Liquor*, 887 F.3d 361, 363 (8th Cir. 2018) (quoting *Friends of the Earth,* 528 U.S. at 189 (2000)).

The party asserting mootness under the voluntary cessation theory bears a "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again." *Friends of the Earth*, 528 U.S. at 189 (internal quotations and citation

omitted). Governmental entities and officials "[are] given considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities." *Prowse v. Payne*, 984 F.3d 700 (8th Cir. 2021) (citation omitted)). But where circumstances suggest that by ceasing to engage in the challenged conduct, the defendant is simply "attempting to manipulate [the court's] jurisdiction to insulate a favorable decision from review," *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000), courts are unlikely to find a case moot. *See Already*, 568 U.S. at 91.

Walsh and Lorge assert three primary grounds for dismissal based on mootness. First, they argue that the 2018 Agreement, and Walsh's revocation of the 2016 Opinion and Protocol, moot Plaintiffs' claims. (W&L Supp'l Mem. at 10.) Second, they contend that *Cooley* represents a change in the law that precludes Walsh from issuing an opinion and protocol similar to the 2016 Opinion and Protocol. (*Id.*) Third, they assert that any holding that this case is not moot "pushes this Court into rank speculation over what either Walsh or Lorge, or their successors, would do if a cooperative agreement was no longer in place." (*Id.*) For all of these reasons, they argue that this case is moot and must be dismissed.

1. Whether the 2018 Agreement and the Revocation of the 2016 Opinion and Protocol Moot the Band's Claims Against Walsh and Lorge

In the December 2020 Order, the Court rejected Walsh and Lorge's related argument that the 2018 Agreement moots Plaintiffs' claims. (Dec. 21, 2020 Order at 2, 35–36.) Referencing mootness by virtue of a party's voluntary cessation of the challenged conduct, the Court explained, "If this case is dismissed, on mootness grounds, the 2018

Agreement will, by its very terms, terminate, and it is highly probable that the parties will continue to dispute the extent of the boundaries of the Reservation and the extent of the Band's sovereign law enforcement authority." (*Id*. at 35–36.) Indeed, disagreement about the Reservation boundaries was at the heart of the County's decision to terminate the 2008 Agreement. (*See* Baldwin Decl. [Doc. No. 150], Ex. KK (Walsh Dep.) at 318:23–319:3 (stating, "The primary motivating factor of the revocation . . . was the M-opinion, and what I think the board viewed as the Band using their law enforcement authority to improve their position vis-à-vis the boundary."); *id.*, Ex. VV (June 22, 2016 Sheriff Staff Mtg. Minutes) at 8 ("This is a boundary dispute between the County and the Band."); *id*., Ex. WW (June 15, 2016 Sheriff Staff Mtg. Minutes) at 2, 5 (noting "Boundary issues" and expressing high likelihood of revocation and that "all will come united because this is a boundary issue.").

a. Reconsideration

Procedurally, Walsh and Lorge did not appeal the portion of the Court's December 2020 Order addressing mootness, nor have they moved for reconsideration or identified any "compelling circumstances" warranting reconsideration. *See* Fed. R. Civ. P. 60 (stating that a motion for "reconsideration" directed at an order is properly considered under Rule 60); D. Minn. L.R. 7.1(j) (authorizing motions for reconsideration only upon obtaining leave of court and upon a showing of compelling circumstances). To the extent the argument is relevant to reconsideration, Walsh and Lorge contend that this case "is not controlled by the voluntary cessation exception to the mootness doctrine," because Walsh did not revoke his 2016 Opinion and Protocol in order to "manipulat[e] his [] conduct or to invent a mootness argument." (W&L Supp'l Mem. at 11.)

The Court finds that this argument does not constitute the type of compelling or "exceptional circumstance[]" necessary to support reconsideration. *See Rindahl v. U.S. Attorney's Office for Minn.*, No. 18-cv-3237 (JRT/ECW), 2019 WL 404043, at *2 (D. Minn. Jan. 31, 2019) (noting that permission to seek reconsideration is granted only upon a showing of compelling circumstances or to "correct manifest errors of law or fact or to present newly discovered evidence."), *report & recommendation adopted*, 2019 WL 1993827 (D. Minn. May 6, 2019). Importantly, a party cannot use a motion to reconsider to repeat previous arguments, introduce new evidence or arguments that could have been presented, or "tender new legal theories for the first time." *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 414 (8th Cir. 1988) (citations omitted). As Plaintiffs observe, Walsh and Lorge previously argued in 2020 that this is not a voluntary cessation case because "[t]he parties voluntarily negotiated and entered into the 2018 []Agreement," and Plaintiff had not shown that Defendants entered into the agreement for the improper purpose of mooting the lawsuit. (W&L Opp'n to Summ. J. on Standing, Ripeness, and Mootness [Doc. No. 176] at 54–55.)

This issue was previously raised and addressed, and the Court finds that Walsh and Lorge fail to present compelling or exceptional circumstances to warrant reconsideration. Accordingly, from a procedural standpoint, Walsh and Lorge's current mootness argument based on the 2018 Agreement and the revocation of the 2016 Opinion and Protocol is not properly before the Court.

b. Effect of the 2018 Agreement and the Revocation of the 2016 Opinion and Protocol on the Merits

Even if this portion of their motion were procedurally proper, the Court remains unpersuaded that the 2018 Agreement and the revocation of the 2016 Opinion and Protocol moots the case. Again, Walsh and Lorge contend that a finding of voluntary cessation is inapplicable, as Walsh attests he revoked the 2016 Opinion and Protocol not because he sought to engage in manipulative conduct in response to this litigation, but because the County and the Band had freely negotiated the 2018 Agreement.[2] (W&L Supp'l Mem. at 11.)

In support of their position, Walsh and Lorge point to *Let Them Play MN v. Walz*, No. 21-cv-79 (ECT/DTS), __ F. Supp. 3d__, 2021 WL 3741486, at *6 (D. Minn., Aug. 24, 2021), in which the court found a lawsuit challenging certain COVID-related restrictions on youth sports was moot. Indeed, the court found the circumstances surrounding the Governor's lifting of restrictions did not demonstrate "the type of manipulative behavior the voluntary-cessation exception is meant to address," but it further found the matter was moot because the challenged conduct was unlikely to recur. *Id*.

Taking a step back from the question of whether the voluntary cessation exception applies, the Court must first address, fundamentally, the underlying question of mootness,

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[2] The Band contends that Walsh fails to support his statements regarding revocation with any supporting evidence, such as a signed document purporting to show the revocation of the 2016 Opinion and Protocol. (Baldwin Decl. [Doc. No. 309] ¶¶ 3–4.) For purposes of this motion, the Court will assume that Walsh revoked the 2016 Opinion and Protocol.

namely, whether "changed circumstances already provide the requested relief and eliminate the need for court action," *Hillesheim*, 903 F.3d at 791, or "the issues presented are no longer live." *Brazil*, 892 F.3d at 959.

Walsh and Lorge rely on their August 2021 Declarations in support of their position that circumstances have changed, rendering this case moot. In his declaration, Walsh states as follows:

> 14. At the time I drafted my opinion and protocol in 2016, the United States Supreme Court had not determined the scope of retained inherent tribal jurisdiction to investigate potential state and federal law criminal violations. In the Opinion, I set out several conclusions relevant to inherent tribal criminal authority. One of these conclusions was that tribes do not have criminal jurisdiction over non-Indians, with a narrow exception under the Violence Against Women Act.
>
> 15. I have read the recent United States Supreme Court decision in *United States v. Cooley*, 141 S. Ct. 1638 (June 1, 2021). In *Cooley*, the Court held that tribes, and by extension tribal police officers, *within their reservation* had inherent authority to stop and investigate non-Indians for possible state and federal law violations. The *Cooley* decision alleviated my major concern in issuing my Opinion in 2016: having evidence that was admissible in court. Consequently, I could not and would not reissue my 2016 Opinion and Protocol should the current cooperative agreement entered into in 2018 terminate.

(Aug. 2021 Walsh Decl. ¶¶ 15–16) (emphasis added). In Sheriff Lorge's declaration, he states that if the 2018 Agreement is terminated, he "would follow the advice of the County Attorney and instruct my deputies and staff accordingly." (Aug. 2021 Lorge Decl. ¶ 6.)

As to whether these representations constitute "changed conduct" that already provides the requested relief, or render issues no longer "live," the Court turns to the Complaint. Among the types of relief the Band requests is a declaration stating that:

> A. As a matter of federal law, the Band possesses inherent sovereign authority to establish a police department and to authorize Band police officers to investigate violations of federal, state and tribal law *within the Mille Lacs Indian Reservation as established in Article 2 of the Treaty with the Chippewa, 10 Stat. 1165 (Feb. 22, 1855)*, and in exercising such authority, to apprehend suspects (including Band and non-Band members) and turn them over to jurisdictions with prosecutorial authority; and
>
> B. Pursuant to 18 U.S.C. § 1162(d), 25 U.S.C. §§ 2801 and 2804, the Deputation Agreement between the Band and the Bureau of Indian Affairs, and the SLECs issued to Band police officers by the Bureau of Indian Affairs, Band police officers have federal authority to investigate violations of federal law *within the Mille Lacs Indian Reservation as established in Article 2 of the Treaty with the Chippewa, 10 Stat. 1165 (Feb. 22, 1855)*, and, in exercising such authority, to arrest suspects (including Band and non-Band members) for violations of federal law.

(Compl. at 7) (emphasis added).

Even giving full credit to Walsh's statement that upon the termination of the 2018 Agreement, and consistent with *Cooley*, he would not "reissue" his 2016 Opinion and Protocol, (Aug. 2021 Walsh Decl. ¶ 16), his representations do not provide the Band's requested relief, nor do they resolve an issue essential to the Band's claims. The Band's claims concerning the scope of its law enforcement authority "*within the Reservation*," quoted above, require resolution of whether the Milles Lacs Reservation remains as it was under Article 2 of the Treaty with the Chippewa, 10 Stat. 1165 (Feb. 22, 1855) ("the Treaty of 1855"), as the Band contends, or whether subsequent treaties and Acts of Congress have disestablished or diminished the Reservation, as Walsh and Lorge contend. (Compl. at 7) (emphasis added).

Walsh and Lorge's Declarations say nothing about the Reservation's boundaries, although they recognize that the issue is crucial to this dispute. For example, elsewhere in

his Declaration, Walsh implicitly acknowledges that the scope of the Band's law enforcement authority is affected by the issue of the Reservation's geographic boundaries. (*See* Aug. 2021 Walsh Decl. ¶¶ 10 (noting prior letters from Minnesota officials stating that the "the Mille Lacs Band's Indian Country is limited to approximately 4,000 acres of land held in trust by the federal government for the [] Band."), 11 (explaining that in drafting the 2016 Opinion and Protocol, Walsh sought to "determine what state law enforcement authority the Mille Lacs tribal police department would have in Mille Lacs County, and in particular, the three northern townships of the County that formed the original reservation in 1855."); *see also* W& L Supp'l Reply [Doc. No. 310] at 9 (asserting that based on *Cooley*, "there is no longer an obvious dispute about Plaintiffs' inherent authority, and there is only a dispute about the geographic scope of that authority.").) Nothing in the Walsh or Lorge Declarations puts to rest the disputed issue regarding the Reservation's boundaries. To the contrary, Defendants maintain that the Reservation was disestablished, and acknowledge that the issue remains unresolved. (*See* W&L Supp'l Reply at 10) (stating, "The only issue here is whether the former reservation has been disestablished.").

In addition, as the Court discusses in greater detail below, *Cooley* concerns tribal law enforcement authority over non-Indians on public rights-of-way running through a reservation. 141 S. Ct. at 1641–42. *Cooley* does not address tribal law enforcement authority when the boundaries of the reservation are in dispute.

Walsh and Lorge rely on *Prowse v. Payne*, 984 F.3d 700 (8th Cir. 2021), a recent case in which an inmate challenged prison authorities' refusal to provide hormone therapy

to the inmate, in reliance on a blanket policy of denying such treatment. While the inmate's appeal was pending, the prison began providing treatment to the inmate. *Id*. at 701–02. The Eighth Circuit noted that while a defendant ordinarily faces a heavy burden to establish mootness, "the standard is slightly less onerous when it is the government that has voluntarily ceased the challenged conduct." *Id*. at 703 (citations omitted). The court found the inmate's challenge to the general policy was rendered moot because she was receiving treatment. *Id*. As to the inmate's challenge based on her own access to treatment, the Eighth Circuit found the question of mootness to be "a closer call." *Id*. But because prison officials averred that the inmate would receive hormone therapy so long as her treating physicians recommended it, the court held that the challenged conduct could not be reasonably expected to recur. *Id*.

Walsh and Lorge argue that there is no meaningful distinction between Walsh's representations here and the prison administrators' representations in *Prowse*. (W&L Supp'l Mem. at 13–14.) But the facts here are unlike the provision of hormone therapy to the inmate in *Prowse*, which constituted changed conduct that granted the requested relief and left no "live" dispute. Walsh's representations that he will not reissue the 2016 Opinion and Protocol still leave open the scope of the Band's law enforcement authority upon the termination of the 2018 Agreement because of the disputed boundary issue. There is no question that the boundary issue, as it affects the scope of the Band's law enforcement authority, remains "live."

Accordingly, the Court finds that neither the 2018 Agreement nor Walsh's representations regarding the revocation of the 2016 Opinion and Protocol moot this case.

2. Whether *Cooley* Moots the Band's Claims Against Walsh and Lorge

As noted earlier, Walsh and Lorge also argue that this matter is moot because *Cooley* represents a change in the law that precludes Walsh from issuing an opinion and protocol similar to the 2016 Opinion and Protocol. (W&L Supp'l Mem. at 14–16.)

In *Cooley*, the Supreme Court held that tribal police officers have the authority to temporarily detain and search a non-Indian on a public right-of-way that runs through an Indian reservation for potential violations of state and federal law. 141 S. Ct. at 1641. The Court observed that it had previously recognized that "where jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities." *Id*. at 1644 (citing *Duro v. Reina*, 495 U.S. 676, 687–88 (1990)). The Supreme Court found the tribal authority in *Cooley*, i.e., the authority to search a non-Indian prior to transport, was ancillary to the authority it had previously recognized. *Id*. (citing *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1180–81 (9th Cir. 1975)). In fact, the Court observed that "several state courts and other federal courts have held that tribal officers possess the authority at issue here." *Id*. (citing, *inter alia*, *United States v. Terry*, 400 F.3d 575, 579–80 (8th Cir. 2005)). Observing that while in *Duro*, "[the Court] traced the relevant tribal authority to a tribe's right to exclude non-Indians from reservation land," the Supreme Court held in *Cooley* that "tribes 'have inherent sovereignty independent of th[e] authority arising from their power to exclude.'" *Id*. (citation omitted).

Importantly, *Cooley* does not address the issue of reservation boundaries, which Walsh and Lorge acknowledge. Walsh recognizes that *Cooley* applies to "tribes, and by extension tribal police officers, *within their reservation*[.]" (Aug. 2021 Walsh Decl. ¶ 16) (emphasis added). And counsel for Walsh and Lorge acknowledged at the November 15, 2021 status conference that "the scope of tribal law enforcement authority in terms of the geographic scope would depend upon the boundary issue. Because if the boundaries were disestablished, then there's Indian Country within Mille Lacs County, but there is not the reservation boundary as such." (Baldwin Decl. [Doc. No. 309], Ex. I (Nov. 15, 2021 Tr.) at 11.) Again, nowhere in Walsh and Lorge's Declarations do they disavow their view that the Reservation has been disestablished. Instead, their position directly contravenes the Band's view that the Reservation remains as it was under the Treaty of 1855.

In addition, the Eighth Circuit's 2005 decision in *Terry*, 400 F.3d at 575, is one of the cases the Supreme Court cited in *Cooley* for the proposition that several state courts and other federal courts had *already* held that tribal officers possessed the authority at issue in *Cooley*. *Cooley*, 141 S. Ct. at 1644. In *Terry*, the Eighth Circuit entertained a criminal appeal in which Terry, a non-Indian, argued that tribal law enforcement officers had unreasonably seized him on the Pine Ridge Reservation, and lacked the authority to do so. 400 F.3d at 579. The Eighth Circuit disagreed, ruling that tribal officers have inherent authority to investigate violations of state and federal law, including violations by non-Indians, at least on reservation land from which the tribe has the power to exclude violators. 400 F.3d at 579–80 (stating, "[T]ribal police officers do not lack authority to detain non-Indians whose conduct disturbs the public order on their reservation," and explaining that

"[b]ecause the power of tribal authorities to exclude non-Indian law violators from the reservation would be meaningless if tribal police were not empowered to investigate such violations, tribal police must have such power.").

Walsh testified in his deposition that he did not consider Eighth Circuit decisions to be controlling authority, and when drafting the 2016 Opinion and Protocol, he took a "conservative viewpoint [that Band law enforcement officers] had less authority than more, which would lead to less appeals and less contested issues[.]" (Baldwin Decl. [Doc. No. 174], Ex. B (Walsh Dep.) at 301:15–17) ("Q: So you wouldn't consider an 8th Circuit decision controlling? A: It's not."); *id*. at 293:24–294:3.) Although Walsh argues that *Cooley* moots the case,[3] he also acknowledges that the case leaves "the scope of any [tribal law enforcement] authority beyond the facts of the case" up to "the lower courts to work out." (W&L Supp'l Mem. at 5) (noting that *Cooley* involved the possession of two semi-automatic rifles). Indeed, that is what this lawsuit seeks to "work out." Defendants continue to maintain that the Reservation has been disestablished—a position directly at odds with Plaintiffs' requested relief, on an issue highly relevant to the Band's scope of law enforcement authority.

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[3] The Minnesota Supreme Court has cited and applied *Terry*, finding a tribal officer had lawfully "detained and investigated" a non-member suspected of violating Minnesota law "pursuant to the tribal authority to detain and remove recognized by the Supreme Court and other federal courts." *State v. Thompson*, 937 N.W.2d 418, 421 (Minn. 2020). Although the Minnesota Supreme Court issued *Thompson* in January 2020, and the U.S. Supreme Court did not issue *Cooley* until June 2021, Walsh and Lorge do not argue that *Thompson* moots this case.

In support of their position, Walsh and Lorge rely on *Young America's Foundation v. Kaler*, 14 F.4th 879, 886 (8th Cir. 2021), in which a student group challenged the University of Minnesota's policy for assigning venues for speaking events, arguing that the policy denied the group a preferred location for its speaker. (W&L Supp'l Reply at 5–6.) By the time of the plaintiffs' appeal, however, the University had replaced its policy for hosting major events to include "more defined terms and standards." *Young Am.'s Found.*, 14 F.4th at 887. The Eighth Circuit analyzed the policy change as conduct "capable of repetition, yet evading review," as opposed to voluntary cessation under *Friends of the Earth*. *Id*. at 886 (explaining that when a law or policy "'has been amended or repealed, actions seeking declaratory or injunctive relief for earlier versions are generally moot unless the problems are 'capable of repetition yet evad[ing] review.'") (citing *Phelps-Roper v. City of Manchester*, 697 F.3d 678, 687 (8th Cir. 2012)) (alteration in original). A policy is not "capable of repetition yet evading review" merely because the governing body may reenact the policy after dismissal of the lawsuit. *Id*. (citing *Teague v. Cooper*, 720 F.3d 973, 977 (8th Cir. 2013)). Such situations are rare and generally arise "where it is virtually certain" that the repealed law or policy will be reenacted. *Id.* (citing *Teague*, 720 F.3d at 977).

The Eighth Circuit found that the University's policy change was not one of those rare situations, noting that the policy was not merely "repackaged," but was substantively amended to address the plaintiff's concerns, and it contained more defined, clear terms. *Id*. at 886–87. The court also found that the plaintiff had failed to show that it was "virtually certain" that the University would reenact its prior policy. *Id*. at 887. To the contrary,

because the new policy was more detailed and broadly applicable to the entire Twin Cities campus, the court found it unlikely that the University would reenact its less defined and more limited prior policy. *Id.* Accordingly, the Eighth Circuit found that the policy was not "capable of repetition yet evading review," rendering plaintiff's facial challenges moot. *Id*.

Walsh and Lorge contend that *Cooley*, and Walsh's representations that based on *Cooley*, he could not and would not reissue his 2016 Opinion and Protocol, represent a change similar to the University's policy change in *Young America's Foundation*. The Court finds this authority distinguishable. Walsh's pledge to not reissue his 2016 Opinion and Protocol, consistent with the limited facts of *Cooley*, is unlike the University of Minnesota's wholesale repeal of its challenged policy in *Young America's Foundation*, and its enactment of a newer, more detailed and broadly applicable policy that entirely disposed of the plaintiff's facial challenge to the repealed policy. 14 F.4th at 886–87. Again, Walsh's representations do not reach the boundary issue, which remains both "live" and essential to the Band's claims regarding its law enforcement authority.

Similarly, his representations are not comparable to the changed circumstances in the other cases on which Defendants rely, where the changes in question resulted in plaintiffs obtaining their requested relief, leaving no actual dispute. *See Hartnett v. Penn State Educ. Ass'n*, 963 F.3d 301 (3d Cir. 2020) (finding that Supreme Court's decision in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), which involved the same issue of union-imposed agency fees on non-union members, and the defendant's compliance with *Janus*, resolved the same issue in *Hartnett* and mooted the case); *DeFunis v. Odegaard*,

416 U.S. 312, 314, 316–320 (1974) (concluding that law school applicant's equal protection challenge to his denial of admission was moot where the lower court had granted injunctive relief, requiring his admission, and by the time the case reached the Supreme Court, student was enrolled in his final term of law school, and would receive his degree, regardless of any decision on the merits); *McCarthy*, 359 F.3d at 1036 (holding that students' challenge to Arkansas statute mandating a hepatitis vaccine unless the students could claim a recognized religious exemption was rendered moot when, while on appeal, the state broadened the scope of the statute to allow exemptions for general religious or philosophical beliefs.); *United States v. Mercy Health Services*, 107 F.3d 632, 636–37 (8th Cir. 1997) (finding that health care entities' decision to not merge thoroughly disposed of the Government's antitrust lawsuit against them, even if they expressed the desire to perhaps merge at some future time).

In all of these cases, changed circumstances, which also resulted in the plaintiffs receiving their requested relief, left no live controversy. Walsh's representations here, consistent with *Cooley*, that he would not reissue his 2016 Opinion and Protocol upon the expiration of the 2018 Agreement, do not resolve the boundary issue that is a key part of the Band's law enforcement claims. Defendants continue to maintain that the Reservation has been disestablished and acknowledge that this issue remains in dispute. Accordingly, the Court finds that *Cooley* and Walsh's representations based on that case, do not moot this case.

3. Whether a Finding that the Case is Not Moot is Speculative

Finally, Walsh and Lorge assert that a finding that this case is not moot "pushes this Court into rank speculation over what either Walsh or Lorge, or their successors, would do if a cooperative agreement was no longer in place." (W&L Supp'l Mem. at 10.) Indeed, "[a] speculative possibility is not a basis for retaining jurisdiction over a moot case." *McCarthy*, 359 F.3d at 1036.

Walsh and Lorge previously raised this argument in opposition to the Band's Motion for Summary Judgment on Standing, Ripeness, and Mootness. (*See* W&L Opp'n to Summ. J. on Standing, Ripeness, and Mootness at 55.) In particular, they argued that "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" following the expiration of the 2018 Agreement. (*Id.*) (emphasis in original). They maintained that such speculation rested on additional, equally speculative, assumptions: that the County Attorney would issue a new Opinion and Protocol contrary to law, that legal precedent or statutes would not alter the legal landscape, and that some future County Attorney would implement the same legal opinion. (*Id.*)

The Court rejected this argument, finding that if the case were dismissed for mootness, prompting the expiration the 2018 Agreement, followed by a 90-day grace period, it was highly probable that the parties would continue to dispute the extent of the boundaries on the Reservation and the extent of the Band's sovereign law enforcement authority. (Dec. 21, 2020 Order at 35–36.) Walsh and Lorge fail to provide any basis for the Court to reconsider its prior ruling, and it is not properly before the Court.

Even if it were, the Court stands by its prior ruling. Given Defendants' unwavering belief that the Reservation has been disestablished, and the impact of the boundary issue on the Band's law enforcement authority, it is not speculative to find that the challenged conduct is likely to recur. For all of the reasons set forth above, neither *Cooley* nor Walsh and Lorge's August 2021 Declarations resolve the issue of the Reservation's boundaries—an issue essential to the Band's claims regarding the scope of its law enforcement authority. Accordingly, the Court denies Walsh and Lorge's motion on this basis.

III. CONCLUSION

Based on the submissions and the entire file and proceedings herein, **IT IS HEREBY ORDERED** that

1. The Motion to Dismiss for Lack of Jurisdiction Based on Mootness [Doc. No. 303] filed by Defendants Donald Lorge and Joseph Walsh is **DENIED**.

Dated: March 3, 2022

s/Susan Richard Nelson
SUSAN RICHARD NELSON
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Mille Lacs Band of Ojibwe, a federally recognized Indian Tribe; Sara Rice, in her official capacity as the Mille Lacs Band Chief of Police; and Derrick Naumann, in his official capacity as Sergeant of the Mille Lacs Police Department, Plaintiffs, v. County of Mille Lacs, Minnesota; Joseph Walsh, individually and in his official capacity as County Attorney for Mille Lacs County; and Donald J. Lorge, individually and in his official capacity as Sheriff of Mille Lacs County, Defendants.	Case No. 17-cv-05155 (SRN/LIB) **MEMORANDUM OPINION AND ORDER**

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Scott M. Flaherty and Scott G. Knudson, Taft Stettinius & Hollister LLP, 80 South Eighth Street, Suite 2200, Minneapolis, MN 55402, for Defendant Joseph Walsh.

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SUSAN RICHARD NELSON, United States District Judge

This matter is before the Court on Cross-Motions for Partial Summary Judgment [Doc. Nos. 223 & 239] filed by the parties. Based on a review of the files, submissions, and proceedings herein, and for the reasons below, the Court **GRANTS** Plaintiffs' motion and **DENIES** Defendants' motion.

I. BACKGROUND

Plaintiffs are the Mille Lacs Band of Ojibwe, Mille Lacs Band Chief of Police Sara Rice, and Mille Lacs Band Sergeant Derrick Naumann (collectively, "the Band"). The Band brought suit against the County of Mille Lacs, Mille Lacs County Attorney Joseph Walsh, and Mille Lacs County Sheriff Donald Lorge (collectively, "the County") seeking declaratory and injunctive relief regarding the Band's law enforcement authority within the Mille Lacs Reservation. (*See generally* Compl. [Doc. No. 1].)

An integral part of the parties' dispute, and the issue now presented to the Court on the parties' Cross-Motions for Summary Judgment, is whether the Mille Lacs Reservation has been disestablished or diminished by Congress. In order to resolve this important issue, the Court must interpret a series of treaties and Acts of Congress dating back to the nineteenth century. The following recitation of the record, which is largely undisputed, begins with the 1855 treaty establishing the Mille Lacs Reservation. The Court then examines the 1863, 1864, and 1867 treaties, which the County contends resulted in the disestablishment of the reservation. Next, the Court explores the treatment of the Mille Lacs Reservation between the Treaty of 1867 and the Nelson Act of 1889, the provisions and history of the Nelson Act, and the Band's written agreement to the Nelson Act (the

"Nelson Act Agreement"). The Court concludes by examining the reservation's history following the Nelson Act, including its treatment by Congress, federal officials, and the courts.

A. The 1855 Treaty Establishing the Mille Lacs Reservation

The Mille Lacs Reservation was established by the 1855 Treaty with the Chippewa, as one of six tracts of land "reserved and set apart . . . for the permanent homes" of the Mille Lacs and other Mississippi Chippewa bands party to the treaty. Treaty with the Chippewa art. 2, Feb. 22, 1855, 10 Stat. 1165 (hereinafter "Treaty of 1855"). The Treaty of 1855 set aside more than 61,000 acres along Lake Mille Lacs for the Mille Lacs Band. *See id.* The treaty also established additional reservations for the Mississippi Chippewa at Gull Lake, Pokegama Lake, Rabbit Lake, Rice Lake, and Sandy Lake. *Id.* In addition, the treaty established reservations for the Pillager and Lake Winnibigoshish bands at Cass Lake, Leech Lake, and Lake Winnibigoshish. *Id.* Under the Treaty of 1855, the Mille Lacs Band and other Indian signatories gave up their aboriginal territory and agreed to "cede, sell, and convey to the United States all their right, title, and interest in, and to, the lands now owned and claimed by them, in the Territory of Minnesota." Treaty of 1855 art. 1.

B. The 1863 and 1864 Treaties

Following increased tension between Minnesota's Indian tribes and white settlers, Minnesota's Dakota Sioux began an uprising in 1862, leading to the deaths of several hundred settlers over the course of six weeks. (Decl. of Courtney Carter ("Carter Decl.")

[Doc. No. 242], Ex. 5 ("Rife Rep."), at 18[1].) During the Dakota uprising, Chief Hole-in-the-Day (the Younger) of the Gull Lake Band of Chippewa—a signatory of the 1855 Treaty—gathered warriors to launch his own campaign against white settlers. (*Id.* at 19.) When the Mille Lacs Band learned that Chief Hole-in-the-Day planned to attack the garrison, refugees, and government officials at Fort Ripley, the Band's chiefs refused to participate in Hole-in-the-Day's uprising and sent their own warriors to protect the fort and nearby settlements. (*Id.* at 21-22; Decl. of James McClurken ("McClurken Decl.") [Doc. No. 235], Ex. A ("McClurken Rep."), at 42.) Hole-in-the-Day's attack was averted, and Commissioner of Indian Affairs William P. Dole—who had been at Fort Ripley—praised the Mille Lacs Band's actions as going "far in enabling us to finally effect a settlement of the Chippewa difficulties without resort to arms." (Rife Rep. at 22.)

Following Hole-in-the-Day's brief uprising and the conclusion of the far bloodier Dakota uprising, the United States sought to remove the Mississippi bands to a reservation near Leech Lake. Through negotiations at Crow Wing in the winter of 1862–1863, representatives of the United States sought to convince the Mille Lacs Band to cede the reservation established under the Treaty of 1855. (McClurken Rep. at 44-48.) Despite the danger to the Band posed by nearby settlers, who were unhappy with the Lincoln Administration's resolution of the Dakota uprising, Mille Lacs Chief Shaboshkung—a signatory of the 1855 Treaty—"scuttled any discussion about the potential cession of the

[1] Pin-cites to the record reference page numbers assigned by the Court's ECF system, where available. Where the ECF system has not assigned page numbers, pin-cites reference the document's internal page numbers.

1855 Mille Lacs Reservation and the Band's removal to Leech Lake," and the Mississippi bands sought instead to negotiate directly with the Secretary of the Interior and the Commissioner of Indian Affairs in Washington, D.C. (*Id.* at 46-48; Rife Rep. at 26-27.) The Band's opposition to removal from their reservation was fueled by their belief that Commissioner Dole had promised them that, due to their aid during Hole-in-the-Day's uprising, they would not be forced to leave the Mille Lacs Reservation.[2] Prior to departing for Washington, D.C., the Ojibwe delegates met in St. Paul to strategize. In order to preserve the Mille Lacs Reservation, the delegates proposed ceding several bands' reservations on the condition that the ceding bands would be permitted to relocate to Mille Lacs. (McClurken Rep. at 48-49.)

Negotiations commenced in Washington, D.C. in February 1863. Representatives from all six Ojibwe bands were present, with Shaboshkung leading the Mille Lacs

[2] McClurken Rep. at 47-48, quoting Bishop Henry Whipple's January 22, 1863 letter to Commissioner Dole, which stated:

> The Mille Lac Indians and Bad Boy say that they held a council with you [Dole] at Fort Ripley and proved satisfactorily to you that they had resisted the outbreak and when their lives were in danger proved themselves the white mans friend. They say that you [Dole] promised them that they should be protected and rewarded, and that Hole-in-the-Day & his followers should be punished, that after Mr. White returned to Washington, he wrote to Mr. Johnson in the name of the Sec of the Interior & promised the same thing, that when Judge Usher came he promised that all their wrongs should be redressed and that Hole in the Day should be punished. They [the Mille Lacs Ojibwe] say that now they who have proved themselves true men are to lose their lands and be sent with bad Indians to a new home where these men will give them trouble.

delegation. (Rife Rep. at 28.) Secretary of the Interior John P. Usher and Commissioner Dole represented the United States. (*Id.*)

During the negotiations, Secretary Usher attempted to persuade the Mille Lacs to leave their reservation, arguing that removing to Leech Lake would offer a reprieve from flooding caused by lumbermen damming the Rum River and from interference by settlers. (McClurken Rep. at 51-52.) Usher also expressed the concern that Minnesotans had settled at Lake Mille Lacs, and that concentrating the bands there—as the delegates had discussed in St. Paul—would result in conflict. (*Id.*) Shaboshkung and the representative of the Leech Lake Band countered that the proposed reservation near Leech Lake lacked sufficient arable land for all the bands; and Shaboshkung disputed Usher's claim of white settlement at Mille Lacs. (*Id.* at 53-54.) Consistent with the delegates' discussion in St. Paul, Shaboshkung proposed enlarging the Mille Lacs Reservation and removing the Gull Lake, Rabbit Lake, Sandy Lake, Pokegama, and Rice Lake Bands to Mille Lacs. (*Id.* at 53.)

But Commissioner Dole expressed the concern that concentrating the bands at Mille Lacs would provoke nearby settlers. (*Id.* at 54.) Dole also stated that land along Lake Mille Lacs had been surveyed and sold, and that he therefore might not be able to add that land to the Mille Lacs Reservation. (*Id.*) And Dole, recognizing that he had made promises to the Mille Lacs following the 1862 uprisings, resisted the proposition that he had promised that the Band would be able to remain at Mille Lacs indefinitely:

> I have not forgotten the councils that I held with the chiefs here from Millacs. I have not forgotten all my promises to them, but they remember that the question of removal was not thought of at that time; and therefore I made no promises to them on that subject. . . . I cannot promise but what it may be necessary that the government should use its power for their removal, and

> the only question now is where can they go for a home where they can make a living. It may be barely possible that the people of Minnesota will consent to the Indians now living at Millac, to remain there . . . for the present. They may consent in the future for them to remain there forever if they will become good citizens. But I am sure that it will not give satisfaction to the people of Minnesota; however much it may be desired by the Indians if we remove them all to Millac my view of it is that at least the Gull Lake Indians will have to remove further north.

(*Id.* at 54-55.) By this speech, Dole indicated his belief that the Mille Lacs Band could safely remain at Mille Lacs for the present, that their good conduct may make it possible for them to remain indefinitely, but that settlers would not tolerate the concentration of all the Ojibwe bands at Mille Lacs. Dole also resisted the claim that he had promised the Mille Lacs they could remain on their reservation as a reward for their assistance during Hole-in-the-Day's uprising, asserting instead that he had not discussed the prospect of removal at Fort Ripley and that circumstances may require their removal from the reservation. (*Id.* at 54-55, 57; Rife Rep. at 29; Decl. of Bruce M. White [Doc. No. 237], Ex. A ("White Rep."), at 95-96.) Dole did, however, acknowledge during the negotiations that the Mille Lacs "have earned this from the Government that they might . . . be allowed to remain where they are at least for the present." (McClurken Rep. at 56.)

As negotiations continued into March 1863, the Mille Lacs delegates were adamant that they be permitted to remain permanently on their reservation, and they rejected Dole's proposal to require their removal after one or two years. (*Id.* at 55-57.) Henry Rice, a United States Senator for Minnesota, joined the negotiations on March 6. Senator Rice, who had experience negotiating with the Ojibwe, met with the Ojibwe delegates in unrecorded private sessions. (*Id.* at 57; White Rep. at 97; Rife Rep. at 32.) Following these meetings,

Senator Rice drafted a treaty and obtained signatures from the Ojibwe delegates by March 11. (White Rep. at 98.) There is no record of the negotiations following Rice's private meetings with the delegates. (*Id.* at 97; McClurken Rep. at 57.) In a March 18 letter to Bishop Henry Whipple, an advocate for Minnesota's Ojibwe, Rice wrote: "Every word in [the treaty] (save amendments made by the Senate) emanated from my pen. I consulted no one—Whites or Indians—and would not allow any changes." (White Rep. at 98.)

Article 1 of the treaty provided that "[t]he reservations known as Gull Lake, Mille Lac, Sandy Lake, Rabbit Lake, Pokagomin Lake, and Rice Lake, as described in the [Treaty of 1855], are hereby ceded to the United States, excepting one-half section of land, including the mission-buildings at Gull Lake, which is hereby granted in fee simple to the Reverend John Johnson, missionary." Treaty with the Chippewa of the Mississippi and the Pillager and Lake Winnibigoshish Bands art. 1, Mar. 11, 1863, 12 Stat. 1249 (hereinafter "Treaty of 1863"). The treaty established a new reservation near Leech Lake, provided for various payments to the bands, and obligated the United States to make certain improvements to the new reservation. *Id.* arts. 2–6. Article 12 made removal from the ceded reservations contingent on the United States fulfilling its obligations under the treaty, and provided for special treatment for the Mille Lacs Band:

> It shall not be obligatory upon the Indians, parties to this treaty, to remove from their present reservations until the United States shall have first complied with the stipulations of Articles 4 and 6 of this treaty, when the United States shall furnish them with all necessary transportation and subsistence to their new homes, and subsistence for six months thereafter: Provided, That owing to the heretofore good conduct of the Mille Lac Indians, they shall not be compelled to remove so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites.

Id. art. 12.

Shortly after signing the treaty, the Ojibwe delegates met with President Lincoln in a closed-door meeting. (White Rep. at 100-04.) Although no record of the meeting was preserved, Mille Lacs leaders repeated Lincoln's message consistently in the following decades. On December 2, 1867, Shaboshkung said:

> [W]e have remembered the words of our great father that he said to us six years ago when we went down to Washington if we would behave ourselves as we have done before that we should be let alone on the land we had before occupyed [sic] for a hundred years or a thousand years or as long as we do not commit any depredations to it . . . .

(McClurken Rep. at 49.) Again, on February 23, 1875, Shaboshkung described the meeting with Lincoln:

> While in this room many years ago, we spoke to the Commissioner and he spoke good words. The President took hold of our hands and promised us faithfully and encouraged us, and he said we could live on our reservation for ten years, and if you are faithful to the whites and behave yourselves friendly to the whites you shall increase the number of years to 100; and you may increase it to a thousand years if you are good Indians, and through our good behaviour [sic] at the time of the war, (we were good and never raised hands against the whites) the Secretary of the Interior and the President said that we should be considered good Indians and remain at Mill Lac so long as we want to.

(*Id.* at 50.) And during negotiations with federal officials in 1886, Band leaders said:

> We saw the President and Commissioner of Indian Affairs sitting in a similar manner [in council]. This man saw them to [pointing to Mon-zo-mahinay] [sic]. They said to us, "Sit quiet where you are; the Mille Lacs will be only a little less splendid than Washington." Why we were told this was because we had always been quiet and peaceable. They told us we might stay here a thousand years if we wished to. For ten thousand years we will sit quiet here. Then for one hundred years, and for one thousand years, and if there be one Mille Lacs living, then he will stay quietly by Mille Lacs.

(*Id.* (alterations in original).)

Although Senator Rice won signatures from the Ojibwe delegates and represented to Bishop Whipple that "the Indians all left [Washington] satisfied with the treaty," McClurken Rep. at 60, the Ojibwe had grave concerns about the treaty. Consistent with Shaboshkung's arguments during the negotiations, chiefs who had not attended the negotiations in Washington, D.C.—including Hole-in-the-Day—complained that the land set aside for the new reservation near Leech Lake was not suitable for all the bands required to relocate there. (Rife Rep. at 36-37; McClurken Rep. at 60-61.) And the Mille Lacs chiefs protested Senate amendments that had reduced appropriations for the implementation of the treaty. (Rife Rep. at 36-37.) Further, after rumors that the Mille Lacs negotiators had ceded their reservation reached Mille Lacs, their constituents made "strong and credible threats against the negotiators' lives." (McClurken Rep. at 61.) Even Senator Rice was dissatisfied with the location of the new reservation near Leech Lake, writing to Bishop Whipple: "I did not like the location—but it was the best that could be done." (White Rep. at 98.)

Seizing the opportunity provided by the bands' discontentment, Hole-in-the-Day traveled to Washington, D.C. with Misquadace, of Sandy Lake, to renegotiate the treaty. No record of the negotiations exists, and it is unclear why the other Ojibwe chiefs present during the 1863 negotiations did not attend. (Rife Rep. at 39.) The resulting treaty, signed May 7, 1864, superseded the Treaty of 1863 but was largely identical to it. (*Id.*; McClurken Rep. at 62.) Article 1 still provided that the bands "ceded" their reservations to the United States, but set apart a section of land at Gull Lake, Sandy Lake, and Lake Mille Lacs for Chiefs Hole-in-the-Day, Misquadace, and Shaboshkung, respectively. Treaty with the

Chippewa, Mississippi, and Pillager and Lake Winnibigoshish Bands art. 1, May 7, 1864, 13 Stat. 693 (hereinafter "Treaty of 1864"). Article 12 retained its proviso that the Mille Lacs Band would not be required to remove, conditioned on their good behavior, and added a second proviso that "those of the tribe residing on the Sandy Lake reservation shall not be removed until the President shall so direct." *Id.* art. 2. Article 2 was modified to slightly expand the Leech Lake Reservation, and a provision was added to Article 3 to pay Hole-in-the-Day $5,000 for damage to his house following the 1862 uprisings. (Rife Rep. at 39.) Finally, the payments provided in Articles 5 and 6 were increased. (*Id.* at 39-40.)

C. The 1867 Treaty

Three years later, concerns regarding encroachment on the new Leech Lake Reservation by lumber and railroad interests prompted another round of negotiations in Washington, D.C. (*Id.* at 41.) Shaboshkung and Hole-in-the-Day, along with eight other chiefs, represented the Mississippi bands. (*Id.*) Special Commissioners Lewis V. Bogy and William H. Watson and Indian Agent Joel B. Bassett represented the United States. (*Id.*) By the resulting treaty, the bands ceded much—though not all—of the Leech Lake Reservation established by the Treaties of 1863 and 1864, and a new reservation was established at White Earth. Treaty with the Chippewa of the Mississippi art. 1, Mar. 19, 1867, 16 Stat. 719 (hereinafter "Treaty of 1867"). The new reservation, located far from the nearest white settlement and containing good farming land, spanned 1,300 square miles and included the White Earth and Rice Lakes. (Rife Rep. at 42.) The Treaty of 1867 did not mention the Mille Lacs Reservation or the Article 12 proviso in the 1863 and 1864 treaties. And federal officials did not record the negotiations leading to the treaty, so it is

unclear whether the status of the Mille Lacs Reservation was discussed. (*See* McClurken Rep. at 74-75.) Regardless, in November 1868, Indian Agent Joel Bassett wrote to Commissioner of Indian Affairs Nathaniel G. Taylor that the Mille Lacs Band did not intend to remove to White Earth; rather, "[t]he Mille Lac bands of Mississippi Indians manifest a strong desire to remain on their old reservation at Millie Lac [sic]." (Rife Rep. at 43.)

D. Treatment of the Reservation Between 1867 and the Nelson Act

Shortly after the Treaties of 1863 and 1864 were signed, local settlers and government officials sought to oust the Mille Lacs Indians from their reservation. To this end, settlers and mercantile interests endeavored to manufacture evidence of the Mille Lacs Band's bad conduct, so as to invoke the removal provisions of the Article 12 proviso. (*See* McClurken Rep. at 67; Rife Rep. at 43-44; White Rep. at 118, 124, 126-29.) The Indian Office never substantiated such claims. Indeed, in 1882, Commissioner of Indian Affairs Hiram Price wrote that the Mille Lacs Band "have never violated the conditions upon which their continued occupancy of the lands in question solely depends." (Decl. of Marc Slonim ("Slonim Decl.") [Doc. No. 226], Ex. 44, at 7.) And in May 1880, the Indian Office received a petition signed by citizens of Morrison County, neighboring the Mille Lacs Reservation, "commending the Mille Lac Indians in the highest terms for their uniform good conduct." (*Id.*)

While some attempted to oust the Band by invoking the Article 12 proviso, others made claims on the reservation timberland, with varying support from federal officials. Beginning in 1871, Indian Agent Edward Smith wrote to Indian Affairs Commissioner Ely

Parker regarding illegal entries on the reservation. Smith reported that "a man, by the name of O. E. Garretson, has sent in men and cut from two to three million feet of pine logs, which are being taken to market." (McClurken Rep. at 99.) Smith requested authorization to collect payment for the lumber, writing:

> The Mill Lac reservation, though ceded by the Indians to the Government, should not yet be subject to entry; for the Indians not having been ordered or notified to leave, are, according to their treaty, yet entitled to all their rights upon it.

(*Id.*) And Smith noted the Band's insistence "that their lands be not thrown open to entry, of any kind, so long as they remain, and that they be permitted to receive, as compensation for the timber cut unlawfully upon their reservation, whatever stumpage may be awarded by the Surveyor." (*Id.* at 100.)

Two months after learning that lumber had been taken from the reservation, Smith discovered that lumbermen had also claimed title to land within the reservation's boundaries. (*Id.*) In 1870, the Surveyor General of Minnesota had authorized a survey of the Mille Lacs Reservation and sent the bill to the Department of the Interior. (*Id.*) When the Department paid the bill and the plat of the survey was filed in the Taylor Falls Land Office, the Register and Receiver at Taylor Falls had interpreted the payment and plat filing as authorization to open the reservation to public entry. (*Id.*) Smith again wrote to Commissioner Parker:

> In this way, without permission of any sort from the Department, settlers and lumber men are taking possession of this Indian Reserve. The consequence is a double wrong. (1) The Indians are dispossessed without being removed, and (2) an injustice is done the public in not being allowed an equal opportunity to enter these lands, the very few men who in some way had

> knowledge of the time when entries would be received having been ready to take the lands.
>
> About one fourth of these lands are taken by scrip . . . which will be shown to be largely fraudulent. The other entries are under preemptive claims for lumbering purposes and preparations are making for extensive lumbering next winter.

(*Id.* at 101.) Smith requested, "in the name of these Indians," that all the entries "be canceled as without authority of law, and that I may be authorized to protect this reservation [Mille Lacs] from any encroachments until the Indians are removed." (*Id.* (alteration in original).)

Commissioner Parker then wrote to the Commissioner of the General Land Office, stating that "no part of said reservation should be considered as subject to entry or sale as public lands." (*Id.*) The General Land Office instructed officials at Taylor Falls:

> You are now informed that these lands are still occupied by the Indians and are not subject to disposal, and you are requested to give public notice by advertisement in a newspaper of general circulation in that neighborhood of the above fact and also that all settlements and entries thereon are illegal and will not be recognized by this office . . . you will allow no Entries on these lands until so ordered by this office.

(*Id.*) And in September 1871, the United States Attorney General ordered the United States District Attorney for Minnesota to prosecute trespassers on the reservation. (*Id.* at 103.)

Throughout the controversy in 1871, federal officials conveyed their understanding that the Band retained exclusive rights to the Mille Lacs Reservation. Agent Smith wrote to the Governor of Minnesota: "their Reservation at Mill Lac, their right to which has never been relinquished or in any way extinguished, has been seized by white men and covered

with fraudulent scrip and preemption claims equally fraudulent . . . ." (*Id.* at 104.) Secretary of the Interior Columbus Delano, in a September 4, 1871 letter to Agent Smith, wrote:

> This Department has no information leading to the belief that [the Article 12] proviso has ever been violated and is therefore of the opinion that the Mille Lac Indians are entitled to remain at present unmolested on their reservation and that their occupancy cannot be disturbed until they shall interfere with or in some manner molest the persons or property of the whites.

(*Id.* at 105.)

Although the Mille Lacs Reservation remained closed to entries for the next twenty years, timber trespasses continued. As Agent Smith aptly predicted at the end of 1871:

> Unfortunately for these Indians, their reservation is rich in pine lands, which makes them the prey of lumber-dealers, and a strong pressure is kept up on all sides to secure their early removal. . . .
>
> There is little doubt that, owing to the presence of this valuable pine, the efforts on the part of the whites to get possession will not be relaxed, and it cannot be long before a sufficient pretext will be found to enforce their removal.

(Slonim Decl., Ex. 22, at 1005–06.) Smith therefore opined that "the best interest of the Indians will be promoted by their early removal to the White Earth reservation," and that appropriations should be made to develop the White Earth Reservation for the Band. (*Id.* at 1006.) To fund the development efforts, Smith suggested—"as the easiest way out of the difficulties in which this reservation is involved"—that the Mille Lacs Reservation's pine be sold, "leaving the fee in the Government and the right of occupying in the Indians until their removal to White Earth." (*Id.*) According to Smith, "[t]he Indians would readily consent to the immediate sale of the pine for the benefit of their Great Father, and when the reservation is once laid bare of its tempting wealth it will be no longer in demand for

pretended settlement . . . .” (*Id.*) As an alternative to removal to White Earth, Smith suggested giving the Band “in severalty so much of the reservation as they can occupy,” and using the proceeds from the sale of the reservation’s pine to fund agricultural development and schools. (*Id.*)

In 1872, Congress appropriated funds to finance the Mississippi Chippewas’ removal to White Earth. Act of May 29, 1872, 17 Stat. 165, 189 (“That the Secretary of the Interior be, and he hereby is, authorized to expend, for the removal of the Chippewa Indians to *to* [sic] the White Earth Lake reservation, in Minnesota, for their subsistence for six months after their removal, and for improvements on the said reservation, the unexpended balance of appropriations heretofore made . . . .”). Approximately twenty-five Mille Lacs Ojibwe moved to White Earth following this appropriation. (McClurken Rep. at 110.)

After Smith was appointed as the Commissioner of Indian Affairs in 1873, he reiterated his suggestion that either title to reservation land be returned to the Band, or the Mille Lacs relocate to White Earth. In his 1873 report, Smith wrote:

> The Mille Lac band of Chippewas in Minnesota remains in its anomalous position. They have sold their reservation, retaining a right to occupy it during good behavior. With this title to the soil it is not deemed expedient to attempt permanent improvements at Mille Lac, unless a title to the reservation can be returned to them on condition that they surrender to Government [sic] all moneys acquired in consideration of their cession of the Mille Lac reservation. If this cannot be done, their Indians should be notified that they belong at White Earth, and be required to remove. In their present location, on its present tenure, nothing can be done looking toward their civilization.

(Slonim Decl., Ex. 24, at 12.) In 1875, a Mille Lacs delegation led by Shaboshkung met with Smith in Washington, D.C. to discuss the state of the Mille Lacs Reservation.

Shaboshkung requested assistance in developing the reservation and providing for its residents. (*Id.*, Ex. 27, at 1.) Smith argued that the Band ought to move to White Earth, explaining:

> The difficulty about your staying at Mille Lac is that you have no ownership in the land. A white man never puts up a house on land that does not belong to him. . . . You have sold your ownership in that country, and something ought to be done, and you ought to go where you can have land that is your own forever.

(*Id.* at 2.) Shaboshkung reiterated the Band's understanding of the promises made by Dole and Lincoln years before, stating:

> While in this room many years ago, we spoke to the Commissioner and he spoke good words. The President took hold of our hands and promised us faithfully and encouraged us, and he said we could live on our reservation for ten years, and if you are faithful to the whites and behave yourselves friendly to the whites you shall increase the number of years to 100; and you may increase it to a thousand years if you are good Indians, and through our good behaviour [sic] at the time of the war, (we were good and never raised hands against the whites) the Secretary of the Interior and the President said that we should be considered good Indians and remain at Mill Lac so long as we want to.

(*Id.*) Regarding the Treaty of 1863, Shaboshkung stated that "[w]e signed the paper because we were asked to sign with the other Indians," but protested that the document did not reflect their understanding of the agreement: "[W]e do not understand. It is very strange to us that whenever anything is done before us we think it is allright [sic], but instead after getting out of the Office, something more was added of which we knew nothing." (*Id.*, Ex. 28, at 2-3.)

Smith responded that the promises made to the Band were not recorded in the Treaties of 1863 and 1864, and that only the written text considered by Congress mattered. (*Id.*, Ex. 27, at 3; *id.*, Ex. 28, at 1-2.) According to Smith:

> The Mille Lac[s] gave up [their reservation] and took the right in White Earth where there was to be land broken for them and houses built, but they were not to be obliged to go so long as they did not interfere with or trouble the persons or property of white people. Now that is exactly the state of things. This is the way you lost you[r] right at Mille Lac. You have not lost it so long as you behave yourself and nobody can find any fault with you. But you see what the danger is, and it is growing more and more every year.

(*Id.*, Ex. 28, at 2.) That "danger," according to Smith, was that despite the Band's good behavior overall, individual members' misbehavior rendered the Band "liable . . . at any time to have a bad name gotten up against you; and then no one knows what will come as to your staying there." (*Id.*, Ex. 27, at 3-4.) Smith concluded that unless Congress ordained to shore up the Band's title to reservation land, the best course was for the Mille Lacs to relocate to White Earth. (*Id.*; *id.*, Ex. 28.) The Mille Lacs left Washington, D.C. unconvinced, but with promises of aid from Smith. (*Id.*, Ex. 28.)

In 1876, the lumbermen's scheming to obtain the reservation's timber continued. Amherst Wilder and future Senator Dwight Sabin arranged to hire settlers to make a preemption entry on reservation land and, after receiving a rejection from the local land office, appeal the decision to Washington. While their attorneys assisted in Washington, William Folsom, a Minnesota legislator, would push for the Band's removal. (White Rep. at 160-63.) Pursuant to the Sabin-Wilder scheme, Folsom's son made such an entry, which was rejected by the local land office and the General Land Office on the ground that the reservation was not open to entry. (*Id.* at 165-66.)

Secretary of the Interior Zachariah Chandler overturned the agencies' decisions. Construing the Treaties of 1863 and 1864, Chandler concluded: "All of the conditions of said treaties having been complied with by the United States, the title to said lands now rests absolutely in the United States." (Slonim Decl., Ex. 32, at 2.) Regarding the Article 12 proviso, Chandler reasoned that "[u]nder this proviso it is true that, so long as said Indians do not interfere with the persons or property of the whites, they cannot be compelled to remove; but it by no means gives them an exclusive right to the lands, nor does it, in my judgment, exclude said lands from sale and disposal by the United States." (*Id.* at 3.) Chandler further explained that "[i]t was anticipated evidently that these lands would be settled upon by white persons, that they would take with them their property and effects, and it was provided that so long as the Indians did not interfere with such white persons or their property, they might remain, not because they had any right to the lands, but simply as a matter of favor." (*Id.* at 3-4.) Accordingly, Chandler ordered that the reservation lands be opened to entry. (*Id.* at 4.) But, because the Mille Lacs Band still occupied the land and no appropriation was available to immediately remove them to White Earth, Chandler suspended execution of his decision until the close of the next session of Congress. (*Id.*) The Chandler decision did not purport to reverse the cancellation of previous entries pursuant to Secretary Delano's intervention in 1871.

Congress did not act on Chandler's decision. (White Rep. at 176.) But, before the Congressional session closed, Carl Schurz succeeded Chandler as the Secretary of the Interior. (*Id.*) The day before Congress was to adjourn, and Chandler's decision would thereby become effective, Schurz sent a telegram to the Taylor Falls Land Office

instructing it not to permit any entries on the Mille Lacs Reservation pursuant to Chandler's decision until Schurz issued further guidance. (*Id.* at 177.) Several days later, Schurz sent additional orders forbidding further entries until "the result of the action of Congress in relation to the right of the Indians in question to occupy the tract of country known as the Mille Lac Reservation . . . shall have been determined." (*Id.*) Despite this directive, in March 1879, the Taylor Falls Land Office permitted 285 entries, covering 24,376.77 acres—more than a third of the Mille Lacs Reservation's land. (*Id.* at 177-78.) This land—obtained using powers of attorney executed by soldiers, most of whom lived outside of Minnesota—was ultimately transferred to Senator Sabin and Amherst Wilder. (*Id.* at 180.) Two months later, Secretary Schurz wrote to the Taylor Falls Land Office cancelling all 285 entries as "having been allowed in contravention of the specific order of the Department, given with a view to afford opportunity for the adjustment of the rights of the Indians in the reservation." (Slonim Decl., Ex. 44, at 14.)

In July 1880, Acting Indian Affairs Commissioner E.J. Brooks responded to a petition seeking assistance against the lumbermen's persistent efforts to claim reservation pine land:

> I have to say, that there is no law authorizing the sale or entry of any of the lands embraced within the Mille Lacs reservation, and in the absence of such law no such sale or entry can be made.
>
> It will be seen, therefore, that the apprehensions of the Indians, and of the people as well, regarding the disposition of the lands referred herein, are not well grounded.

(*Id.*, Ex. 39; *see also id.*, Exs. 36-37 (describing the petition).) Similarly, in a May 1882 report, Indian Affairs Commissioner Hiram Price analyzed the Treaties of 1863 and 1864,

and concluded that the Article 12 proviso's right of occupancy was exclusive: "The Indians were there, and until they were removed either by their own consent or by reason of the forfeiture of their right of occupancy the whites manifestly must keep out." (*Id.*, Ex. 44, at 4.)

Despite Price's 1882 report, the Department of the Interior again changed course. Secretary Henry M. Teller restored Chandler's view of the Article 12 proviso. (*Id.*, at 10-12.) Teller reasoned that the proviso "gave to this band of Indians the right to remain on the reservation until they should voluntarily remove therefrom," but "[w]hatever title they had passed by this treaty to the United States, nothing remained in the Indians." (*Id.* at 11.) Teller noted that the parties to the treaty contemplated the band's voluntary removal to the reservation first established near Leech Lake, and later relocated to White Earth; but the Mille Lacs "have refused to do so and still refuse." (*Id.*) In Teller's view, the "interests of the Indians undoubtedly require their removal" but, under the Article 12 proviso, the United States could not compel removal absent the "clearest proof" that the Band had violated the proviso. (*Id.*) Because such proof did not exist, "it must be presumed that the Indians are rightfully on the reservation and entitled to the protection of the Government in all that was given them by the proviso in article 12." (*Id.*) Yet Teller concluded that the right of occupancy did not extend to the entire reservation:

> The question is whether they may occupy the whole reservation or only the part that is necessary to make good the promise of the proviso of section 12. It is not claimed that they originally occupied the entire reservation, or that it is now necessary to exclude white settlers therefrom to keep in good faith the treaty with them. I conclude that whatever they actually occupied in 1863 they are entitled now to occupy; if they have increased the area of their

> occupation they are entitled to that, if such occupation was prior to the occupancy by white people.
>
> The reservation was public land open to homestead and pre-emption claims, subject only to the rights of the Indians to reside thereon and not to remove therefrom until they wish so to do. Good faith required the Government to reserve for them as much land as they needed. This could not be more fairly determined than by conceding to them all they had previously occupied.

(*Id.*) Teller accordingly directed Commissioner Price to ascertain the amount of land occupied by the Band, so that the remainder could be occupied by settlers who had, in good faith, attempted settlement. (*Id.* at 11-12.) Following this decision, Teller reinstated Sabin and Wilder's 1879 entries—but not those canceled in 1871. (*Id.* at 16.)

In 1884, the House of Representatives requested a report on the Mille Lacs Reservation. After receiving Price's 1882 report and Teller's decision, Congress declared "[t]hat the lands acquired from the . . . Mille Lac band[] of Chippewa Indians on the White Earth reservation [sic[3]], in Minnesota, by the [Treaty of 1864] shall not be patented or disposed of in any manner until further legislation by Congress." Act of July 4, 1884, 23 Stat. 76, 89. The General Land Office again closed the Mille Lacs Reservation to entry. (*See* Slonim Decl., Ex. 53, at 541.)

[3] Although the Act of July 4, 1884 referred to the "White Earth reservation," Congress clearly intended to address the Mille Lacs Reservation, given that the White Earth Reservation was in fact established by the Treaty of 1867. (*See* Slonim Decl., Ex. 53, at 541 (1887 letter from Acting Interior Secretary Henry Muldrow, noting that "[t]he words 'on the White Earth reservation' in said act are repugnant to its otherwise clearly expressed intent and meaning and must yield thereto in construction" and concluding that the Act barred further entries on the Mille Lacs Reservation).)

Then, in May 1886, Congress authorized the Secretary of the Interior to "negotiate with the several tribes and bands of Chippewa Indians in the State of Minnesota for such modification of existing treaties with said Indians and such change of their reservation as may be deemed desirable by said Indians and the Secretary of the Interior." Act of May 15, 1886, 24 Stat. 29, 44. The Secretary appointed the Northwest Indian Commission to conduct these negotiations. The Commission reached agreements with the Chippewa of the White Earth, Leech Lake, Cass Lake, Lake Winnebagoshish, and White Oak Point Reservations, and the Gull Lake and Gull River Bands, providing for the consolidation of these bands at White Earth, the allotment of land at White Earth, and the sale of their prior reservations. (Slonim Decl., Ex. 52, at 1.) A second agreement with the Chippewa at the Red Lake Reservation provided for the sale of some of that reservation's land, and authorized the band to take allotments on the remaining land in the future. (*Id.* at 2.)

The Commission similarly held a council with the Mille Lacs Band, where "[e]very possible argument was used to influence their minds in favor of the movement [to White Earth]." (*Id.* at 17.) The Commission reported: "Their refusal was absolute and unqualified." (*Id.* at 18.) Shaboshkung again repeated the Mille Lacs account of the 1863 negotiations, stating that President Lincoln and Commissioner Dole

> said to us, "Sit quiet where you are; the Mille Lacs will only be a little less splendid than Washington." Why we were told this was because we had always been quiet and peaceable. They told us we might stay here a thousand years if we wished to. For ten years we will sit quiet here. Then for one hundred years, and for one thousand years, and if there be one Mille Lacs living, then he will stay quietly by Mille Lacs.

(*Id.* at 30.) Chief Mozomany echoed Shaboshkung's arguments: "Our young men have kept their part of the contract—to live in peace with the whites. . . . Is the one thousand years up that the Great Father has sent you here?" (*Id.*) Following the Band's refusal to remove to White Earth, Secretary of the Interior Lucius Lamar directed the Commission to try again. (*Id.*) But the Band persisted in its refusal to remove—except for a dozen representatives, who agreed on behalf of fifty Band members to remove to White Earth. (*Id.* at 19, 33-37.)

In 1888, foreshadowing the passage of the Nelson Act and echoing the Band's requests in years past, the Band petitioned Washington to permit the Band to take allotments at Mille Lacs. (*Id.*, Ex. 54, at 6-9.) The petition recalled the Band's resistance against Hole-in-the-Day's uprising in 1862, and explained the Band's desire to remain at Mille Lacs. (*Id.* at 6-7.) The Band wrote:

> [W]e are firm in our determination to remain at Mille Lac, and shall ask our Great Father to . . . sell the timber that we have no use for at Mille Lacs, or in some other way assist us to make ourselves more comfortable homes where we are. . . .
>
> We are told that we ceded our reservation at Mille Lac to the United States in 1863 and that we now only have the right to occupy it during good behavior. We never intentionally ceded all our lands at Mille Lac to the United States; we never intended to go away from our home at Mille Lac but if our Great Father shall decide that we have ceded them away and that we still have only the right of possession left and as it will make but little difference to him where they are, and a great deal of difference to us, we would respectfully ask you to let us remain at Mille Lac and give to us in severalty, the lands on this reservation, not disposed of . . . .

(*Id.* at 7.) One of the County's experts, Dr. Paul Driben, points to this petition as the first indication that the Band desired to give up its reservation, having concluded that

relinquishing the reservation in exchange for allotments was the only way to prevent settlers' and lumbermen's persistent encroachment. (*See* Decl. of Paul Driben ("Driben Decl.") [Doc. No. 259], at ¶ 5; *id.*, Ex. A ("Driben Rep."), at 57; Slonim Decl., Ex. 162 ("Driben Dep."), at 62, 128; *but see* Decl. of Randolph Valentine [Doc. No. 236], Ex. B ("Valentine Rebuttal"), at 16-17 (opining that the 1888 petition "implies a desire to retain their reservation, not to rid themselves of it").)

E. The Nelson Act

1. Legislative History

In March 1888, the U.S. House of Representatives' Committee on Indian Affairs issued a report regarding the agreements obtained by the Northwest Indian Commission and a proposed bill (which later became the Nelson Act). *See* H.R. Rep. No. 50-789 (1888) [Doc. No. 229-3]. The report summarized all the "reservations and unceded lands" in Minnesota that would be affected by the bill, and included the Mille Lacs Reservation in its summary. *Id.* at 2. But the Committee also stated that "[t]he Mille Lac Reservation has long since been ceded by the Indians, in fee, to the United States, with a right reserved to the Indians to occupy the same as long as they are well behaved." *Id.*

The Committee recommended that "[a]ll the Indians on the small outlying and scattered reservations" be removed to the White Earth Reservation and receive allotments there. *Id.* at 6. To carry out this objective, among others, the Committee proposed a bill providing for the sale of reservation land and the establishment of a "permanent interest-bearing fund for all the Chippewa Indians in common," as well as the concentration of Minnesota's Chippewa at White Earth. *Id.*

On the House floor, however, the proposed bill was amended to allow Minnesota's Chippewa to take allotments on their existing reservations, rather than at White Earth. 19 Cong. Rec. 1887-88 (1888) [Doc. No. 229-5]. Moreover, when Senator Sabin brought the bill to the Senate floor, a new provision was added, which barred the sale or disposal of "any tract upon which there is a subsisting valid preemption or homestead entry" and permitted such entries to proceed to patent. 19 Cong. Rec. 9129-32 (1888) [Doc. No. 229-6]. Although this provision was not in earlier versions of the bill, Senator Sabin apparently sought to include this language in order to protect his and Wilder's personal entries on the Mille Lacs Reservation. (McClurken Rep. at 181-82; White Rep. at 248-49.)

2. Statutory Provisions

In 1889, Congress approved the Nelson Act. The Nelson Act established a commission to negotiate with Minnesota's Chippewa "for the complete cession and relinquishment in writing of all their title and interest in and to all the reservations of said Indians in the State of Minnesota, except the White Earth and Red Lake Reservations . . . , for the purposes and upon the terms hereinafter stated." Act of Jan. 14, 1889 ("Nelson Act") § 1, 25 Stat. 642. The cession was contingent on the written assent of two-thirds of the male adults of each band and the President's approval. *Id.* Further, the President's approval would "be deemed full and ample proof of the assent of the Indians, and shall operate as a complete extinguishment of the Indian title . . . for the purposes and upon the terms in this act provided." *Id.*

Section 3 of the Act provided that, after the cessions had been obtained, approved, and ratified, all Minnesota Chippewa, except those on the Red Lake Reservation, would be

removed to White Earth and then receive allotments there. *Id.* § 3. However, in line with the House's revisions, the Act permitted the Chippewa to remain on their reservations:

> *Provided further*, That any of the Indians residing on any of said reservations may, in his discretion, take his allotment in severalty under this act on the reservation where he lives at the time of the removal herein provided for is effected, instead of being removed to and taking such allotment on [the] White Earth Reservation.

Id.

Under Sections 4 and 5, the ceded lands were to be surveyed and categorized as "pine lands" or "agricultural lands," and the "pine lands" were to be sold for at least their appraised values. *Id.* §§ 4–5. Section 6 provided for the disposal of unallotted "agricultural lands" under the homestead laws, subject to Senator Sabin's proviso forbidding the disposal of land with "subsisting, valid, pre-emption or homestead entr[ies]." *Id.* § 6. The Act created an interest-bearing "permanent fund" within the Treasury Department, into which "all money accruing from the disposal of said lands"—after deducting "all the expenses of making the census, of obtaining the cession and relinquishment, of making the removal and allotments, and of completing the surveys and appraisals"—would be deposited. *Id.* § 7. Some of the interest accruing on that fund would be distributed to the Chippewa, and some would be "devoted exclusively to the establishment and maintenance of a system of free schools among said Indians." *Id.* The Act also permitted Congress to appropriate the fund's principal "for the purpose of promoting civilization and self-support among the said Indians." *Id.*

3. The Nelson Act Agreement

After the passage of the Nelson Act, President Harrison appointed Senator Henry Rice, Martin Marty, and Joseph Whiting to the commission described in the Act (the "Chippewa Commission"). H.R. Exec. Doc. No. 51-247, at 1 (1890) [Doc. Nos. 230 & 230-1]. On October 2, 1889, the Chippewa Commission began negotiations with the Mille Lacs Band at their reservation. *Id.* at 163. After Whiting read the Nelson Act to everyone present, Rice "took charge" of the negotiations. (McClurken Rep. at 155.) Rice turned to the Treaty of 1863 and confirmed that the Band's understanding of that treaty was correct: "the understanding of the chiefs as to the treaty was right. Here is the acknowledgment of the Government that you were right, that 'you have not forfeited your right to occupy the reservation.'" H.R. Exec. Doc. No. 51-247, at 164. Later, Rice explained that the Band's "acceptance of this act will not affect these old matters at all, or weaken your chances of obtaining hereafter your dues, but, on the contrary, leaves you in a stronger position than before." *Id.* at 165. Rice then delivered an "elaborate explanation" of the Nelson Act, and Mozomany reported that "this understanding is perfect." *Id.* at 165–66.

Later in the negotiations, when discussing allotments, Maheengaunce stated that he understood all that Rice had said and that the Band would take allotments on the Mille Lacs Reservation: "as you have uttered the words of the law, stating that an Indian can take his allotment on the reservation where he resides, we make known to you that we wish to take

our allotments on this reservation, and not be removed to White Earth." *Id.* at 168.[4] Toward the end of the negotiations, Rice confirmed that if the Band agreed to the Act, they would receive allotments at Mille Lacs. *Id.* at 171. In urging Band members to assent to the agreement, Maheengaunce explained that it was "a settlement of all our past difficulties. . . . They tell us we are going to stay here forever, and that they are going to make allotments here to us." *Id.* Similarly, Kegewdosay told Rice that "we have heard from your own mouth, from the Commission . . . that we are going to have our allotments on our old reservation where we have resided." *Id.* at 174.

The Mille Lacs Band then signed the Nelson Act Agreement proffered by the Commission. *Id.* That Agreement provided that the Indians "occupying and belonging to the Mille Lac Reservation under and by virtue of a clause in the twelfth article of the [Treaty of 1864]" accept and consent to the Nelson Act "and each and all of the provisions thereof." *Id.* at 45. The Band agreed to "grant, cede, relinquish, and convey to the United States all of our right, title, and interest in and to" lands at White Earth and Red Lake not required to make the allotments provided for by the Act. *Id.* at 45–46. And the Band further agreed to "hereby forever relinquish to the United States the right of occupancy on the Mille Lac Reservation, reserved to us by the twelfth article of the [Treaty of 1864]." *Id.* at 46.

[4] Throughout the negotiations, Band members repeatedly referred to the land as their "reservation." *See generally id.* at 166–70.

One week after the Band signed the Nelson Act Agreement, Rice sent a letter to T.J. Morgan, the Commissioner of Indian Affairs, advising him that the Band "assented to the propositions offered them" and "signified their intention to remain where they are, and will take allotments upon that reservation." (Slonim Decl., Ex. 64, at 2.) In a December 1889 report to Morgan, the Chippewa Commission stated that the 1863 and 1864 treaties "confirmed the belief that [the Mille Lacs] were not only permanently located, but had the sole occupancy of the reservation." H.R. Exec. Doc. No. 51-247, at 22.

On March 4, 1890, President Harrison approved the Nelson Act Agreement, noting that the Nelson Act "authorized any Indian to take his allotment upon the reservation where he now resides," and observing that the Chippewa Commission reported that "quite a general desire was expressed by the Indians to avail themselves of this option." *Id.* at 1–2.[5]

F. The Mille Lacs Reservation After the Nelson Act

1. Interior Secretary Noble's Decisions

After the passage of the Nelson Act, settlers continued to enter the Mille Lacs Reservation. The first in a trio of decisions from Interior Secretary John Noble accelerated

[5] The Court also notes that, shortly after the President approved the Nelson Act Agreement, Congress passed two laws apparently acknowledging the continued existence of the Mille Lacs Reservation. First, the Act of July 22, 1890, provided a right-of-way for "construction of a railroad through the Mille Lacs Indian Reservation," and the right to take 320 acres of land "in said reservation" for railroad purposes "upon paying to the United States for the use of said Indians such sum" as the Secretary of the Interior may direct. 26 Stat. 290. Second, a reservoir-damage appropriation was enacted on August 19, 1890, which provided for payment to the "Mississippi band, now residing or entitled to reside on the White Earth, White Oak Point, and Mille Lac Reservations . . . ." 26 Stat. 336, 357.

these entries, frustrating attempts to allot Mille Lacs Reservation lands to Band members for nearly three decades. (McClurken Rep. at 194.) In January 1891, Secretary Noble concluded that, following the Nelson Act Agreement, homestead entries suspended by the 1884 Act could proceed to patent. *Amanda J. Walters*, 12 Pub. Lands Dec. 52 (1891) [Doc. No. 231-3]. In so holding, Noble stated that the Mille Lacs Reservation was not a "reservation" on which the Indians could take allotments because, in his view, the Band ceded the reservation in 1863 and Mille Lacs was "the very land referred to and intended to be covered by" Sabin's § 6 proviso preserving entries made prior to the Nelson Act. *Id.* at 55–56. Noble did not, however, address lands within the Mille Lacs Reservation that were not subject to preexisting claims under the § 6 proviso. (*See* McClurken Rep. at 194.)

Then, in September 1891, Secretary Noble decided *Northern Pacific Railroad Co.*, a case involving railroads seeking to claim lands on the Mille Lacs Reservation. 13 Pub. Lands Dec. 230 (1891) [Doc. No. 231-4]. In that case, Noble recognized that the Article 12 proviso's right of occupancy was "a real and substantial interest or right in the enjoyment of which the Indians were entitled to protection," and was therefore an "appropriation as excepted [the lands] from [the railroad withdrawal] orders." *Id.* at 234. Accordingly, he held that reservation lands that did not have pre-existing claims, and were therefore not covered by the § 6 proviso, could only be disposed of under the Nelson Act. *Id.*

Finally, in April 1892, Noble considered the tension between *Northern Pacific Railroad Co.* and a departmental letter providing that reservation lands should be disposed of under the general land laws. Noble held that *Northern Pacific Railroad Co.* was

controlling, and required that reservation lands be disposed of according to the provisions of the Nelson Act. *Mille Lac Lands*, 14 Pub. Lands Dec. 497, 497–98 (1892) [Doc. No. 231-9]. Subsequently, the General Land Office determined that all homestead and preemption entries made after the Nelson Act's passage in 1889 "must be disallowed and cancelled." *See* H.R. Rep. No. 52-2321, at 2 (1893). Between the *Walters* and *Mille Lac Lands* decisions, entries were made covering 31,659 of the reservation's approximately 61,000 acres. H.R. Rep. No. 53-149, at 1 (1893).

2. 1893 Resolution

In the wake of the *Mille Lac Lands* decision, Congress determined that "prompt action" was needed to protect the preemption and homestead entries that settlers had made on the Mille Lacs Reservation as a result of the *Walters* decision. H.R. Rep. No. 52-2321, at 1-2. The House and Senate therefore approved a resolution to legitimize the entries that occurred between the *Walters* and *Mille Lac Lands* decisions. (*See* McClurken Rep. at 206-07; White Rep. at 319.) The 1893 Resolution confirmed "all bona fide pre-emption or homestead filings or entries allowed for lands within the Mille Lac Indian Reservation" between the dates of the *Walters* and *Mille Lac Lands* decisions, and permitted such entries to proceed to patent. J. Res. 5, 53rd Cong., 28 Stat. 576 (1893).

3. 1898 Resolution

Throughout the 1890s, the U.S. government made repeated attempts to induce Band members to leave the Mille Lacs Reservation, such as by withholding annuity payments from those who refused to remove to White Earth. (*See* McClurken Rep. at 210-13.) Nevertheless, most remained at the Mille Lacs Reservation, and they continued to seek

allotments there. (*Id.* at 219, 224-25.) They also continued to express their desire to remain on the Reservation. For example, in an October 1894 letter addressed to "Our Great Father in Washington," Band leaders—who wrote as the Great Father's "Children who reside on the Mille Lac Reservation"—stated that they "never consented to give up our lands" and proposed "to [retain] possession of them until a court of competent jurisdiction shall decide that we have no legal right to [retain] possession of our reservation." (Slonim Decl., Ex. 96.) Further, in June 1897, the Band requested that federal officials allot "unpatented lands of the Mille Lacs reservation, amounting to several thousand acres," to Band members. (*See* McClurken Rep. at 223-25.) Throughout this time period, however, settlers continued to claim reservation lands. (*Id.* at 216-17.)

In 1897 and 1898, Congress considered whether settlers could make entries and obtain patents on the reservation's lands. (*See id.* at 227-30.) In 1898, Binger Hermann, the Commissioner of the General Land Office, wrote that the last clause of the Nelson Act Agreement, which relinquished the Band's right of occupancy under the Treaty of 1864, was "not necessary" to extinguish title to the lands—"the words occurring before in the agreement being sufficient for that purpose." S. Rep. No. 55-1007, at 3 (1898). Consequently, Hermann asserted that the Band "elected . . . not to take the allotments on what was their own particular reservation," and therefore they could "only properly take" allotments on the White Earth Reservation. *Id.* He added that the remaining land at Mille Lacs "is insufficient in quantity and unfit in quality for the purpose of allotment." *Id.*

Thereafter, Congress approved a Joint Resolution providing that "all public lands formerly within the Mille Lac Indian Reservation . . . are hereby, declared to be subject to

entry by any bona fide qualified settler under the public land laws." J. Res. 40, 55th Cong., 30 Stat. 745 (1898). The 1898 Resolution further provided that certain preemption filings and all homestead entries or applications "shall be received and treated in all respects as if made upon any of the public lands of the United States subject to preemption or homestead entry." *Id.* In a proviso, Congress "perpetually reserved" a few lots "as a burial place for the Mille Lac Indians, with the right to remove and reinter thereon the bodies of those buried on other portions of said former reservation." *Id.*

4. 1902 Act

Although the Nelson Act offered the Band the right to individual allotments on the Mille Lacs Reservation, the record indicates that only one Band member successfully obtained an allotment at Mille Lacs prior to 1925. (White Rep. at 324.) Reflecting their frustration with their inability to obtain allotments, Band members wrote a letter in March 1900 to the Secretary of the Interior, and stated that the "reservation was given to our band as a reward for its loyalty to the Government, and its services in suppressing the Indian uprising in Minnesota in 1862," but "through the influence of pine syndicates it was opened to settlement in violation to [sic] treaty stipulations." (Slonim Decl., Ex. 126, at 3.) The Band explained its view of the Nelson Act and Agreement: "In 1889, an act was passed by Congress under which we ceded our rights to the reservation to occupy it as a band, but reserved the right to take allotments in severalty thereon." (*Id.*) But "[b]efore we had allotments given to us our reservation was again opened to settlement, and not only the vacant lands were entered but those upon which our houses were built and our gardens located. Since then we have been driven out of our houses by the settlers who claim the

lands upon which they are located." (*Id.*) Despite the deprivation of their lands and the Government's failure to grant allotments pursuant to the Nelson Act, the Band reported that its "young men have stubbornly refused to leave the reservation and insist upon the fulfillment of the agreement of 1889, in relation to allotting lands to them at Mille Lac." (*Id.* at 3-4.)

In early 1900, the Senate Committee on Indian Affairs considered a bill to compensate Band members for improvements to the Mille Lacs Reservation and permit them to take allotments at White Earth. (Slonim Decl., Ex. 127, at 2.) Indian Affairs Commissioner William Jones, who supported the bill, wrote that the Band "relinquished their right of occupancy on said reservation under" the Nelson Act, but that the white settler entries permitted prior to the Nelson Act and pursuant to the 1898 Resolution "had the effect of practically exhausting every acre of land on the reservation available for allotment to the Indians." (*Id.*) Consequently, "the Indians must . . . of necessity either remove from the reservation or secure no lands." (*Id.*) But a minority of the committee emphasized that "[o]ut of the tangle of verbiage of which treaties, laws, and rulings are composed[,] the Indians of the Mille Lac Reservation are able only to realize that somewhere in their dealings with the white race bad faith has been extended to them." (*Id.* at 5-6.) Consequently, the minority suggested instead that the Government purchase reservation lands occupied by settlers, and allot those lands to Band members. (*Id.*)

Although the bill did not pass, it was reintroduced in 1902, with an increased appropriation and a proviso permitting Band members who acquired lands within the reservation to remain at Mille Lacs. The House Committee Report regarding the

reintroduced bill echoed the previous Senate minority's view that the Band had been treated poorly, but supported the bill so that the Band, "from whom the land has been taken, perhaps with their consent but without their knowledge, may receive satisfactory compensation, in order that they may the more willingly vacate the reservation which has been taken from them by various treaties." (*Id.*, Ex. 135, at 7.) The Committee offered its support despite its conclusion that the appropriation for the bill, split among the 1,200 Band members then residing on the reservation, amounted to "a sum of slight consequence." (*Id.*) As enacted, the Act provided:

> For payment to the Indians occupying the Mille Lac Indian Reservation . . . the sum of forty thousand dollars, or so much thereof as may be necessary, to pay said Indians for improvements made by them, or any of them, upon lands occupied by them on said Mille Lac Indian Reservation . . . upon condition of said Indians removing from said Mille Lac Reservation: *Provided*, That any Indian who has leased or purchased any Government subdivision of land within said Mille Lac Reservation . . . shall not be required to move from said reservation . . . . *And provided further*, That this appropriation shall be paid only after said Indians shall, by proper council proceedings, have accepted the provisions hereof . . . and said Indians upon removing from said Mille Lac Reservation shall be permitted to take up their residence and obtain allotments in severalty either on the White Earth Reservation or on any of the ceded Indian reservations in the State of Minnesota on which allotments are made to Indians.

Act of May 27, 1902, 32 Stat. 245, 268.

Indian Inspector James McLaughlin and Indian Agent Simon Michelet met with Band members in August 1902 to procure their assent to the 1902 Act. McLaughlin asked the Band members whether they were "willing to accept a fair appraisement for improvements that you have made upon certain locations here, and remove from the former Mille Lac Reservation." (Slonim Decl., Ex. 134, at 32.) He told them to "[b]ear in mind

that you have lost all rights to lands here, you have no rights to lands here now, and you can acquire none here, but you can acquire rights elsewhere under the present legislation." (*Id.*) Chief Wahweyaycumig contested McLaughlin's portrayal of the Band's rights. He explained that when Senator Rice came to negotiate the Nelson Act Agreement, "[h]e pointed to the different directions defining our reservation and said that it would come to pass that this land would be allotted to us, and if there is not sufficient land on this reservation to allot us there was plenty of vacant Government land upon which we might locate." (*Id.* at 56.) The Chief argued that Senator Rice explained that the agreement would provide for payment to the Band for its pine, and promised "that we would commence to notice the movement of the whitemen [sic] from our territory immediately upon the acceptance of the treaty." (*Id.* at 57.) To McLaughlin's characterization of the Nelson Act, Chief Wahweyaycumig responded: "I have not realized any of the promises that were made to me, neither do I recognize this act that you have read to me today as the one that was presented and ratified at the time Mr. Rice was here to treat with us."[6] (*Id.*) McLaughlin and Michelet assured the Band that the 1902 Act contemplated only their removal from the reservation and the payment for their improvements to it; it would not result in the forfeiture of the Band's "back claims," and they would lose "no rights by moving." (*Id.* at 67-71.)

[6] *See also id.* at 72 (stating "I am pretty well along in age now and I have never heard my people at any time consent to the cession of this territory we claim as our own").

Ultimately, the Band consented to the 1902 Act. Ayndosogeshig explained: "These men that you see here before you wish to have the money that you speak of, as being appropriated to pay for the damages of these Indians for their improvements, to be placed in their hands while they remain here." (*Id.* at 73.) Ayndosogeshig apparently believed that the payments were to compensate them for property damage caused by settlers' efforts to displace Band members. (*Id.*) Notably, Ayndosogeshig also expressed the Band's desire to remain on the reservation: "I wish to purchase five different tracts of land upon which the Indians made settlements. The understanding that we had, when we were in Washington, was, that if any of the Indians wished to take an allotment on any of the other reservations and return to live upon this land there was not to be any objection to it." (*Id.*) Agent Michelet explained that the band, or individual members, could choose to purchase land on the reservation if they became dissatisfied with White Earth, but the payments afforded by the Act were conditioned on their initial removal. (*Id.* at 77-78.)

The 1902 Agreement proffered by McLaughlin and Michelet and signed by the Band provided:

> NOW THEREFORE, IN CONSIDERATION of the covenants and agreements of the party of the first part [the United States] herein contained, the said Mille Lac Indians occupying the former Mille Lac Indian Reservation, parties of the second part, hereby accept the appraisement made by James McLaughlin, U.S. Indian Inspector, and Simon Michelet, U.S. Indian Agent, of even date herewith, aggregating Forty thousand dollars, ($40,000), as full compensation for improvements made by them, or any of them, upon lands occupied by them, on said Mille Lac Reservation, and also accept the terms and conditions of said Act of Congress and agree to remove from said Mille Lac Indian Reservation, (except the excepted classes provided for in said Act of Congress), upon payment to them of the said appraised sum of Forty thousand dollars ($40,000), . . . as soon thereafter as notified by the proper authorities that the necessary arrangements have been

> made for them upon the White Earth Reservation or any of the ceded Indian Reservations in the state of Minnesota on which allotments are made to Indians . . . .
>
> It is understood that nothing in this agreement shall be construed to deprive the said Mille Lacs Indians of any benefits to which they may be entitled under existing treaties or agreements not inconsistent with the provisions of this agreement, or the [Act of 1902].

(Carter Decl., Ex. 61, at 25.)

5. Continuing Presence at Mille Lacs

After assenting to the 1902 Act, many Band members left the Mille Lacs Reservation. However, many Band members remained, and some that initially left later returned. The parties do not dispute that at least two or three hundred Band members always remained at Mille Lacs. (*See* McClurken Decl., Ex. C ("McClurken Rebuttal"), at 5-6.) But due to inaccurate counting and apparent fraud by White Earth lumbermen, the number of Mille Lacs Band members who actually removed to White Earth is unclear. (*See* McClurken Rebuttal at 6-12.) Federal investigations in the 1910s found that fewer than 51 Mille Lacs Ojibwe lived at White Earth. (*Id.* at 13.) Further, by 1910, only 120 allotments had been issued to Band members living at White Earth. (*Id.* at 12.) And by 1912, all land available for allotment at White Earth had been allotted, and federal officials ceased efforts to remove the Mille Lacs Ojibwe to White Earth. (*Id.* at 13.)

In 1914, 1923, and under the Indian Reorganization Act of 1934, Congress purchased and allotted lands on the Mille Lacs Reservation for Band members.[7] By 2010,

[7] Act of Aug. 1, 1914, 38 Stat. 582, 590–91; Act of Jan. 24, 1923, 42 Stat. 1174, 1191; *see* Slonim Decl., Ex. 160.

1,598 of the 4,907 persons living on the reservation identified as Indian. Mem. from Solicitor to Sec'y of the Dep't of the Interior ("2015 Interior M-Opinion"), M-37032, at 20 (Nov. 20, 2015) [Doc. No. 150-4]. Today, the United States owns approximately 3,600 of the reservation's 61,000 acres in trust for the Band, and the Band and its members own another 6,100 acres in fee, comprising about 16% of the Mille Lacs Reservation. (Decl. of Bridgett Quist ("Quist Decl."), at ¶¶ 3-6.) The Band's government center is located on the reservation, and the Band operates schools, clinics, community centers, utility infrastructure, and a gaming complex on its trust and fee lands within the reservation. (*Id.* ¶¶ 7-10.)

6. Prior Litigation Concerning the Reservation

In 1909, Congress conferred jurisdiction on the U.S. Court of Claims "to hear and determine a suit or suits to be brought by and on behalf of the Mille Lac band of Chippewa Indians in the State of Minnesota against the United States on account of losses sustained by them or the Chippewas of Minnesota by reason of the opening of the Mille Lac Reservation in the State of Minnesota . . . to public settlement under the general land laws of the United States." Act of Feb. 15, 1909, 35 Stat. 619. In 1911, the Band brought such a suit against the United States. The Band alleged that the Mille Lacs Reservation survived the Treaties of 1863 and 1864, and that when the Band assented to the Nelson Act, the United States—rather than allotting reservation land to Band members—instead opened the reservation to entry under the general land laws. (Second Slonim Decl. [Doc. No. 254], Ex. 4 ("1911 Compl."), at 5-8.) The Band argued that by opening the reservation to settlement, without paying the Band the value of the land sold as required by the Nelson

Act, the United States deprived the Band, "without their consent and against their will," of "all pine lands in the said Mille Lac Reservation, and all of the land comprising such Mille Lac Reservation, and all of their right, title and interest in and to such reservation." (Carter Decl., Ex. 65 ("1911 Brief"), at 505.) For the uncompensated sale of reservation land, the Band sought three million dollars in damages. (*Id.* at 427.) The United States argued that the reservation had been ceded under the Treaty of 1864, and therefore the reservation did not fall within the scope of the Nelson Act. (*Id.*, Ex. 66, at 101 ("As the former Mille Lac Reservation was not *ceded* under the act of 1889, it could not be surveyed, divided up, or classified as pine or agricultural lands, and it was therefore not intended to come within the provisions of the act.").)

The Court of Claims, interpreting the Article 12 proviso, found that the Treaties of 1863 and 1864 did not grant the Band "a mere license or favor," but instead "reserved to the [Band] the Mille Lac Reservation." *Mille Lac Band of Chippewas v. United States*, 47 Ct. Cl. 415, 438, 457 (1912), *rev'd on other grounds sub nom. United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498 (1913). The Mille Lacs Band

> remained as a band in open, notorious possession of the same, a lawful notice to the world of a claim of title, until the resolutions of the Congress opened their domain to public settlement and divested them of title to their lands. They fulfilled all the conditions of the tenure, remained at peace with the whites, and were fully entitled to the benefits of the act of January 14, 1889, which were denied them.

Id. at 458. The court did not address, nor did the parties raise, the issue of whether the Nelson Act or subsequent legislation disestablished the reservation. Instead, having found that the United States sold reservation land in derogation of the Nelson Act's promises, the

court awarded damages to the Band—payable to the Chippewa fund established by the Nelson Act, rather than to the Band itself—representing the value of the land sold in violation of the Nelson Act. *Id.* at 461–62.

The United States appealed to the Supreme Court. Recognizing that "there was a real controversy between the Mille Lacs and the government in respect of the rights of the former under article 12 of the treaty of 1864," the Court reasoned that "this controversy was intended to be and was . . . adjusted and composed" by the Nelson Act. *United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498, 506 (1913). The Court read the Nelson Act as presenting a compromise between the Mille Lacs Band and the Government: "while the government . . . waived its earlier position respecting the status of the reservation, and consented to recognize the contention of the Indians, this was done upon the express condition, stated in the proviso to § 6, 'that nothing in this act shall be held to authorize the sale or other disposal under its provision of any tract upon which there is a subsisting, valid pre-emption or homestead entry, but any such entry shall be proceeded with under the regulations and decisions in force at the time of its allowance, and if found regular and valid, patents shall issue thereon.'" *Id.* at 507. Because that compromise legitimized valid entries made prior to the Nelson Act, the Court held that the Court of Claims erred in including such land in its calculation of damages. *Id.* But the United States' disposal of "the lands not within the proviso . . . not for the benefit of the Indians, but in disregard of their rights," was "clearly in violation of the trust" created by the Nelson Act. *Id.* at 509. The Court reached its conclusion notwithstanding Congress's 1893 and 1898 Resolutions approving the disposal of land under the general land laws:

> That the wrongful disposal was in obedience to directions given in two resolutions of Congress does not make it any the less a violation of the trust. The resolutions . . . were not adopted in the exercise of the administrative power of Congress over the property and affairs of dependent Indian wards, but were intended to assert, and did assert, an unqualified power of disposal over the lands as the absolute property of the government. Doubtless this was because there was a misapprehension of the true relation of the government to the lands, but that does not alter the result.

Id. at 509–10. On remand, the Court of Claims adjusted its damages award to exclude lands subject to the Nelson Act's § 6 proviso, limiting the award to lands disposed of after the Nelson Act's passage. *Mille Lac Band of Chippewa Indians in State of Minn. v. United States*, 51 Ct. Cl. 400 (1916).

The Supreme Court referenced its 1913 *Mille Lac Band* decision in *United States v. Minnesota*, 270 U.S. 181 (1926). In *Minnesota*, the United States brought suit to recover swamplands patented to Minnesota, including about 700 acres of swampland on the Mille Lacs Reservation patented in 1871. *Id.* at 198–99. The United States argued that Indian lands were not disposable under the Swamp Lands Acts, and sought to either cancel patents granted on reservation swampland or recover the value of such land. *Id.* at 192–93. The Court reiterated its conclusion in *Mille Lac Band* that the Nelson Act "adjusted and composed" the controversy over the Band's interest in reservation lands under the Article 12 proviso. *Id.* at 198. Consistent with its holding in *Mille Lac Band* that the Nelson Act's compromise validated legitimate entries prior to 1889, the Court held that the United States could not recover the Mille Lacs swamplands patented in 1871. *Id.* at 199 ("[T]he United States is without right to any recovery here in respect of the lands as to which it was adjudged [in *Mille Lac Band*] to be free from any obligation or responsibility to the

Indians."). The Court did not examine whether the Treaties of 1863 and 1864 or the Nelson Act disestablished the reservation.

In 1946, Congress created the Indian Claims Commission ("ICC") to hear claims against the United States by Indian tribes, including claims for equitable revisions of treaties and claims "based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." Indian Claims Commission Act ("ICCA") § 2, 60 Stat. 1049 (Aug. 18, 1946). Congress waived defenses based on laches and statutes of limitations, and provided that any accrued claims not brought within five years would be barred. *Id.* But the Act provided that "[n]o claim accruing after the date of the approval of this Act shall be considered by the Commission," and that any claim existing before the statute's enactment yet not presented within five years could not "thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by Congress." *Id.* §§ 2, 12.

The Minnesota Chippewa Tribe and its constituent bands, including the Mille Lacs, filed several claims under the Act. *See Minn. Chippewa Tribe v. United States*, 11 Cl. Ct. 221, 232–33 (1986); *Minn. Chippewa Tribe v. United States*, 230 Ct. Cl. 761 (1982); *Minn. Chippewa Tribe v. United States*, 15 Ind. Cl. Comm. 466 (1965) [Doc. No. 242-15, at 58]; *Minn. Chippewa Tribe v. United States*, 14 Ind. Cl. Comm. 226 (1964) [Doc. No. 242-15, at 19]. Relying on the unique causes of action created by the ICCA, the Band sought damages for the disposal of its land both before and after the Nelson Act.[8] The Court of

[8] *See, e.g.*, *Minn. Chippewa Tribe*, 11 Ct. Cl. at 234–35 ("Based on the treaties of 1863 and 1864, plaintiffs contend that the Mille Lac band was promised a reservation in

Claims—to which the Band's claims were transferred after the ICC concluded its operations—reasoned that the Band remained in possession of its 1855 reservation prior to the Nelson Act:

> [B]y treaties made in 1855, 1863, and 1864, reservations were set aside for the Mille Lac band in return for cessions of land. In article XII of both the 1863 and 1864 treaties, the band was promised the right to remain in possession of its reservation "so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites." It is undisputed that the band never violated that condition.

Id. at 236. The court noted the Supreme Court's 1913 opinion in *Mille Lac Band*, which denied the Band compensation for the 29,335.5 acres entered prior to the Nelson Act on the basis of the Act's § 6 proviso. *Id.* But under the unique causes of action created by the ICCA, the Court of Claims granted summary judgment in favor of the Band with respect to the pre-Nelson Act entries. *Id.* at 237. The court reasoned that, "as the Court of Claims and the Supreme Court found, the purpose of the 1863 and 1864 treaties was to assure that the band could keep its reservation because of its 'good conduct.'" *Id.* at 239. Although the Band "never broke its promise not to interfere with the white people or their property," due to the United States' subsequent disposal of the reservation's land, "the United States received the proceeds from [the] sale of these lands under the land laws, [while] the band received no compensation at all for nearly half of its reservation . . . and the timber growing

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return for their good conduct, but that through a series of conveyances confirmed as a result of the Nelson Act, that reservation was taken from them. Under clauses 3 and 5 of 25 U.S.C. § 70a . . . they seek, for the band, the fair market value of the land which the Supreme Court in 1913 held had not been ceded under the Nelson Act, and for the tribe, the fair market value of the acreage which was then ceded.").

on it." *Id.* at 239. The court therefore found that the United States' disposal of lands entered prior to the Nelson Act violated the standard of fair and honorable dealings and equated to unconscionable consideration, satisfying the elements of two of the ICCA's causes of action.[9] *Id.* at 240.

But the court declined to grant summary judgment on the plaintiffs' claim for the fair market value of the nearly 32,000 acres disposed of under the Nelson Act, for which the Supreme Court had ordered payment in *Mille Lac Band*. The court reasoned:

> Plaintiffs' claim seems to be that once having promised (in article 12 of the treaties of 1863 and 1864) that the Mille Lac band "shall not be compelled to remove" during the course of their good conduct, it was unfair to present the Nelson Act to them for assent. . . . [I]n contrast to the situation as to the land which was not subject to the Nelson Act, there is no question that band members *were* aware that they were ceding some of the land previously promised to them in return for the benefits of the act. As the Supreme Court held, those benefits were considerable, in that they thereby secured a share in the proceeds of the sale of all other Chippewa land, to which they otherwise had no claim.
>
> In short, the court cannot find solely on the basis of the earlier promises made to the band, that it was per se dishonorable for the government to offer them a treaty on different terms. They knew that they would be ceding parts of their reservation by assenting to the Nelson Act and they received compensation for their assent.

Id. at 240–41 (citations and footnotes omitted). Like the Court of Claims and Supreme Court in the *Mille Lac Band* proceedings, the court did not address whether the Nelson Act or subsequent legislation disestablished the reservation.

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[9] Unlike the damages awarded in *Mille Lac Band*, which were made part of the Chippewa trust established by the Nelson Act, the court reasoned that the ICCA claim "belongs to the band alone since it was then the sole possessor of the Indian Title to the reservation." *Id.* at 240.

Ultimately, in 1999 the court granted the parties' Joint Motion and Stipulation for Entry of Final Judgment. (*See* Decl. of James M. Schoessler [Doc. No. 256-1].) The stipulation "dispose[d] of all claims, rights, and demands under Section 2 of the ICCA . . . which plaintiff has asserted or could have asserted." (*Id.*, Ex. A, at ¶ 2.) The Band withdrew "[a]ll claims, rights, and demands under Section 2 of the ICCA . . . regarding those lands in the Mille Lacs Reservation that were disposed of by the United States prior to [the Nelson Act]" with prejudice. (*Id.* ¶ 8.) The parties "specifically agree[d] that the plaintiff is receiving no compensation for any such claim under the final judgment entered pursuant to this Stipulation, and no such Claim is being adjudicated by such judgment." (*Id.*) But the parties also agreed that "[n]othing in this Stipulation shall be construed to limit, foreclose, or otherwise adversely affect . . . any tribal treaty right, on any lands or waters within any of the reservations of plaintiff's six constituent bands." (*Id.* ¶ 11.)

II. DISCUSSION

A. Standard of Review

Summary judgment is appropriate if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A fact is 'material' if it may affect the outcome of the lawsuit." *TCF Nat'l Bank v. Mkt. Intelligence, Inc.*, 812 F.3d 701, 707 (8th Cir. 2016). A factual dispute is "genuine" only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In evaluating a motion for summary judgment, the Court must view the evidence and any

reasonable inferences drawn from the evidence in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Although the moving party bears the burden of establishing the lack of a genuine issue of fact, the party opposing summary judgment may not "rest on mere allegations or denials but must demonstrate on the record the existence of specific facts which create a genuine issue for trial." *Krenik v. Cty. of Le Sueur*, 47 F.3d 953, 957 (8th Cir. 1995) (internal quotation marks omitted); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Moreover, summary judgment is properly entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322. Where, as here, the record is largely undisputed and "the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate." *Aucutt v. Six Flags Over Mid-Am., Inc.*, 85 F.3d 1311, 1315 (8th Cir. 1996) (citing *Crain v. Board of Police Comm'rs*, 920 F.2d 1402, 1405–06 (8th Cir. 1990)).

B. Affirmative Defenses

Before turning to the merits of the parties' cross-motions, the Court must resolve several affirmative defenses raised by the County. Namely, the County asserts that the Band's claims are barred by claim and issue preclusion, judicial estoppel, laches, and the Indian Claims Commission Act. For the reasons that follow, the Court finds that these doctrines do not bar the claims brought in this litigation.

1. Claim Preclusion

The Court first considers the County's argument that claim preclusion bars this action. Where a party brings successive lawsuits, claim preclusion operates as a bar to claims asserted in the later-filed suit when: "(1) the first suit resulted in a final judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) both suits involve the same parties (or those in privity with them); and (4) both suits are based upon the same claims or causes of action." *Elbert v. Carter*, 903 F.3d 779, 782 (8th Cir. 2018) (quoting *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 673 (8th Cir. 1998)). In general, "claim preclusion does not apply to claims that did not arise until *after* the first suit was filed." *United States v. Bala*, 948 F.3d 948, 951 (8th Cir. 2020) (emphasis in original) (quoting *Baker Grp. v. Burlington N. & Santa Fe Ry.*, 228 F.3d 883, 886 (8th Cir. 2000)). However, a subsequent claim may be barred where it "arises out of the same nucleus of operative facts as the prior claim." *Id.* (quoting *Lane v. Peterson*, 899 F.2d 737, 742 (8th Cir. 1990)).

According to the County, claim preclusion applies in this case because the Band already litigated its "claim of reservation cession" in the *Mille Lac Band* proceedings in 1912 and 1913, in *Minnesota* in 1926, and in the *Minnesota Chippewa Tribe* proceedings under the ICCA. (Mem. in Supp. of Defs.' Mot. for Summ. J. [Doc. No. 241], at 75-83.) In response, the Band argues that claim preclusion does not apply because (1) the claims in this case are different from any of those brought in prior cases, and (2) this case does not involve the same parties as the prior cases. (Mem. in Opp'n to Defs.' Mot. for Summ. J. [Doc. No. 253], at 73-76.)

The Court agrees with the Band. In this case, the Band asserts claims for declaratory and injunctive relief concerning the scope of its inherent and federally delegated law enforcement authority. (*See* Compl. at 7.) These claims arise from the County's alleged interference with that authority beginning in 2016. (*See id.*) As the County concedes, "the Band has never before brought a claim seeking a declaration of its investigatory and jurisdictional authority over the 1855 Treaty area." (Mem. in Supp. of Defs.' Mot. for Summ. J. at 75.) The County asserts that claim preclusion nonetheless applies because the Band and the Minnesota Chippewa Tribe "have previously litigated the claim of reservation cession." (*Id.*) But that argument conflates claim preclusion with the closely related doctrine of issue preclusion. Whether or not the disestablishment *issue* may have been previously litigated does not mean that the Band's law enforcement authority *claims* are precluded. None of the Band's prior litigation involved such claims. *See generally supra* Section I.F.6. The *Mille Lac Band* proceedings in 1912 and 1913 involved the Band's claims for compensation based on the Government's opening of the reservation to settlement in derogation of the Nelson Act. In *Minnesota*, the United States sought to cancel patents granted to Minnesota on reservation swampland or to recover the value of such land. And the *Minnesota Chippewa Tribe* cases involved the unique claims created by the ICCA.

Moreover, the Band could not have brought its present claims before the County allegedly interfered with the Band's law enforcement authority in 2016. Claim preclusion generally does not apply to claims that did not arise until after the first suit was filed, unless the subsequent claim "arises out of the same nucleus of operative facts as the prior claim."

Bala, 948 F.3d at 951 (quotation omitted). To be sure, the Band's claims concerning its law enforcement authority raise the issue of whether its reservation was disestablished, and the core facts driving the disestablishment inquiry today are largely identical to the facts considered by the Court of Claims, Supreme Court, and the ICC decades ago. But the *claims* asserted here arise out of the County's alleged interference with the Band's law enforcement activities in 2016—a markedly different "nucleus of operative facts." Because the prior cases were not "based upon the same claims or causes of action" as this case, claim preclusion does not apply. *Elbert*, 903 F.3d at 782.

Finally, claim preclusion is inapplicable here for another reason: this case does not involve the same parties as the prior cases. The County urges the Court to apply the exception to claim preclusion's mutuality requirement recognized in *Nevada v. United States*, 463 U.S. 110 (1983). There, the United States sued to adjudicate certain water rights that were resolved in a prior action. *Id.* at 116–21. The prior action was an equitable action to quiet title, and all parties involved in that action "contemplated a comprehensive adjudication of water rights intended to settle once and for all" how the rights associated with a certain river should be divided among the litigants. *Id.* at 143. The Court explained that "even though quiet title actions are *in personam* actions, water adjudications are more in the nature of *in rem* proceedings," and nonparties "have relied just as much on" the decree in the prior action "as have the parties of that case." *Id.* at 143–44. Therefore, the Court concluded that "under these circumstances it would be manifestly unjust . . . not to permit subsequent appropriators to hold" one of the litigants to the claims it made in the

prior action, and that any "other conclusion would make it impossible ever finally to quantify a reserved water right." *Id.* at 144 (quotation omitted).

The Court declines to extend *Nevada's* "narrow exception to the mutuality rule" to the Band's claims in this case. *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 932 (8th Cir. 1997), *aff'd*, 526 U.S. 172 (1999). As the Eighth Circuit has explained, "[t]he proceedings in *Nevada* were unique; they involved [a] comprehensive water rights adjudication, in which many non-party water appropriators had relied on a prior decree as much as the parties to the action, making res judicata appropriate because of the special need to finally quantify reserved water rights." *Id.* at 932–33. Those concerns are not present in this case, and the Court sees no need to extend *Nevada's* "narrow exception."

Accordingly, the Court finds that claim preclusion does not bar the Band's claims.

2. Issue Preclusion

Next, the County argues that the Band is precluded from arguing that its reservation has never been disestablished. Issue preclusion bars a party from relitigating an issue where the following elements are satisfied:

> (1) the party sought to be precluded in the second suit must have been a party, or in privity with a party, to the original lawsuit; (2) the issue sought to be precluded must be the same as the issue involved in the prior action; (3) the issue sought to be precluded must have been actually litigated in the prior action; (4) the issue sought to be precluded must have been determined by a valid and final judgment; and (5) the determination in the prior action must have been essential to the prior judgment.

Sandy Lake Band of Miss. Chippewa v. United States, 714 F.3d 1098, 1102–03 (8th Cir. 2013) (quotation omitted).

The County points to the Court of Claims' 1912 and 1986 decisions, the Supreme Court's 1913 and 1926 decisions, and the ICC's 1964 and 1982 decisions. The County asserts that "[w]hether the lands encompassed by the 1855 Treaty and the Nelson Act remained Indian country, or were ceded to the United States through the 1863, 1864, and 1867 Treaties and the Nelson Act, were essential to the courts' determinations in the earlier litigation. It was at the core of their analyses of the disposition of lands and the compensation to which the Band was entitled." (Mem. in Supp. of Def.'s Mot. for Summ. J. at 96-97.)

The County is partially correct: the issue of whether the reservation survived the Treaties of 1863 and 1864 was previously litigated and decided. But that issue was resolved in the Band's favor. In 1913, the Court of Claims held that the Article 12 proviso "reserved to the [Band] the Mille Lac Reservation." *Mille Lac Band of Chippewas v. United States*, 47 Ct. Cl. 415, 438, 457 (1912), *rev'd on other grounds sub nom. United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498 (1913). Consequently, the court concluded that by disposing of reservation land under the general land laws rather than the Nelson Act, the United States violated the Nelson Act. *Id.* at 461–62. The Supreme Court did not reach the merits of the controversy surrounding the Article 12 proviso, holding instead that it was "adjusted and composed" in the Nelson Act, whereby "the government . . . waived its earlier position respecting the status of the reservation, and consented to recognize the contention of the Indians," on the condition that otherwise valid entries prior to the Nelson Act would be carried to patent pursuant to the Act's § 6 proviso. 229 U.S. at 507. Similarly, the Court of Claims in 1986 found that "the purpose of the 1863 and 1864 treaties was to

assure that the band could keep its reservation because of its 'good conduct.'" *Minn. Chippewa Tribe v. United States*, 11 Cl. Ct. 221, 239 (1986).[10]

But none of the courts considered whether the Nelson Act disestablished the Mille Lacs Reservation. Each court considered whether the United States violated the Nelson Act by its subsequent disposition of reservation lands. *See, e.g.*, *Mille Lac Band of Chippewa Indians*, 229 U.S. at 509 (holding that the sale of "lands not within the [Nelson Act's § 6] proviso . . . not for the benefit of the Indians, but in disregard of their rights," was "clearly in violation of the trust" created by the Nelson Act). The Band's damages claims for the wrongful disposition of its land did not require the courts to reach, nor did they reach, the question of whether the Nelson Act or subsequent legislation altered the reservation's boundaries.

Because the disestablishment question, insofar as it concerns the pre-Nelson Act treaties, was resolved in the Band's favor; and because the disestablishment question, insofar as it concerns the Nelson Act, was neither determined, litigated, nor essential to the judgments in the Band's prior litigation, the Court finds that the Band is not precluded from litigating the disestablishment issue in this case.

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[10] The County also cites decisions from the ICC as holding that the Band had "ceded" its reservation under the Treaties of 1863 and 1864. But "cession" and "disestablishment" are not necessarily equivalent terms. *See infra* Sections II.C.2, 4. A close review of the ICC's decisions confirms that the Commission did not opine on Congress's intent to disestablish the reservation through the Treaties of 1863 or 1864. *See Minn. Chippewa Tribe v. United States*, 14 Ind. Cl. Comm. 226 (1964); *Minn. Chippewa Tribe v. United States*, 15 Ind. Cl. Comm. 466 (1965). And, to the contrary, when the Band's ICC claims were transferred to the Court of Claims, that court found that the treaties preserved the reservation. *Minn. Chippewa Tribe v. United States*, 11 Cl. Ct. at 239 (1986).

3. Judicial Estoppel

The County also insists that the Band is estopped from asserting that the Mille Lacs Reservation has never been disestablished. "The doctrine of judicial estoppel prevents a party who assumes a certain position in a legal proceeding, and succeeds in maintaining that position, from later assuming a contrary position." *Scudder v. Dolgencorp, LLC*, 900 F.3d 1000, 1006 (8th Cir. 2018) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)) (cleaned up). In determining whether judicial estoppel applies, courts consider three factors: "(1) whether a party's later position is clearly inconsistent with its earlier position, (2) whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled, and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* (quoting *New Hampshire*, 532 U.S. at 750–51) (cleaned up). At bottom, judicial estoppel is a discretionary equitable doctrine intended to prevent abuses of the judicial process by "prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire*, 532 U.S. at 749–50 (quotation omitted).

In support of this defense, as with the County's preclusion defenses, the County points to the Band's litigation before the Court of Claims and the ICC. The County asserts that, throughout the Band's litigation history, the Band claimed its reservation had been disestablished; that the Band prevailed on its position, and received compensation for the

disestablishment of its reservation; and that the Band should therefore be estopped from asserting before this Court that the reservation was never disestablished.

But the County's review of the Band's litigation history improperly conflates the "cession" of reservation land with disestablishment.[11] Throughout the 1900s, first under a 1909 jurisdictional statute and later under the ICCA, the Band sought damages for the uncompensated disposition of its land under the general land laws. The Band argued that its reservation still existed at the time of the Nelson Act, and that the Nelson Act entitled the Band to compensation for unallotted land opened for sale and settlement. But it did not argue that the reservation was *disestablished* by the Nelson Act. Like the County, the Court views as representative the Band's claims leading to the Court of Claims' 1986 decision:

> The claimants' position is that the 1863 and 1864 treaties reserved the Mille Lac Reservation to the Mille Lac Band for so long as the Band complied with the condition of Article 12; that the Band did comply with the condition; that the United States, in violation of standards of fair and honorable dealings (a) opened the reservation lands to disposal under the public land laws in violation of the treaties; . . . (d) disposed of the Band's reservation land under the public land laws both before and after the 1889 Act although the law was crystal clear that Interior was entirely without authority to issue valid patents to Indian lands; and (e) failed to pay the fair market value of the land and timber so disposed of. But for the Government's unfair and dishonorable dealings, but for the use of the legalistic Section 6 proviso as a pretext for taking the Band's property, all of the reservation land would have been disposed of initially under the Nelson Act. The claimants would have

[11] In support of its argument, the County identifies various statements in the Band's past complaints and briefs such as "the reservation ceased to exist" or the reservation was "relinquished" or "disposed of." Read in context, these statements reflect the Band's position that, despite its legal rights in its reservation, the reservation's land had come to rest almost entirely in non-Band members. In other words, the Band argued that the reservation had ceased to exist de facto, not de jure. And insofar as the Band referred to the "disposal" and "relinquishment" of its land under the Nelson Act, those terms are not equivalent to disestablishment. *See infra* Section II.C.4.

> received the benefit of 1889 Act compensation plus the right under the Indian Claims Commission Act, to recover the fair market value of those lands, less payments on the claim.

(Carter Decl., Ex. 117, at 16-17 (footnote omitted) (emphasis added).) The Band's claim, as before the Court of Claims in 1911, was that the Treaties of 1863 and 1864 did not disestablish the Mille Lacs Reservation; that the Nelson Act promised payment for the disposal of reservation lands under that Act; and that the United States disposed of reservation land under the general land laws, rather than the Nelson Act, without compensating the Band. The Band did not argue that the Nelson Act disestablished the reservation; instead, the Band simply sought compensation for the United States' disposal of reservation lands without payment to the Band, in contravention of the Act.[12]

The Court finds that the Band's prior litigation positions are fully consistent with its position before this Court, and that the Band is therefore not estopped from asserting that its reservation has never been disestablished or diminished.

4. Laches

Next, the County argues that the Band's claims are barred by laches. The County relies principally on *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), and *Wolfchild v. Redwood County*, 91 F. Supp. 3d 1093, 1105 (D. Minn. 2015), *aff'd*, 824 F.3d 761 (8th Cir. 2016). In *Sherrill*, the Supreme Court observed that "[t]he

[12] *See Minn. Chippewa Tribe v. United States*, 11 Cl. Ct. 221, 236–37 (1986) ("Plaintiffs . . . contend . . . that by treaty the United States promised the band that it would not be compelled to leave its reservation . . . ; and that despite its continuing good conduct the band was ejected without benefit of payment for nearly half of the land."); *see generally supra* Section I.F.6.

principle that the passage of time can preclude relief has deep roots in our law, and this Court has recognized this prescription in various guises. It is well established that laches, a doctrine focused on one side's inaction and the other's legitimate reliance, may bar long-dormant claims for equitable relief." *Id.* at 217. Applying laches, the Court held that the Oneida Indian Nation was barred from asserting a claim to sovereignty (in particular, immunity from local taxation) to land last occupied by the tribe two centuries ago, which had recently been purchased by band members in fee. *Id.* at 214–15 ("We . . . hold that standards of federal Indian law and federal equity practice preclude the Tribe from rekindling embers of sovereignty that long ago grew cold." (internal quotation marks omitted)).

And in *Wolfchild*, descendants of the Mdewakanton Sioux alleged that a twelve-square-mile reservation sold to private landowners between 1865 and 1895 had never been disestablished, and sought to dispossess the defendant landowners. *Wolfchild*, 91 F. Supp. 3d at 1102. Applying *Sherrill*, this Court held that the plaintiffs' claims were barred by laches. The Court reasoned that "[t]he *Sherrill* doctrine has been applied to dismiss centuries old Indian land claims that would have a disruptive effect and would upset the justified expectations of the Defendants in a number of cases." *Id.* at 1104 (collecting such cases). The Court found that the plaintiffs' claims to the land would have a significantly disruptive effect, and given the tribe's inaction, the Court concluded that the claims were barred under *Sherrill*:

> The landowner Defendants assert that public records establish that their title to the properties at issue originated with land patents and grants issued in the 1800's. Since that time, the Defendants and their predecessors in title have

> used and occupied the properties, improving and developing the land for agriculture, businesses and residences. Throughout this time, the land has also been governed and taxed by the State of Minnesota and the Municipal Defendants. The public record further demonstrates that ditches, watershed districts, roads and other rights of way were openly established and used. Plaintiffs do not dispute that by 1891, all land patents for the disputed area had been issued. Plaintiffs thus had notice, for well over one hundred years, that others were in wrongful possession of land to which Plaintiffs now claim title.

Id.

The Court finds that laches does not bar the Band's claims. Unlike in *Wolfchild*, the Band does not seek to oust any landowners within the Mille Lacs Reservation. Nor does it seek damages for the disposition of reservation land. Rather, it seeks only declaratory and injunctive relief concerning its law enforcement authority within the 1855 treaty area. And unlike in *Sherrill*, the Band's claim to law enforcement authority within the reservation would not upset any reliance interests. The Band has remained in continuous possession of parts of the reservation since it was established in 1855, and has asserted rights to the reservation throughout that time. Importantly, as reflected by the filings of the United States and State of Minnesota, appearing as amici curiae, a decision recognizing the reservation's continued existence would not upset any settled expectations. (*See* Amicus Curiae Brief of the United States [Doc. No. 265-1]; Amicus Curiae Brief of the State of Minnesota [Doc. No. 250].) Indeed, both the United States and Minnesota have recognized the reservation's continued existence within the 1855 treaty area.[13]

[13] *See* 2015 Interior M-Opinion at 2 ("The 1863 and 1864 Treaties, as well as the 1889 Nelson Act, fail to evince a clear Congressional intent to disestablish the Reservation and, in fact, guaranteed the Band continuing rights to its Reservation."); Amicus Curiae Brief of the State of Minnesota at 11 ("[T]he Mille Lacs Band and various state agencies

Because the Band has occupied and actively defended its rights in the Mille Lacs Reservation since its inception and timely filed this lawsuit seeking declaratory and injunctive relief concerning its law enforcement authority, and further recognizing the Band's claims would not upset longstanding reliance interests, the Court finds that the laches doctrine does not bar the Band's claims.

5. The Indian Claims Commission Act

Finally, the County argues that the Indian Claims Commission Act bars the Band's claims. It is true that the ICCA barred claims that could have been brought under it, yet were not brought within five years. ICCA § 2, 60 Stat. 1049 (Aug. 18, 1946). But the Act also provided that "[n]o claim accruing after the date of the approval of this Act shall be considered by the Commission." *Id.* Again, the County incorrectly equates the Band's claims in this litigation (claims for declaratory and injunctive relief regarding the Band's law enforcement authority on the reservation) with an issue raised by those claims (whether the Mille Lacs Reservation has ever been disestablished). The Band's *claims*, which accrued in 2016, could not have been brought under the ICCA, and are therefore not subject to the statute's time-bar.

The County argues that the Band's law enforcement authority claims are an effort to re-litigate the "ancient" issue of its treaty rights by artful pleading. It relies principally on *Oglala Sioux Tribe of Pine Ridge Indian Reservation v. U.S. Army Corps of Engineers*,

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have intergovernmental cooperative agreements already in place to clarify and guide regulatory responsibilities in the 1855 treaty area. Ongoing intergovernmental cooperation can be relied upon to ensure continuity and efficient governance.").

where the court reasoned: "A tribe cannot avoid the Indian Claims Commission Act through 'artful pleading.' It cannot obtain review of a historical land claim otherwise barred by the Act by challenging present-day actions involving the land." 570 F.3d 327, 332 (D.C. Cir. 2009) (citations omitted). But there, the tribe's claims would have "require[d] the court to decide whether to rescind the Sioux Tribe's agreements with the United States approving the 1889 Act's diminishment of the Great Sioux Reservation, to declare that Act null and void, and to treat the area as if the 1868 Treaty had not been modified"—claims that could have been brought under the ICCA. *Id.*

By contrast, the Band's claims here do not require this Court to set aside any treaty, statute, or agreement—it merely must interpret them to determine the scope of the Band's present law enforcement authority on the Mille Lacs Reservation. As the D.C. Circuit reasoned in *Oglala Sioux*:

> The Tribe answers that the Indian Claims Commission Act does not bar suits to determine a reservation's boundaries. This is generally true, but the Tribe puts the matter much too broadly. The reservation boundary cases do not run afoul of the Indian Claims Commission Act because the courts were being called upon to interpret federal legislation and executive orders, not to set these sources aside or to treat them as void on the basis of centuries-old flaws in the ratification process.

Id. at 333. Because the Band's claims merely require the Court to interpret statutes, treaties, and agreements, not to "treat them as void," this case falls into the same class as the reservation boundary cases referenced in *Oglala Sioux*.

Accordingly, the Court finds that the ICCA does not bar the Band's claims.

C. Disestablishment of the Mille Lacs Reservation

As noted at the outset, in this litigation the Band seeks declaratory and injunctive relief regarding its law enforcement authority on the Mille Lacs Reservation. An issue essential to the Band's claims, and the issue brought before the Court on the present motions, is whether the Mille Lacs Reservation remains as it was under the Treaty of 1855, or whether subsequent treaties and Acts of Congress have disestablished or diminished the reservation. The County asserts that the Treaties of 1863 and 1864 disestablished the reservation, leaving only a temporary right of occupancy insufficient to constitute a "reservation" in the term's legal sense. The County also asserts that the reservation was disestablished by the Treaty of 1867, the Nelson Act, and three Acts of Congress at the turn of the nineteenth century. Before considering the effect of these treaties and statutes on the existence of the Mille Lacs Reservation, the Court will first examine the standards governing this important question.

1. The Law of Reservation Disestablishment

It is undisputed that the Treaty of 1855, which "reserved and set apart" more than 61,000 acres at Lake Mille Lacs "for the permanent home[]" of the Mille Lacs Ojibwe, established a reservation. Treaty with the Chippewa art. 2, Feb. 22, 1855, 10 Stat. 1165. The question is to what extent that reservation exists today. As the Supreme Court recently explained, "To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020). Congress "wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties. But that

power . . . belongs to Congress alone." *Id.* (citation omitted). Thus, "only Congress can divest a reservation of its land and diminish its boundaries." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). But "[o]nce a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Id.* (citation omitted); *see also City of New Town v. United States*, 454 F.2d 121, 125 (8th Cir. 1972) ("The opening of an Indian reservation for settlement by homesteading is not inconsistent with its continued existence as a reservation."). Congress's intent to disestablish a reservation "must be clear." *Nebraska v. Parker*, 577 U.S. 481, 488 (2016) (citation omitted).

The Supreme Court has described the standards governing disestablishment analysis, often referred to as the *Solem* framework, as "well settled." *Id.* at 487. "The most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands." *Hagen v. Utah*, 510 U.S. 399, 411 (1994) (citation omitted). "Common textual indications of Congress' intent to diminish reservation boundaries include '[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests' or 'an unconditional commitment from Congress to compensate the Indian tribe for its opened land.'"[14] *Parker*, 577 U.S. at 488 (quoting *Solem*, 465 U.S. at

[14] *See DeCoteau v. Dist. Cty. Ct. for Tenth Jud. Dist.*, 420 U.S. 425, 445 (1975) (finding disestablishment where statute ratified an agreement providing that the tribe "hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation"); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 597 (1977) (finding diminishment where statute provided that the tribe would "cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in" part of its reservation); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344–45 (1998) (finding diminishment where statute ratified

470). Language "providing for the total surrender of tribal claims in exchange for a fixed payment evinces Congress' intent to diminish a reservation, and creates an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." *Id.* (citations and internal quotation marks omitted).

Courts have also considered extrinsic evidence of Congressional intent to disestablish a reservation. As the *Hagen* Court explained: "We have also considered the historical context surrounding the passage of the surplus land Acts, although we have been careful to distinguish between evidence of the contemporaneous understanding of the particular Act and matters occurring subsequent to the Act's passage." 510 U.S. at 411 (citation omitted). The context surrounding a statute's passage may indicate an intent to disestablish where the circumstances "unequivocally reveal a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Solem*, 465 U.S. at 471. And courts have also considered subsequent demographic history and federal treatment of the reservation as having "some evidentiary value." *Id.*; *Hagen*, 510 U.S. at 411.

Although such extrinsic evidence of Congressional intent to disestablish a reservation has long been considered under the *Solem* framework, the Supreme Court in *McGirt* emphasized that such evidence is relevant only in the face of statutory ambiguity. The Court explained:

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tribe's agreement to "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation" in exchange for payment).

> [The] value such [extrinsic] evidence has can only be *interpretative*—evidence that, at best, might be used to the extent it sheds light on what the terms found in a statute meant at the time of the law's adoption, not as an alternative means of proving disestablishment or diminishment. . . .
>
> There is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms. The only role such materials can properly play is to help "clear up . . . not create" ambiguity about a statute's original meaning. And, as we have said time and again, once a reservation is established, it retains that status "until Congress explicitly indicates otherwise."

McGirt, 140 S. Ct. at 2469 (citations omitted); *see Oneida Nation v. Village of Hobart*, 968 F.3d 664, 675 n.4 (7th Cir. 2020), *reh'g denied* (Sept. 18, 2020) ("We read *McGirt* as adjusting [the *Solem*] framework by establishing statutory ambiguity as a threshold for any consideration of context and later history.").

Throughout the disestablishment inquiry, "we resolve any ambiguities in favor of the Indians, and we will not lightly find diminishment." *Hagen*, 510 U.S. at 411 (citing *South Dakota v. Bourland*, 508 U.S. 679, 687 (1993) (Blackmun, Souter, JJ., dissenting) ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.")).

2. The Treaties of 1863 and 1864

Following the 1862 uprisings by the Dakota Sioux and Chief Hole-in-the-Day, the United States endeavored to consolidate Minnesota's Chippewa at a reservation created near Leech Lake. After lengthy negotiations, during which the Mille Lacs Band's representatives made their opposition to removal from their reservation clear, Senator Rice obtained all the Ojibwe delegates' assent to the Treaty of 1863. Article I of that treaty provided: "The reservations known as Gull Lake, Mille Lac, Sandy Lake, Rabbit Lake,

Pokagomin Lake, and Rice Lake, as described in the [Treaty of 1855], are hereby ceded to the United States." Treaty of 1863 art. 1, 12 Stat. 1249. As "consideration [for] the foregoing cession," the United States created a reservation near Leech Lake, promised to make certain improvements to it, and agreed to extend the Indians' annuities provided for in the Treaty of 1855, furnish supplies for ten years, and pay the bands' chiefs money owed under an 1854 treaty. *Id.* arts. 2–5. But the treaty also provided that none of the Indians would be required to remove to Leech Lake until the United States had complied with its obligations, and that, "owing to the heretofore good conduct of the Mille Lac Indians, they shall not be compelled to remove so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites." *Id.* art. 12.

The County reads Article 1 as "plain unmistakable language," by which "the six Mississippi Chippewa [b]ands ceded all 'their right, title and interest' to the" 1855 reservations, including Mille Lacs. (Mem. in Supp. of Def.'s Mot. for Summ. J. at 50.) According to the County, such language, together with the payments provided in Articles 3 and 5, creates "an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." *Solem v. Bartlett*, 465 U.S. 463, 470–71 (1984). The County then interprets the Article 12 proviso separately, and concludes that the "temporary right of occupancy" there created does not constitute a "reservation."

Of course, Article 1 does not state that the Mille Lacs Band "ceded all their right, title and interest" in the Mille Lacs Reservation, as characterized by the County. Rather, Article 1 stated that the six reservations "are hereby ceded to the United States." *Cf. DeCoteau v. Dist. Cty. Ct. for Tenth Jud. Dist.*, 420 U.S. 425, 445 (1975) (finding

disestablishment where statute ratified an agreement providing that the tribe "hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation"); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 597 (1977) (finding diminishment where statute provided that the tribe would "cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in" part of its reservation); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344–45 (1998) (finding diminishment where statute ratified tribe's agreement to "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation" in exchange for payment).

Like any treaty between the United States and an Indian tribe, the Treaty of 1863 "must . . . be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676, *modified sub nom. Washington v. United States*, 444 U.S. 816 (1979) (quotation omitted). And like any matter of interpretation, the Court must read Article 1 in the context of the whole treaty. *See, e.g.*, *Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Okl. Tax Comm'n*, 829 F.2d 967, 979 (10th Cir. 1987) (concluding that separate sections of a statute, read *in pari materia*, did not reveal clear Congressional intent to divest reservation lands of their Indian country status).

The Court therefore must read Article 1, providing that the six reservations were "ceded" to the United States, together with the Article 12 proviso, which provided that the

Mille Lacs Band "shall not be compelled to remove so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites." Treaty of 1863 arts. 1, 12. The Court concludes that, read together, these provisions do not clearly reflect a Congressional intent to disestablish the Mille Lacs Reservation. Although the treaty provided that "[t]he reservation[] known as . . . Mille Lac . . . [is] hereby ceded to the United States," courts look for "language evidencing the *present and total surrender of all tribal interests*." *Solem*, 465 U.S. at 470 (emphasis added). By Article 12, the Band expressly and unambiguously reserved its right to occupy the Mille Lacs Reservation. As persuasively explained by the Court of Claims more than a century ago:

> The language of the proviso would be difficult to construe in any other way than the granting of a right of occupancy to the Mille Lac Band. That they shall not be compelled to remove was certainly equivalent to a right to remain. Remain where? Why, on the Mille Lac Reservation, for all other reservations had been by the treaty ceded to the Government.

Mille Lac Band of Chippewas v. United States, 47 Ct. Cl. 415, 440–41 (1912), *rev'd on other grounds sub nom. United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498 (1913). With respect to the Mille Lacs, at least, the Treaty of 1863 plainly did not constitute a "present and total surrender" of all the Band's rights in its reservation.

To the extent the juxtaposition of Articles 1 and 12 creates an ambiguity, permitting the Court to consider extrinsic evidence of Congressional intent under *McGirt*, that evidence compels the conclusion that the Treaty of 1863 did not disestablish the Mille Lacs Reservation. During the negotiations precipitating the treaty, the Band refused to leave its reservation, and repeated the Band members' belief that Commissioner Dole had promised them that they could remain on their reservation as a reward for their assistance during

Hole-in-the-Day's uprising. (*See* McClurken Rep. at 47-48, 51-57.) Following closed-door negotiations led by Senator Rice, the Band's position was reflected in the Article 12 proviso, and Senator Rice reported that the delegates left Washington "satisfied with the treaty." (*Id.* at 60.)

The County's contention that the treaty divested the Band of its reservation, granting only a limited right of occupancy in its place, does not fit the record of the treaty negotiations and cannot be squared with the Article 12 proviso's role as a reward to the Mille Lacs for their aid during the 1862 uprisings. As the Court of Claims fittingly asked: Was this proviso, "the reward for their signal services of loyalty," a "mere license to live on their reservation, bury their dead there, build their improvements, and then . . . be dispossessed at the pleasure of the advancing whites?" *Mille Lac Band of Chippewas*, 47 Ct. Cl. at 440. To the contrary, the Court finds, as did the Court of Claims in 1912, that the treaty's historical context demonstrates that the proviso was intended by Congress and understood by the Band, not as a mere license to occupy a former reservation's land, but to preserve the Band's Indian title to the Mille Lacs Reservation.[15] Indeed, Senator Rice himself—who claimed "[e]very word in [the treaty] . . . emanated from my pen," and who "would not allow any changes" to the treaty—later confirmed that the Band's

[15] *Cf. id.* at 443 ("No mere license to fish and hunt was conferred upon the Mille Lac Indians by article 12 of the treaty of 1864 . . . . What other Indian right, then, could have been intended save the right of occupancy? . . . [The treaty] confirmed rather than extinguished their rights under the treaty of 1855. The language of article 12 is not ambiguous and if considered apart from the context of the whole instrument could convey but one meaning.").

understanding of the proviso was correct: "[T]he understanding of the chiefs as to the treaty was right. [The Nelson Act] is the acknowledgment of the Government that you were right, that 'you have not forfeited your right to occupy the reservation.'" H.R. Exec. Doc. No. 51-247, at 164 (1890) [Doc. Nos. 230 & 230-1]; White Rep. at 98. And the mere rumor that the Band's negotiators had ceded their reservation resulted in "strong and credible threats against the negotiators' lives." (McClurken Rep. at 61.) Moreover, even Dr. Driben, one of the County's own experts, opined that the Mille Lacs Band did not understand the Treaty of 1863 to result in the loss of their rights to their reservation.[16]

To be sure, it is apparent that some federal officials anticipated, and even desired, that the Mille Lacs would remove to the new reservation near Leech Lake in short order.[17]

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[16] Q. Did band leaders state repeatedly that they understood the 1863 and 1864 treaties to preserve the reservation for them?

A. Yes. In fact, there's a number of documents in the list that you provided me where the Mille Lacs Anishinaabe are saying that quite clearly. From their perspective -- I want to emphasize from their perspective -- there was no change in the reservation in 1863, or '64, from their perspective.

Q. And do you have any reason to doubt that those statements accurately reflected their understanding of the treaties?

A. No. I think that those statements do reflect their understanding of the agreements of '63 and '64. . . .

(Driben Dep. at 66.)

[17] See, for example, Commissioner Dole's speech during the treaty negotiations:

I cannot promise but what it may be necessary that the government should use its power for their removal . . . . It may be barely possible that the people of Minnesota will consent to the Indians now living at Millac, to remain there . . . for the present. They may consent in the future for them to remain

But the Treaty of 1863 did not accomplish that result, and was, even under the County's interpretation, at most a first step toward that goal. As the Supreme Court recently explained regarding Congress's belief that allotting reservation land would precipitate the end of the reservation system: "[J]ust as wishes are not laws, future plans aren't either. Congress may have passed allotment laws to create the conditions for disestablishment. But to equate allotment with disestablishment would confuse the first step of a march with arrival at its destination." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2465 (2020). Likewise, to equate the Treaty of 1863, which may have been designed to create the conditions for future removal of the Mille Lacs Band and the disestablishment of their reservation, with a final act of disestablishment would erroneously "confuse the first step of a march with arrival at its destination." *Id.*

Subsequent treatment of the reservation further bolsters the conclusion that the treaty did not disestablish the Mille Lacs Reservation. It is true that, following the treaty, local lumbermen spent decades attempting (quite successfully) to undermine the Band's possession of reservation timberland. *See supra* Section I.D. But it is equally true that the Band steadfastly opposed removal from its reservation. Although, at times, the Department of the Interior sided against the Band, such adverse decisions were quickly reversed or

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> there forever if they will become good citizens. But I am sure that it will not give satisfaction to the people of Minnesota . . . .

(McClurken Rep. at 54-55; *see also id.* at 56 (stating that the Mille Lacs "have earned this from the Government that they might . . . be allowed to remain where they are at least for the present").)

stayed. Ultimately, however, "only Congress can divest a reservation of its land and diminish its boundaries." *Solem*, 465 U.S. at 470. When *Congress* addressed the conflicting Interior decisions regarding the reservation's status, it stayed any further disposition of lands on the Mille Lacs Reservation. *See* Act of July 4, 1884, 23 Stat. 76, 89. And when Congress passed the Nelson Act in 1889—which applied only to the "reservations" in Minnesota—Congress "adjusted and composed" the controversy regarding the Band's rights, and "the government thus . . . consented to recognize the contention of the Indians." *United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498, 507 (1913).

Because the Treaty of 1863, read as a whole, does not clearly reflect Congress's intent to disestablish the Mille Lacs Reservation, the Court finds that it did not do so. The treaty reserved to the Band an indefinite right to occupy its reservation, conditioned only on the Band's good behavior. That right is inconsistent with the "present and total surrender of all tribal interests" in the reservation. *Solem*, 465 U.S. at 470. Insofar as the treaty is ambiguous, the historical context, the contemporary understanding of the Band, and subsequent treatment of the reservation by Congress all support the conclusion that the Treaty of 1863 did not disestablish the reservation. At the very least, the record does not demonstrate the "clear" Congressional intention required for disestablishment. *Parker*, 577 U.S. at 488.

The Treaty of 1864 is in all material respects identical to the Treaty of 1863. Thus, for the same reasons that the Court finds the Treaty of 1863 did not disestablish the Mille Lacs Reservation, the Court finds that the Treaty of 1864 did not, either.

3. The Treaty of 1867

The Court turns now to the Treaty of 1867. The Treaties of 1863 and 1864 served to consolidate Minnesota's Chippewa at a single reservation near Leech Lake. When lumber and railroad interests encroached on that reservation, and the unsuitability of its location became clearer, the United States negotiated to unite the Chippewa at White Earth instead. To that end, the Treaty of 1867 granted a new reservation at White Earth, and provided: "The Chippewas of the Mississippi hereby cede to the United States all their lands in the State of Minnesota, secured to them by the second article of their [Treaty of 1864]." Treaty of 1867, 16 Stat. 719.

The County appears to argue that this cession language applies to the Mille Lacs Reservation. But the Mille Lacs Reservation was "secured to [the Mille Lacs]" by the Treaty of 1855, not the Treaty of 1864. To the extent the County contends that the Mille Lacs Reservation was "secured" by the Article 12 proviso, and therefore ceded under the Treaty of 1867, the County misreads the treaty: the Treaty of 1867 ceded lands "secured . . . by the second article" of the Treaty of 1864, not Article 12. Because the Treaty of 1867 concerned only the reservation created near Leech Lake, the Court finds that it had no effect on the Mille Lacs Reservation.

4. The Nelson Act

Next, the Court turns to the Nelson Act. The Nelson Act established a commission to negotiate with Minnesota's Chippewa "for the complete cession and relinquishment in writing of all their title and interest in and to all the reservations of said Indians in the State of Minnesota, except the White Earth and Red Lake Reservations . . . , for the purposes

and upon the terms hereinafter stated." Nelson Act § 1, 25 Stat. 642 (Jan. 14, 1889). If the commission obtained the Chippewas' assent to the Act, that assent would "operate as a complete extinguishment of the Indian title . . . for the purposes and upon the terms in this act provided." *Id.* The Act provided for the sale of reservation lands, and created a "permanent fund" within the Treasury Department, into which "all money accruing from the disposal of said lands"—after deducting certain expenses—would be deposited. *Id.* § 7. Some of the interest accruing on that fund would be distributed to the Chippewa; some would be "devoted exclusively to the establishment and maintenance of a system of free schools among said Indians." *Id.* The Act also permitted Congress to appropriate the fund's principal "for the purpose of promoting civilization and self-support among the said Indians." *Id.*

In addition, the Nelson Act provided for the removal of Minnesota's Chippewa to White Earth, where they would be entitled to allotments:

> [A]s soon as the census has been taken, and the cession and relinquishment has been obtained, approved, and ratified . . . , all of said Chippewa Indians in the State of Minnesota, except those on the Red Lake Reservation, shall . . . be removed to and take up their residence on the White Earth Reservation, and thereupon there shall . . . be allotted lands in severalty to the Red Lake Indians on Red Lake Reservation, and to all the other of said Indians on White Earth Reservation . . . .

Id. § 3. Section 3 contained a proviso, however, permitting "any of the Indians residing on any of said reservations" to "take his allotment in severalty under this act on the reservation where he lives at the time of [sic] the removal herein provided for is effected, instead of being removed to and taking such allotment on White Earth Reservation." *Id.* Finally, as a result of Senator Sabin's efforts to retain the lands acquired at Mille Lacs through the

Sabin-Wilder scheme, § 6 included a proviso prohibiting the sale of reservation lands on which a "subsisting, valid, pre-emption or homestead entry" existed, and permitting such entrants to attempt to perfect their title. *Id.* § 6.

The Nelson Act Agreement, obtained by the Chippewa Commission appointed under the Act, recorded the Mille Lacs Band's assent to the Act. By that Agreement, the Mille Lacs "consented and agreed to" the Nelson Act, and agreed to two forms of cession. First, the Band agreed to "grant, cede, relinquish, and convey to the United States all of our right, title, and interest in and to" lands at White Earth and Red Lake not required to make the allotments provided for by the Act. H.R. Exec. Doc. No. 51-247, at 46. Second, the Band also agreed to "forever relinquish to the United States the right of occupancy on the Mille Lac Reservation, reserved to us by the twelfth article of the [Treaty of 1864]." *Id.* After signing the Nelson Act Agreement, the Band requested to take its allotments at Mille Lacs pursuant to the § 3 proviso, and few agreed to remove to White Earth. *See id.* at 1–2; *see also* Slonim Decl., Ex. 64; McClurken Rebuttal at 5-12.

The Court begins its analysis with the text of the Nelson Act and Agreement. It is true, as the County emphasizes, that the Nelson Act established a commission to negotiate "the complete cession and relinquishment . . . of all [the Chippewas'] title and interest in and to all the reservations," and the Act provided that the Indians' assent would "operate as a complete extinguishment of the Indian title." Nelson Act § 1. This language was, however, accompanied by an important qualification that the County does not address: such "cession[s]," "relinquishment," and "extinguishment" were "for the purposes and upon the terms" of the Nelson Act. *Id.* That purpose was to permit the sale of reservation

timber and agricultural land not allotted to the Indians, and to create a permanent fund for the benefit of all the Chippewa, into which the proceeds from such sales would be placed in trust. *See id.*; *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001, 1004–05 (D. Minn. 1971) ("It is apparent in light of events before and after the passage of the Nelson Act that its purpose was not to terminate the reservation or end federal responsibility for the Indian but rather to permit the sale of certain of his lands to homesteaders and others."); *State v. Forge*, 262 N.W.2d 341, 346 (Minn. 1977) ("Sales of the extensive agricultural and timber lands ceded [under the Nelson Act] were . . . to be conducted by the Federal government, and the proceeds of these sales were to be held in trust by the government for the benefit of the Indians.").

The Nelson Act, read as a whole, had three relevant features. First, it permitted Minnesota's Chippewa to obtain allotments, either at White Earth or on their present reservations. Nelson Act § 3, 25 Stat. 642. Second, it opened unallotted portions of the reservations to sale and settlement. *Id.* §§ 1, 4–6. And third, it provided that the proceeds of such sales would be placed in trust, for the benefit of the entire tribe.[18] *Id.* § 7. By the

[18] The County emphasizes that the Nelson Act "did not create a technical trust." *Chippewa Indians of Minnesota v. United States*, 307 U.S. 1, 3 (1939). The *Chippewa Indians* Court's statement was made, however, in the context of a claim that "by the Act of 1889, Congress abdicated its plenary power of administration of the Chippewas' property as tribal property, recognized that the reservations of the respective bands were not tribal property, and agreed to hold the proceeds of the ceded lands in strict and conventional trust for classes of individual Indians in accordance with the program outlined in the Act." *Id.* That the Nelson Act did not create a "strict and conventional trust" so as to support the particular equitable claims asserted in *Chippewa Indians* has no bearing on the disestablishment question. The point is that the Nelson Act did not offer the Chippewa a fixed sum in exchange for their land; rather, it provided for the sale of their land, and that the proceeds (less the Government's expenses) would be held in a fund, the interest on

Act's plain terms, the Act required "cession," "relinquishment," and "extinguishment" only for these purposes.

So understood, the statute does not reflect a clear Congressional intent to disestablish the Mille Lacs Reservation, despite the cession language included in the Act and Agreement. The Supreme Court has continuously held that neither allotting reservation land nor opening reservation land for sale to non-Indians necessarily results in the disestablishment of the subject reservation. *See McGirt v. Oklahoma*, 140 S. Ct. 2452, 2464 (2020) ("For years, States have sought to suggest that allotments automatically ended reservations, and for years courts have rejected the argument. . . . [T]his Court has explained repeatedly that Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others."); *Mattz v. Arnett*, 412 U.S. 481, 504 (1973) ("The presence of allotment provisions in the 1892 Act cannot be interpreted to mean that the reservation was to be terminated."); *see also City of New Town v. United States*, 454 F.2d 121, 125 (8th Cir. 1972) ("The opening of an Indian reservation for settlement by homesteading is not inconsistent with its continued existence as a reservation."). And, importantly, the § 3 proviso expressly permitted Band members to refuse removal to White Earth, and instead take their allotments at Mille Lacs.

Because the Nelson Act's cession language was not unqualified, it does not reflect the "present and total surrender of all tribal interests." *Solem v. Bartlett*, 465 U.S. 463, 470

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which would be applied for the benefit of the entire tribe. Such an arrangement is, for all purposes here relevant, fairly considered a "trust."

(1984).[19] Nor did the Nelson Act's sale and trust provisions constitute the type of sum-certain compensation which may, together with language evidencing complete cession, create "an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." *Id.*; *see Minn. Chippewa Tribe v. United States*, 11 Ct. Cl. 221, 226 (1986) ("[The Nelson Act] differed from most earlier treaties because it provided for the sale of the ceded land and the establishment of a trust held by the United States for the tribe, rather than for a cession in return for a sum certain paid to the Indians.").

Moreover, this Court and the Minnesota Supreme Court have previously held that the Nelson Act did not result in the disestablishment of subject reservations. In *Leech Lake Band of Chippewa Indians v. Herbst*, Judge Devitt, writing for this Court, found that the Leech Lake Band retained hunting and fishing rights on the Leech Lake Reservation. 334 F. Supp. 1001, 1004–05 (D. Minn. 1971). The Court reasoned: "It is apparent in light of events before and after the passage of the Nelson Act that its purpose was not to terminate the reservation or end federal responsibility for the Indian but rather to permit the sale of certain of his lands to homesteaders and others." *Id.* Because "the existence of this continuing [guardian-ward] relationship [between the Band and the United States] negatives any inference that the Leech Lake Reservation . . . was terminated," the Court

[19] *See also United States v. Grey Bear*, 828 F.2d 1286, 1290 (8th Cir.), *reh'g en banc granted in part, opinion vacated in non-relevant part*, 836 F.2d 1088 (8th Cir. 1987), *and on reh'g en banc*, 863 F.2d 572 (8th Cir. 1988) ("We conclude that the 'cede, surrender, grant, and convey' language of the 1904 Act, standing alone, does not evince a clear congressional intent to disestablish the Devils Lake Reservation. In the past, when Congress has intended to disestablish a reservation, it generally has forthrightly stated this intention." (collecting cases)).

held that the Band's hunting and fishing rights on reservation land had not been terminated by the Nelson Act. *Id.* at 1006; *accord State v. Forge*, 262 N.W.2d 341, 346 (Minn. 1977) ("Although the disestablishment effect of the Nelson Act is not free from doubt, we are convinced after a review of the voluminous authorities cited to us that the act did not terminate the Leech Lake Reservation.").

The Minnesota Supreme Court reached a similar conclusion regarding the White Earth and Grand Portage reservations. *State v. Clark*, 282 N.W.2d 902, 907 (Minn. 1979) (holding that the Nelson Act did not disestablish the White Earth reservation, because (1) it did not disestablish the Leech Lake Reservation, from which the Chippewa were expected to remove to White Earth; (2) Congress subsequently treated White Earth as a reservation; and (3) the Chippewa Commission's negotiations reflected the parties' belief that the act would preserve all but four townships of the White Earth Reservation); *Melby v. Grand Portage Band of Chippewa*, No. CIV 97-2065, 1998 WL 1769706, at *8 (D. Minn. Aug. 13, 1998) ("[T]he Court finds that the statutory language of the Nelson Act does not disestablish the entire [Grand Portage] reservation, because it reserved parcels of land for Indians who elected to remain on the reservation.").

The County emphasizes that, despite his decision regarding Leech Lake, Judge Devitt later held that the Nelson Act diminished the Red Lake and White Earth Reservations. *See United States v. Minnesota*, 466 F. Supp. 1382 (D. Minn. 1979), *aff'd sub nom. Red Lake Band of Chippewa Indians v. Minnesota*, 614 F.2d 1161 (8th Cir. 1980) [hereinafter *Red Lake Band*]; *White Earth Band of Chippewa Indians v. Alexander*, 518 F. Supp. 527 (D. Minn. 1981), *aff'd*, 683 F.2d 1129 (8th Cir. 1982) [hereinafter *White Earth*

Band]. In *Red Lake Band*, the Court reasoned that the language of the band's written agreement to the Nelson Act—that the band would cede "all right, title, and interest" to "so much of said Red Lake Reservation as is not embraced in the following described boundaries"—was "precisely suited for the purpose of eliminating Indian title and conveying to the government all the Band's interest in the ceded lands." 466 F. Supp. at 1385 (quotation omitted); *see* H.R. Exec. Doc. No. 51-247, at 27–28 (Red Lake Band's agreement to the Act). Similarly, in *White Earth Band*, the Court concluded that the same result obtained with respect to four townships on the White Earth Reservation, which had likewise been excluded from the land expressly reserved to the band in its written agreement to the Nelson Act. 518 F. Supp. at 1385–86; H.R. Exec. Doc. No. 51-247, at 37 (White Earth Band's agreement to the Act). In both cases, the Eighth Circuit affirmed without adding to the diminishment analysis.

But these cases are not inconsistent with the cases holding that the Nelson Act did not *disestablish* subject reservations, nor do they support the conclusion that the Mille Lacs Reservation was disestablished or diminished. Although the County asserts that Judge Devitt "changed his position on the Nelson Act," the cases are fully reconcilable with each other and with the rules for disestablishment articulated in *McGirt*. (Mem. in Opp'n to Pls.' Mot. for Summ. J. [Doc. No. 257], at 66.) "The Nelson Act treated various bands or tribes and reservations differently, and contemplated that a separate agreement would be negotiated with individual bands or tribes pursuant to the Act." *White Earth Band of Chippewa Indians v. Alexander*, 683 F.2d 1129, 1135 (8th Cir. 1982) (citation omitted). The Red Lake Band's agreement provided that the band ceded "so much of said Red Lake

Reservation as is not embraced in the following described boundaries," and went on to describe the reservation's intended post-Nelson Act boundaries. H.R. Exec. Doc. No. 51-247, at 27–28. In *Red Lake Band*, this Court held that the lands outside of the enumerated boundaries were no longer part of the reservation. Similarly, the White Earth Band agreed to cede "so much of said White Earth Reservation as is not embraced in the following described boundaries," and the agreement then listed thirty-two of the reservation's thirty-six townships. *Id.* at 37. In *White Earth Band*, this Court held that the four townships not listed in the agreement were no longer part of the reservation. And in both cases, the bands had been informed by the Chippewa Commission that their reservations would shrink.[20]

The Leech Lake agreement did not follow the same form as the White Earth and Red Lake agreements, but instead provided for the band's consent to the Nelson Act and for a general "cession" of the Leech Lake Reservation "for the purposes and upon the terms stated in said act." *Id.* at 49. This Court, as well as the Minnesota Supreme Court, held that the Leech Lake Reservation was not thereby disestablished or diminished. Similar to the Leech Lake Band, the Mille Lacs Band's agreement provided for the Band's consent to the

[20] *See* H.R. Exec. Doc. No. 51-247, at 80 (Senator Rice, stating to the Red Lake Band: "You must not, of course, expect to keep all your reservation . . . . You may think that you ought to have what we consider too much, and that what we consider is enough is too small; so we must talk it over calmly . . . ; but that territory which is now and always will be useless to you, you might as well part with and avoid a repetition of the difficulties between yourselves and the whites."); *White Earth Band*, 518 F. Supp. at 532 ("The transcripts of the negotiations between the Rice Commission and the [White Earth] Indians clearly reflect that the proposed cession of the four townships was fully considered by the Indians, and that it was understood that the reservation would be diminished by cession of those lands.").

Nelson Act, and that the Band "hereby forever relinquish . . . the right of occupancy . . . reserved to us by the [Article 12 proviso]." *Id.* at 45–46. Unlike the agreements with the Red Lake and White Earth Bands, the Mille Lacs' agreement did not expressly provide for the cession of a subset of the reservation's land. There is, therefore, no textual basis for a finding of diminishment, unlike in the *Red Lake* and *White Earth* cases.

Nor is there a textual basis for concluding that the Mille Lacs, by assenting to the Nelson Act and relinquishing its "right of occupancy" under the Article 12 proviso, thereby ceded their reservation. As explained above, the Nelson Act merely provided for the allotment and sale of reservation land, the proceeds to be held in trust for Minnesota's Chippewa. Each court to address the Nelson Act has concluded that it did not reflect Congressional intent to disestablish subject reservations. Although the Band agreed to "forever relinquish" its rights under the Article 12 proviso, the proviso was not the source of the Band's rights in its reservation. Rather, as explained previously, the Band held its reservation under the Treaty of 1855; the Article 12 proviso operated to express the parties' intention that the Treaties of 1863 and 1864 did not deprive the Band of that reservation so long as the Band maintained its good conduct. For all the foregoing reasons, the Court finds that, construed as a whole, the unambiguous language of the Nelson Act and Agreement do not evidence a clear Congressional intent to disestablish or diminish the Mille Lacs Reservation.

To the extent the Act and Agreement are ambiguous, their historical context bolsters the conclusion that the Mille Lacs Reservation was not disestablished. In explaining the

Nelson Act to the Band, Senator Rice—the author of the Treaty of 1863—represented that the Nelson Act confirmed that the Band had retained its reservation, and that accepting allotments under the Act "will not affect these old matters at all . . . but, on the contrary, leaves you in a stronger position than before." H.R. Exec. Doc. No. 51-247, at 164–65. The Band, which had itself suggested taking allotments at Mille Lacs in an 1888 petition,[21] called Rice's explanation "perfect," and the Band's negotiators declared their intention to take "our allotments on this reservation, and not be removed to White Earth." H.R. Exec. Doc. No. 51-247, at 165–66, 168; *see also id.* at 74 ("They tell us we are going to stay here forever, and that they are going to make allotments here to us.").

The County points to a number of subsequent events as evidence that the Nelson Act was regarded as disestablishing the reservation. For example, the County contends that disestablishment is evidenced by later decisions of the Department of the Interior, Acts of

[21] The County characterizes the Band's 1888 petition as an indication that the Band desired to give up its reservation, having concluded that relinquishing the reservation in exchange for allotments was the only way to prevent settlers' and lumbermen's persistent encroachment. (*See* Driben Decl. ¶ 5; Driben Rep. at 57; Driben Dep. at 62, 128.) But the Band's statements do not reflect a desire to terminate the reservation. The Band's petition stated that "[w]e are told that we ceded our reservation at Mille Lac to the United States in 1863," but "we never intended to go away from our home at Mille Lac," and pleaded for the opportunity to take allotments at Lake Mille Lacs. (Slonim Decl., Ex. 54, at 7.) This petition reflects a desire to strengthen the Band's rights to its reservation, not forfeit them. (*See* Valentine Rebuttal at 16-17 (opining that the 1888 petition "implies a desire to retain their reservation, not to rid themselves of it").) Nor does the County explain why taking allotments is inconsistent with continued reservation status—it plainly is not. *See McGirt*, 140 S. Ct. at 2464 ("For years, States have sought to suggest that allotments automatically ended reservations, and for years courts have rejected the argument."); *Mattz v. Arnett*, 412 U.S. 481, 504 (1973) ("The presence of allotment provisions in the 1892 Act cannot be interpreted to mean that the reservation was to be terminated.").

Congress,[22] the Mississippi Chippewa Tribe's 1936 constitution, cartographic records, and demographic evidence regarding changes to the reservation's population. (*See generally* Mem. in Supp. of Def.'s Mot. for Summ. J.; *see also supra* Section I.F.) Although such extrinsic evidence may have "some evidentiary value," *Solem v. Bartlett*, 465 U.S. 463, 471 (1984), the Court does not find it helpful, on these facts, in ascertaining whether *Congress* intended to disestablish the Mille Lacs Reservation through the Nelson Act. At the very least, such evidence does not override the language of the Nelson Act and Agreement, coupled with the contemporary evidence of the Nelson Act's meaning. Nor is such evidence so strong as to demonstrate the clear Congressional intent required for this Court to find disestablishment.

The County also argues that the Supreme Court, in its 1913 *Mille Lac Band* decision, necessarily held that the Nelson Act disestablished the Mille Lacs Reservation. The Court disagrees. There, the Supreme Court held that the existing controversy over the reservation's status under the Article 12 proviso was "adjusted and composed" by the

[22] As explained further in the next Section, the County points to Congressional Resolutions in 1893 and 1898 that allegedly reflect Congress's understanding that the Mille Lacs Reservation had been disestablished by the Nelson Act. But as the Supreme Court held in its 1913 *Mille Lac Band* decision, those Resolutions were made in violation of the Nelson Act. *See United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498, 509 (1913) (holding that the United States' disposal of land on the Mille Lacs Reservation following the Nelson Act was "not for the benefit of the Indians, but in disregard of their rights," and was "clearly in violation of the trust" created by the Nelson Act). Because those resolutions were contrary to the Nelson Act—and in any event bear only "some evidentiary value," *Solem*, 465 U.S. at 471—the Court does not find them persuasive in discerning Congress's intention when passing the Nelson Act. Moreover, two other statutes, enacted in 1890, reflect the *opposite* understanding. *See supra* note 5.

Nelson Act. *United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498, 506 (1913). According to the Court, the Nelson Act embodied a compromise, by which the United States agreed to recognize the Band's contention that the Treaties of 1863 and 1864 did not disestablish its reservation, on the condition that entries made prior to the Nelson Act would not be disturbed. *Id.* at 507. The Court reasoned that, therefore, the reservation's land was subject to disposal under the Nelson Act—except land subject to valid entries pre-dating the Nelson Act—and that by disposing of the land under the general land laws instead, the United States had violated the Nelson Act. *Id.* at 509. The Court did not address whether the Nelson Act, by permitting the allotment and disposal of reservation land, operated to disestablish the Mille Lacs Reservation, and it did not need to reach that question in order to determine that the United States had violated the Nelson Act.

Likewise, the Supreme Court's decision in *United States v. Minnesota* did not resolve whether the Nelson Act disestablished the reservation. 270 U.S. 181 (1926). There, the Court reiterated its holding that the Nelson Act "adjusted and composed" the controversy regarding the Band's rights to its reservation under the Treaties of 1863 and 1864. Because the Nelson Act's compromise recognized valid entries made prior to the Act, the Court concluded that the United States could not recover reservation swampland patented to Minnesota in 1871. *Id.* at 198. Contrary to the County's interpretation, this holding did not require the Court to find that the swampland was not reservation land as of 1871, and it certainly did not require the Court to examine whether the Nelson Act disestablished the reservation in 1889.

In sum, the Court finds that the Nelson Act and Nelson Act Agreement do not reflect clear Congressional intent to disestablish or diminish the Mille Lacs Reservation. The documents are unambiguous, and their import was to allot reservation lands, open the reservation to sale and settlement, and apply the proceeds of such sales for the benefit of Minnesota's Chippewa. These purposes are consistent with the continued existence of the reservation. And, importantly, the Nelson Act expressly permitted the Band to take allotments at Mille Lacs rather than White Earth, undermining the implication that the Act was intended to terminate the reservation. When viewed in the historical context of the Nelson Act and Agreement, the conclusion that Congress did not clearly intend to disestablish the Mille Lacs Reservation becomes plain. Although the Band was subsequently deprived of many of the benefits of the Act, including by the Congressional resolutions discussed below, the Chippewa Commission represented that the Band would strengthen its position at Mille Lacs—not forfeit it—by assenting to the Act. The historical record suggests the Band so understood the Act. The Court agrees with that understanding, and finds that the Nelson Act and Agreement did not disestablish or diminish the reservation.

5. Post-Nelson Act Congressional Resolutions

The County argues that several additional acts disestablished the Mille Lacs Reservation—namely, the 1893 and 1898 Resolutions and the 1902 Act. The Court considers each in turn.

In the 1893 Resolution, Congress confirmed "all bona fide pre-emption or homestead filings or entries allowed for lands within the Mille Lac Indian Reservation"

made between the Interior Department's 1891 *Walters* decision, which held that the reservation's lands were open to entry under the general land laws, and the 1892 *Mille Lac Lands* decision, which resulted in the cancellation of all homestead and preemption entries made after the Nelson Act. J. Res. 5, 53rd Cong., 28 Stat. 576 (1893). The Court finds that this resolution does not reflect a clear intent to disestablish the Mille Lacs Reservation. The 1893 Resolution simply permitted disposal of reservation land under the general land laws, rather than under the Nelson Act. Merely opening reservation lands to sale and settlement to non-Indians does not necessarily result in disestablishment. *See McGirt v. Oklahoma*, 140 S. Ct. 2452, 2464 (2020) ("[T]his Court has explained repeatedly that Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others."); *see also City of New Town v. United States*, 454 F.2d 121, 125 (8th Cir. 1972) ("The opening of an Indian reservation for settlement by homesteading is not inconsistent with its continued existence as a reservation.").

And to the extent the resolution is ambiguous, its legislative history confirms that Congress's purpose was to protect the reliance interests of those settlers who made entries following the *Walters* decision—entries that covered 31,659 of the reservation's 61,000 acres—rather than to disestablish the reservation. *See* H.R. Rep. No. 53-149, at 1 (1893) ("The object of the pending bill is to confirm the entries . . . made in good faith under the [*Walters*] ruling . . . , and between that date and the time when said ruling was reversed . . . . The occupants of these lands made their entries and paid their money under the general land laws and in accordance with the ruling of the Secretary of the Interior. The

subsequent reversal of that ruling by the same Secretary ought not to deprive them of their equitable right to these lands.").

In 1898, Congress passed a second resolution, following mistaken reports that the Band did not desire to take allotments at Mille Lacs. *See supra* Section I.F.3. The 1898 Resolution provided:

> That all public lands formerly within the Mille Lac Indian Reservation . . . be, and the same are hereby, declared to be subject to entry by any bona fide qualified settler under the public land laws of the United States; and all preemption filings heretofore made . . . and all homestead entries or applications to make entry under the homestead laws, shall be received and treated in all respects as if made upon any of the public lands of the United States subject to preemption or homestead entry: *Provided*, That [certain land at Mille Lacs] be . . . perpetually reserved as a burial place for the Mille Lac Indians . . . .

J. Res. 40, 55th Cong., 30 Stat. 745 (1898). Although the 1898 Resolution reflects the *assumption* that the Mille Lacs Reservation was "public land[]" (and Congress therefore declared the lands open to entry), the resolution did not itself purport to return the reservation's lands to the public domain.[23] *Cf. Hagen v. Utah*, 510 U.S. 399, 412 (1994) (finding disestablishment where the statute provided that "all the unallotted lands within said reservation shall be restored to the public domain" (emphasis omitted)). And merely

[23] The County makes much of the fact that the title of the 1893 Resolution and the text of the 1898 Resolution refer to the "former" Mille Lacs Reservation. That Congress subsequently refers to a reservation as a "former" reservation does not necessarily mean that a prior statute was intended to disestablish the reservation. *See McGirt*, 140 S. Ct. at 2472–73 (finding no disestablishment despite Congressional references to a "former" reservation); *Solem v. Bartlett*, 465 U.S. 463, 479 (1984) (same). Indeed, that Congress believed in 1898 that the reservation had already been disestablished would undermine the claim that Congress intended to disestablish the reservation via the 1898 Resolution—that is, that Congress intended to do what it believed had already been done.

opening reservation lands to settlement does not result in disestablishment. *See McGirt*, 140 S. Ct. at 2464; *City of New Town*, 454 F.2d at 125. Rather, as the Supreme Court held in *Mille Lac Band*, the resolution was merely an assertion of power over land believed to be "the absolute property of the government" due to a "misapprehension of the true relation of the government to the lands." *United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498, 510 (1913). The Court finds that the resolution does not reflect a clear Congressional intent to disestablish the Mille Lacs Reservation.

Finally, the Court turns to the 1902 Act. The Act provided for "payment to the Indians occupying the Mille Lac Indian Reservation . . . , to pay said Indians for improvements made by them . . . upon lands occupied by them on said Mille Lac Indian Reservation . . . upon condition of said Indians removing from said Mille Lac Reservation." Act of May 27, 1902, 32 Stat. 245, 268. The Act's provisos permitted Band members who purchased land on the reservation to remain, and permitted members to take allotments at any other reservation in Minnesota that was subject to allotment. *Id.*

The Court finds that there is no textual basis for the contention that the Act disestablished the Mille Lacs Reservation. Congress referred to the reservation as "the Mille Lac Indian Reservation," and offered a payment for improvements on the reservation to Band members who chose to leave for another reservation. The arrangement was voluntary. It reflects no intention, let alone a clear intention, to disestablish the reservation. Crucially, when the Band agreed to the Act, its written agreement expressly provided:

> It is understood that nothing in this agreement shall be construed to deprive the said Mille Lacs Indians of any benefits to which they may be entitled

> under existing treaties or agreements not inconsistent with the provisions of this agreement, or the [Act of 1902].[24]

(Carter Decl., Ex. 61, at 25.) The Act and subsequent agreement, therefore, furnish no textual basis for a finding of disestablishment.

Nor does the Act's context indicate that Congress intended to disestablish the reservation. By the time Congress began to consider the Act, the Band had been largely dispossessed of the Mille Lacs Reservation, and no land remained for the allotments permitted under the Nelson Act. *See supra* Sections I.F.1–6. In negotiating with Inspector McLaughlin and Agent Michelet, the Band repeated its understanding that the Nelson Act preserved its reservation, and expressed its desire to remain there. (*See* Slonim Decl., Ex. 134, at 56, 73 ("[Senator Rice] pointed to the different directions defining our reservation and said that it would come to pass that this land would be allotted to us.").) And McLaughlin and Michelet expressly assured the Band that the Act contemplated only their removal, that it would not result in the forfeiture of the Band's "back claims" under the

[24] The County also emphasizes that the agreement referred to the reservation as a "former" reservation. But if *Congress's* use of the word "former" offers little evidence of Congressional intent to disestablish a reservation, *see supra* note 23, use of the word in an agreement penned by federal negotiators bears virtually no weight. *See Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675–76, *modified sub nom. Washington v. United States*, 444 U.S. 816 (1979) ("[I]t is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties. When Indians are involved, this Court has long given special meaning to this rule. It has held that the United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side. '[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.'" (quoting *Jones v. Meehan*, 175 U.S. 1, 11 (1899)) (second alteration in original)).

Nelson Act, and that they would lose "no rights by moving." (*Id.* at 67-71.) Finally, although the demographic record is complicated, it suggests that hundreds of Band members did not take advantage of the Act. *See supra* Section I.F.5.

6. Summary

By the Treaty of 1855, the Band was promised a "permanent home[]" at Lake Mille Lacs. Following the Band's defense of the United States during the uprisings of 1862, the Band received special treatment in the Treaties of 1863 and 1864: While other bands were required to leave their reservations and be consolidated near Leech Lake, the treaties' Article 12 proviso permitted the Mille Lacs Band to remain on their reservation during their good behavior. The treaties, read as a whole—and particularly when viewed in their historical context—do not clearly reflect Congressional intent to disestablish the reservation. Nor does the Treaty of 1867, which pertained only to the White Earth and Leech Lake Reservations. By the Nelson Act, Congress "consented to recognize the contention of the Indians" that their reservation persisted, but as part of the Act's compromise, Congress permitted prior entries to proceed to patent. *United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498, 507 (1913). The Act also provided for the sale of reservation pine and agricultural land, the proceeds to be held in trust for the Chippewa; but it expressly permitted the Mille Lacs to take allotments on the reservation. Again, the statutory scheme and the Band's agreement to it, viewed as a whole and especially when viewed in context, do not reflect the clear intention required for this Court to find disestablishment. Nor do the Resolutions of 1893 and 1898 (which merely permitted disposal of reservation lands in violation of the Nelson Act), or the 1902 Act (which

preserved the Band's rights under prior treaties), reflect the clear intention required for this Court to find disestablishment.

Over the course of more than 160 years, Congress has never clearly expressed an intention to disestablish or diminish the Mille Lacs Reservation. The Court therefore affirms what the Band has maintained for the better part of two centuries—the Mille Lacs Reservation's boundaries remain as they were under Article 2 of the Treaty of 1855.

III. CONCLUSION

Accordingly, for all the foregoing reasons, and based on the submissions and the entire file and proceedings herein, **IT IS HEREBY ORDERED** that Plaintiffs' Motion for Partial Summary Judgment [Doc. No. 223] is **GRANTED**, and Defendants' Cross-Motion for Partial Summary Judgment [Doc. No. 239] is **DENIED**.

IT IS SO ORDERED.

Dated: March 4, 2022

s/Susan Richard Nelson
SUSAN RICHARD NELSON
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Mille Lacs Band of Ojibwe, a federally recognized Indian Tribe; James West, in his official capacity as the Mille Lacs Band Chief of Police; and Derrick Naumann, in his official capacity as Sergeant of the Mille Lacs Police Department, Plaintiff, v. County of Mille Lacs, Minnesota; Joseph Walsh, individually and in his official capacity as County Attorney for Mille Lacs County; and Donald J. Lorge, individually and in his official capacity as Sheriff of Mille Lacs County, Defendants.	Case No. 17-cv-05155 (SRN/LIB) **ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**

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2530, Minneapolis, MN 55415; and Scott M. Flaherty and Scott G. Knudson, Taft Stettinius & Hollister LLP, 80 South Eighth Street, Suite 2200, Minneapolis, MN 55402, for Defendant Donald J. Lorge.

SUSAN RICHARD NELSON, United States District Judge

This matter is before the Court on the Plaintiffs' Motion for Summary Judgment Awarding Declaratory and Injunctive Relief [Doc. No. 317] and Defendants Joseph Walsh and Donald Lorge's Motion for Summary Judgment [Doc. No. 322]. Based on a review of the files, submissions, and proceedings herein, and for the reasons below, the Court grants in part and denies in part Plaintiffs' motion, and grants in part, denies in part, and denies as moot in part Defendants Walsh and Lorge's Motion.

I. BACKGROUND

A. Parties and the Mille Lacs Indian Reservation

Plaintiffs are the Mille Lacs Band of Ojibwe, Mille Lacs Band Chief of Police James West[1], and Sergeant Derrick Naumann (collectively, "the Band"). In November 2017, the Band filed this lawsuit against the County of Mille Lacs, Mille Lacs County Attorney Joseph Walsh, and Sheriff Donald Lorge[2] (collectively, "the County") seeking declaratory and injunctive relief regarding the Band's law enforcement authority within the Mille Lacs Indian Reservation. (*See generally* Compl. [Doc. No. 1].) This Court maintains subject

[1] In April 2022, Chief of Police West was automatically substituted as a named plaintiff under Fed. R. Civ. P. 25(d), having succeeded former Chief of Police and named plaintiff, Sara Rice. (April 4, 2022 Jt. Letter [Doc. No. 314] at 3.)

[2] In March 2019, Sheriff Lorge was automatically substituted as an individual defendant for his predecessor, former Sheriff and individual defendant, Brent Lindgren. (Order on Stip. [Doc. No. 63].)

matter jurisdiction over this matter based on federal question jurisdiction. (*See* Dec. 21, 2020 Order [Doc. No. 217] at 24–29.)

1. History of the Dispute Regarding Tribal Law Enforcement Authority on the Reservation

Article 2 of the 1855 Treaty between the Minnesota Chippewa Tribe and the United States established the Mille Lacs Indian Reservation, which comprises about 61,000 acres of land. (10 Stat. 1165 (Feb. 22, 1855); Quist Decl. [Doc. No. 160] ¶ 3.) Within the Reservation, the United States holds approximately 3,600 acres in trust for the benefit of the Band, the Minnesota Chippewa Tribe, or individual Band members. (Quist Decl. ¶ 4.) Such lands are considered "trust lands." *See* 25 U.S.C. § 2201(4)(i). The Band owns in fee simple about 6,000 acres of the Reservation, and individual Band members own in fee simple about 100 acres of the Reservation. (Quist Decl. ¶ 4.) These lands, to which the Band or its members hold title, are referred to as "the Band's fee lands."[3]

Pursuant to state law, in 2008, the Band and the County entered into a cooperative law enforcement agreement ("2008 Cooperative Agreement"). (Baldwin Decl. [Doc. No. 150][4], Ex. H (Revocation & 2008 Coop. Agmt.) at 13–20.) The 2008 Cooperative Agreement allowed Band law enforcement officers to exercise concurrent jurisdiction with

[3] Because "fee lands" denote that a person holds title to the land, to the extent the Court refers to lands to which nonmembers or non-Indians hold title, the Court will refer them as "nonmember fee lands" or "non-Indian fee lands."

[4] Unless otherwise indicated, citations to "Baldwin Decl." refer to the Declaration of Beth Baldwin in Support of Plaintiffs' Motion for Summary Judgment on Standing, Ripeness, and Mootness, found at Doc. No. 150.

the Mille Lacs County Sheriff's Department to enforce Minnesota criminal law, consistent with Minn. Stat. § 626.90. (*Id.*) Minnesota Statute § 626.90 provides that if certain regulatory and liability requirements are met, the Band and the Mille Lacs County Sheriff possess concurrent jurisdictional authority as follows: (1) over all persons in the geographical boundaries of the trust lands; (2) over all Minnesota Chippewa tribal members within the boundaries of the 1855 Treaty; and (3) over any person who commits or attempts to commit a crime in the presence of an appointed band peace officer within the boundaries of the 1855 Treaty. Minn. Stat. § 626.90, subd. 2(c). However, the statute makes clear that "[n]othing in this section shall be construed to restrict the band's authority under federal law." Minn. Stat. § 626.90, subd. 6.

In approximately 2013, the Band applied to the U.S. Department of Justice for concurrent federal jurisdiction over crimes committed in the Band's Indian country,[5] pursuant to the Tribal Law and Order Act (TLOA), 18 U.S.C. § 1162(d). (Baldwin Decl., Ex. D (M-Opinion) at 1–2 n.2.) During the application process, the County submitted

[5] "Indian country" means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. 18 U.S.C. § 1151.

The Court uses the term "Indian" as defined in 25 U.S.C. § 1301(4), and "non-Indian" to refer to persons who do not fall within the definition of § 1301(4).

comments in opposition, asserting that the Reservation, as established by the 1855 Treaty, had been disestablished such that the 1855 Treaty boundaries no longer constitute the Band's Indian country. (*Id*. at 2 & n.3.) The Band responded to the contrary, maintaining that the 1855 Treaty boundaries remain intact. (*Id*. & n.4.)

In response to the dispute, in November 2015, the U.S. Department of the Interior's Office of the Solicitor ("DOI Solicitor") issued an opinion entitled *Opinion on the Boundaries of the Mille Lacs Reservation*, Solicitor's Opinion M-37032 (the "M-Opinion"). (*Id*. at 1–2.) In the 37-page, single-spaced M-Opinion, the DOI Solicitor recounted the establishment of the Mille Lacs Reservation in 1855, the applicable treaties, the Nelson Act, the historical treatment of the land, Supreme Court authority, and Interior Department positions regarding the Reservation. (*Id*. at 2–22.) After analyzing the complicated history of the Reservation and the applicable law, the DOI Solicitor found no evidence of clear congressional intent to disestablish the Reservation sufficient to overcome the general rule that "doubtful expressions are to be resolved in favor of the Indians." (*Id*. at 36 & n.260 (citing *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809, 816 (8th Cir. 1983) (quoting *DeCoteau v. Dist. Cnty. Court*, 420 U.S. 425, 444 (1975) (cleaned up)).) Thus, the DOI Solicitor concluded the M-Opinion by finding that the Reservation, as it was established by the 1855 Treaty, remained intact. (*Id*. at 36.)

The M-Opinion and its findings on the Reservation's boundaries prompted the County to terminate the 2008 Cooperative Agreement between the County and the Band regarding their concurrent authority to enforce state criminal law. (Revocation & 2008 Coop. Agmt. at 1–5.) Walsh explained, "The primary motivating factor of the revocation,

as stated in the revoking resolution, was the M-opinion, and what I think the board viewed as the Band using their law enforcement authority to improve their position vis-à-vis the boundary." (Baldwin Decl., Ex. KK (Walsh Dep.) at 318:23–319:3.) Indeed, in the County's July 21, 2016 resolution to revoke the 2008 Cooperative Agreement, the County expressly "reject[ed] the conclusions of the M Opinion and the Mille Lacs Band of Ojibwe's use of the criminal justice system to address the disputed boundary of the Mille Lacs Indian Reservation in violation of Minn. Stat. § 626.90(7) and paragraph 10 of the Cooperative Agreement." (Revocation & 2008 Coop. Agmt. at 4.) The Revocation Resolution provided that the 2008 Cooperative Agreement would expire within thirty days of the Band and Sheriff receiving notice. (*Id*. at 3–4.)

In July 2016, County Attorney Walsh asked then-Minnesota Attorney General Lori Swanson for an opinion regarding whether the Band's police department remained a state law enforcement agency under Minnesota law. (Aug. 27, 2021 Walsh Decl. [Doc. No. 306-1] ¶ 7.) Swanson denied the request for an opinion and recommended that Walsh advise the County as he deemed appropriate. (*See id*. ¶ 8.)

2. The Opinion and Protocol: The Undisputed Record

Shortly thereafter, on July 18, 2016, Walsh issued an Opinion and Protocol, addressing the Band's state law enforcement authority. (Baldwin Decl., Ex. I (hereafter, "Opinion").) Walsh stated that he developed the Opinion and Protocol "to ensure that the evidence being presented to me for potential prosecution would be admissible in court," precluding jurisdictional challenges that might arise "if a Band police officer made an illegal stop." (Aug. 27, 2021 Walsh Decl. ¶ 13.)

In the "Opinion" portion of the Opinion and Protocol, Walsh opined that "the nature and extent of [the Band's] inherent tribal criminal authority is presently unknown." (Opinion at 14.) Walsh stated that the Band's police department was created by Minn. Stat. § 626.90, and its state law enforcement authority within the County "is entirely dependent upon the interpretation of that statute." (*Id*. at 3.) Under a "plain reading" of the statute, Walsh opined, the Band was only allowed to provide law enforcement services in the County if it entered into a mutual aid/cooperative agreement with the Sheriff. (*Id*.) Because the County had revoked the 2008 Cooperative Agreement and no other agreement was forthcoming, Walsh addressed the scope of the Band's state law enforcement authority, absent a cooperative agreement.

a. Scope of Authority

As an initial matter, Walsh addressed geographic limitations on the Band's jurisdiction, drawing distinctions between part of the Reservation that lies in Pine County and part in Mille Lacs County, at issue here. (*Id*. at 2–3, 6.) A statute similar to Minn. Stat. § 626.90 provides for shared law enforcement jurisdiction between the Band and the Pine County Sheriff. *See* Minn. Stat. § 626.93, subd. 3.[6] Because the Band and the Pine

[6] The statute applicable to Pine County broadly provides that subject to certain requirements, and if the tribe enters into a cooperative agreement, "the tribe shall have concurrent jurisdictional authority under this section with the local county sheriff *within the geographical boundaries of the tribe's reservation* to enforce state criminal law." Minn. Stat. § 623.93, subd. 3 (emphasis added). By contrast, the statute applicable to Mille Lacs County contains additional distinctions between the persons subject to the Band's concurrent jurisdiction ("all persons," "all Minnesota Chippewa tribal members," or "any person") and their location, ("in the geographical boundaries of the property held by the United States in trust for the Mille Lacs Band or the Minnesota Chippewa tribe," or "within the boundaries of the [1855 Treaty]."). Minn. Stat. § 626.90, subd. 2(c)(1)–(3). Moreover,

County Sheriff had a cooperative agreement in place, Walsh opined that for criminal offenses occurring in Pine County, Band officers maintained all of their defined law enforcement authority, but for offenses occurring in Mille Lacs County, the Band lacked the jurisdictional authority of peace officers, since the Band and Mille Lacs County had no cooperative agreement in place. (*Id*. at 6–7 ("The Mille Lacs Band Police Department no longer has lawful state law jurisdiction within Mille Lacs County unless and until a new cooperative agreement pursuant to Minn. Stat. § 626.90 is reached.").) Rather, he found the Band's officers generally maintained only the state law enforcement authority of private citizens in Mille Lacs County. (*Id*. at 6.)

Specifically, Walsh opined as to the Band's authority to engage in arrests and citizen's arrests, issue citations, perform investigations, sign state criminal complaints, sign state law search warrant applications, use force under state law, carry firearms under state law, and use deadly force under state law. (*Id*. at 6–11.) As to the power to arrest, Walsh opined that Band officers in Mille Lacs County possessed a peace officer's power to make warrantless arrests only when facing circumstances that permit the use of deadly force by a peace officer. (*Id*. at 6–7 (citing Minn. Stat. §§ 629.40(4); 609.066).) Absent such circumstances, Band officers in Mille Lacs County were limited to "the same powers of arrest that an ordinary citizen would possess." (*Id*. at 7 (citing Minn. Stat. § 629.40(4)).) Under Minnesota law, a private person may arrest another: (1) for a public offense

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any agreement between the Band and the Mille Lacs County Sheriff must "define the trust property involved in the joint powers agreement." *Id*., subd. 2(b).

committed or attempted in the arresting person's presence; (2) when the person arrested has committed a felony, although not in the arresting person's presence; or (3) when a felony has in fact been committed, and the arresting person has reasonable cause to believe the person arrested committed it. Minn. Stat. § 629.37. Walsh opined:

> In practice, Mille Lacs Band Police Officers may be present wherever a private person may lawfully be under the circumstances. They may provide security and observe. When there is probable cause of one of the three circumstances justifying a citizens' arrest . . . , they may conduct an arrest and turn over the arrested person to a [] County Deputy or another peace officer under state law within their lawful jurisdiction.

(Opinion at 8.)

With respect to issuing citations for violations of state law, because citations must be issued by peace officers and not private persons, (*id*. (citing Minn. R. Crim. P. 6.01(1)(a))), Walsh found that Band officers were precluded from issuing state law citations in Mille Lacs County. (*Id*.) Rather, if a Band officer observed a violation warranting a state law citation, the officer was to inform a County Sheriff's deputy. (*Id*.)

As to Band officers' authority to conduct investigations, Walsh opined that the fruits of any investigations conducted outside of Pine County were "not likely to be admissible in state court." (*Id*.) He noted that under state law, citizens do not have the power to make investigative stops or to administer preliminary breath tests. (*Id*.) Walsh opined that if the Band's officers conducted an investigation of a state-law violation "where they have no state law enforcement jurisdiction, the goals of public safety in Minnesota's criminal justice system will be jeopardized." (*Id*. at 9.) Moreover, to "ensure the admissibility of evidence in state court," Walsh directed that any evidence gathered as a result of state law

violations in Mille Lacs County be given to either the Sheriff or applicable municipal police department. (*Id*.)

Walsh also found that the Band's officers were precluded from signing state-law criminal complaints, stating, "It is the policy of the Mille Lacs County Attorney's Office that, absent extraordinary circumstances, all criminal complaints shall be signed by a peace officer acting within his or her state law jurisdiction." (*Id*.) Similarly, because state search warrants must be directed to a "peace officer," (*id*. at 10 (citing Minn. Stat. § 626.05)), Walsh stated, "Search warrants executed by [the Band's officers] on or after July 22, 2016 are likely to be inadmissible in state court." (*Id*. (citing Minn. Stat. § 629.40; *State v. Horner*, 617 N.W.2d 789, 795 (Minn. 2000)).) However, Walsh "encouraged" the Band's officers to refer investigations potentially involving search warrants to "a peace officer with state law enforcement jurisdiction in Mille Lacs County," and permitted the Band to assist in the execution of the warrant, provided the licensed peace officer who applied for the warrant was present and involved in its execution. (*Id*.)

With respect to the use of force by Band officers, Walsh identified the following circumstances in which Band officers "outside of their jurisdiction as a 'peace officer'" could employ force under Minnesota law: (1) to assist a public officer under the officer's direction (a) in effecting a lawful address; (b) in the execution of legal process; (c) in enforcing an order of the court; or (d) in executing any duty imposed upon the public officer by law; (2) to conduct a lawful citizen's arrest; (3) to resist or aid another to resist an offense against the person; (4) to resist a trespass or other unlawful interference with real property; (5) to prevent the escape, or to retake following the escape, of a person lawfully held on a

charge or conviction of a crime. (*Id*. at 10–11 (citing applicable portions of Minn. Stat. § 609.06).)

Despite Walsh's prohibitions against Band officers' authority to perform certain state law enforcement tasks in Mille Lacs County, discussed above, he opined that Band officers were permitted to carry a firearm within Mille Lacs County because they are "peace officers." (*Id*. at 10 (citing Minn. Stat. § 624.714).)

Finally, Walsh advised that if confronted with circumstances justifying a peace officer's use of deadly force pursuant to Minn. Stat. § 609.066, a Band officer could "make a lawful warrantless arrest *as a peace officer*, including the same right to use deadly force possessed by a peace officer." (*Id*. at 11 (citing Minn. Stat. §§ 609.066, 629.40(4), 629.34).)

b. Legal Liability

In the Opinion, Walsh also warned of legal liability that might follow Band officers' unauthorized law enforcement conduct in the County. (*Id*. at 11–12.) With respect to citizen's arrests, he noted that an arrested person may file a civil lawsuit alleging false imprisonment against a private citizen making a citizen's arrest, (*id*.), and the arresting citizen could be subject to felony liability for confining or restraining another without valid consent while "knowingly lacking lawful authority to do so." (*Id*.) In addition, Walsh advised that when conducting a citizen's arrest, a Band officer's use of firearms to cause fear of immediate bodily harm or death in another would constitute a felony offense, subject to a mandatory three-year sentence. (*Id*. (citing Minn. Stat. §§ 609.224, 609.222, 609.11(5), (9)).) Also, making a citizen's arrest "without declaring the cause to be a

citizen's arrest under apparent authority as a peace officer within Mille Lacs County or while pretending to be a peace officer within Mille Lacs County" could subject a Band officer to criminal liability for a gross misdemeanor offense. (*Id*. at 12 (citing Minn. Stat. § 629.402).)

More generally, Walsh cautioned against the unauthorized practice of a law enforcement officer, generally a misdemeanor offense, which involves "'a person who is not a peace officer' (1) making a representation of being a peace officer or (2) performing or attempting to perform an act, duty or responsibility reserved by law for licensed peace officers." (*Id*. (citing Minn. Stat. § 626.863).) He opined that "[t]his would include conducting investigative stops and other investigations not permitted under state law if those actions obstruct or interfere with a peace officer's investigation." (*Id*.) Similarly, Walsh warned of the "risks inherent in peace officers' out-of-jurisdiction citizen's arrests." (*Id*.)

c. Legal Authority

Walsh also opined as to the impact of Public Law 280, adopted by Minnesota, which grants criminal and civil jurisdiction to certain states over activities occurring in Indian country. (*Id*. at 13.) Stating that "[t]his seemingly universal grant of jurisdiction has been limited by subsequent decisions of the [] Supreme Court," Walsh noted that state-law jurisdiction applies to criminal or prohibitory laws, but not civil regulatory laws. (*Id*. (citing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209–10 (1987)).) He further advised that in Minnesota, traffic offenses are considered civil/regulatory. (*Id*. (citing *State v. Stone*, 572 N.W.2d 725 (Minn. 1997)).)

Walsh opined that the U.S. Supreme Court "has never determined the scope of retained inherent tribal jurisdiction over criminal matters by a Band or Tribe in a Public Law 280 state," and as the Band "now asserts inherent tribal jurisdiction, . . . there is little clarity in the law on what that may mean from a practical standpoint." (*Id*. at 14 (distinguishing *United States v. Wheeler*, 435 U.S. 313, 318 (1978), as a decision concerning a non-Public Law 280 state, and *Walker v. Rushing*, 898 F.2d 672, 675 (8th Cir. 1990), for its statement "*in dicta* that 'Public Law 280 did not divest Indian tribes of their sovereign power to punish their own members for violations of tribal law.'").)

Describing the state of the law as "anything but clear," Walsh nevertheless provided the following "conclusions that may be tentatively reached (pending future clarification):"

> (1) The Mille Lacs Band of Ojibwe may retain inherent criminal jurisdiction over Mille Lacs Band of Ojibwe members and may also have inherent criminal jurisdiction over members of other Indian tribes and bands on tribal trust lands, but not for "major crimes" or felony offenses;
>
> (2) The Mille Lacs Band of Ojibwe has exclusive jurisdiction over members of the Mille Lacs Band of Ojibwe in civil regulatory cases arising in "Indian country;"
>
> (3) Criminal jurisdiction by tribes does **not** extend to non-Indians (with one narrow potential exception under the Violence Against Women Act);
>
> (4) Inherent tribal jurisdiction is limited to "Indian country." Indian country includes land held in trust and land within an Indian Reservation. The Milles Lacs Band and the State of Minnesota including Mille Lacs County differ on the extent of "Indian country" in Mille Lacs County. The State and County believe that "Indian country" in Mille Lacs County is limited to tribal trust lands.[7]

[7] The Court notes that in this case, in 2021, the State of Minnesota appeared as amicus curiae in support of the Band's Motion for Summary Judgment on the boundary issue. The State observed that the question of whether the Reservation had been diminished or disestablished was, for a long period, an open question, and at various times, state

(5) The State of Minnesota has criminal jurisdiction over all criminal/prohibitory offenses committed by Indians anywhere in the State of Minnesota;

(6) The State of Minnesota has civil/regulatory jurisdiction over Indians who are not on their own reservation or own tribe's trust land.

(*Id.*)

d. Protocol

At Sheriff Lindgren's request, Walsh prepared the "Protocol" portion of the Opinion and Protocol to provide "practical conclusions as to what Band police officers may or may not do and what state police officers may or may not do[.]" (Aug. 27, 2021 Walsh Decl. ¶ 12.) In the introduction to the Protocol, Walsh announced the County's general position that "inherent criminal authority doesn't extend (1) outside of trust lands or (2) to non-members of the Mille Lacs Band." (Baldwin Decl., Ex. J (Protocol) at 1.) In an additional prefatory paragraph, Walsh stated, in bold-faced text,

> **Mille Lacs Band Police Officers are peace officers of the State of Minnesota with state law enforcement jurisdiction within Pine County only. In Mille Lacs County, they have significant powers of arrest as outlined below, but must turn over arrested persons without delay to a Mille Lacs County peace officer so an investigation admissible in state court may be conducted.**

(*Id.*)

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officials had weighed in on the question. (State's Amicus Mem. [Doc. No. 250] at 2.) However, in light of emerging legal authority, including *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), the State found no clear expression of congressional intent to diminish or disestablish the Reservation. (*Id.* at 2–9.) Accordingly, the State supported the Band's summary judgment motion and asserted that the Reservation continues to consist of the approximately 61,000 acres identified in the 1855 Treaty. (*Id.* at 10.)

Walsh then summarized his opinions on the Band's specific law enforcement authority as follows:

Mille Lacs Band Police Officers May:

1) Conduct warrant arrests as a peace officer pursuant to court order. Minn. Stat. §§ 629.40 & 629.32.

2) Conduct warrantless arrests as a peace officer when (1) the arrest is for a crime arising out of reservation land in Pine County or (2) when presented with circumstances justifying a peace officer's use of deadly force. *See* Minn. Stat. §§ 629.40 & 609.066.

3) Conduct a valid citizens' arrest pursuant to Minn. Stat. §§ 629.37–.40 and/or temporarily seize an arrested person until Mille Lacs County peace officers arrive to investigate.

4) Aid a Mille Lacs County peace officer upon request including making arrests, retaking anyone who has escaped from custody, executing legal process, and assisting in the execution of search warrants. Minn. Stat. §§ 387.03, 629.403, & 626.13.

5) Provide witness statements *or* written reports to Mille Lacs County peace officers.

6) Use force to the same degree as a private citizen pursuant to Minn. Stat. §§ 609.06–.065.

7) Carry a firearm with a valid license pursuant to Minn. Stat. § 624.714.

Mille Lacs Band Police Officers May Not Lawfully:

1) Issue state law citations and/or tab charges.

2) Apply for search warrants in state district court.

3) Use firearms to affect [sic] a citizen's arrest pursuant to Minn. Stat. §§ 629.27–.40.

4) Conduct investigations regarding violations of state law including statements, investigative stops, traffic stops, and gathering evidence.

5) Impersonate a peace officer, obstruct justice, or engage in the unauthorized practice of a peace officer, primarily by interfering with investigations within Mille Lacs County.

(*Id.*)

In a footnote, the Protocol clarified that Band officers "may conduct investigations where they have tribal jurisdiction (e.g., civil/regulatory citations to Band members and investigations related to inherent tribal criminal authority)." (*Id.* at 1 n.1.)

It is beyond dispute that compliance with the Opinion and Protocol was mandatory. (Baldwin Decl. [Doc. No. 150] Ex. K (Walsh Dep.) at 305 (testifying that he never "suggested [compliance with the Protocol] was voluntary."). Further, Walsh stated that Band officers' violations of the Opinion and Protocol could violate state criminal law. (*Id.* at 297–98.)

After Walsh issued the Opinion and Protocol, then-Sheriff Lindgren "instructed [his] staff and deputies to follow the County Attorney's Opinion and Protocol." (Lindgren Decl. [Doc. No. 180] ¶ 3; Lorge Decl. [Doc. No. 306-2] ¶ 4.) Assistant County Attorney Gardner testified to his understanding that the Band's officers could not exercise authority on non-trust lands, or investigate violations of state law on trust lands, and that County "officers were advised that they could arrest tribal police officers if they" violated the Protocol. (Baldwin Decl., Ex. L (Gardner Dep.) at 60.)

Lindgren attests that he is unaware of any Sheriff's Office employees threatening the arrest of Band police officers for violations of the Opinion and Protocol, nor did the County Attorney expressly instruct the Sheriff's Office to make such arrests. (Lindgren Decl. ¶ 5.) The Band's former Police Chief, Rice, testified that although Sheriff Lindgren

informally advised that Band officers would not be arrested or prosecuted, she was skeptical about his assurances because he was committed to following the Protocol's mandates. (Baldwin Decl., Ex. GG (Rice Dep.) at 157, 204-05; *see also* Lindgren Decl. ¶ 6 (confirming conversation with Rice that included assurance of no arrests for violations of the Opinion and Protocol.) Rice acknowledged that no Band officers had been arrested, but she believed that was simply "[b]ecause we followed the [P]rotocol." (Rice Dep. at 205.) The Band's then-Deputy Police Chief, West, testified to Band officers' fears of "getting arrested for impersonating officers" under the Protocol. (Baldwin Decl., Ex. BB (West Dep.) at 37–38.) West confirmed that "[o]fficers followed the [P]rotocol." (*Id.* at 42.) More specifically, Walsh acknowledged that the Band's officers' investigative role had been assumed by the Sheriff's deputies, even on trust lands, as well as in response to calls for service, i.e., 911 calls, on non-trust lands. (Walsh Dep. at 375–78.)

In a December 2016 letter, Walsh advised the U.S. Attorney's Office for the District of Minnesota and the U.S. Department of Justice of the current law enforcement arrangement. (Baldwin Decl., Ex. JJ (Undated Letter from Walsh to Luger); Walsh Dep. at 378.) Walsh made clear that "the Mille Lacs County Sheriff's Office has taken on all state law enforcement services provided in the entirety of Mille Lacs County" and that a "tenuous status quo has been followed by the Mille Lacs County Sheriff's Office and the Mille Lacs Band Police Department based on my Opinion and Protocol." (Undated Letter from Walsh to Luger; Walsh Dep. at 378.) In his deposition, Walsh conceded that his letter did not advise federal officials of some of the particulars of the law enforcement arrangement, such as the fact that investigations of all violations of state law on trust lands

were performed by the County Sheriff's Office, which had also assumed responsibility for responding to all calls and investigating all violations of state law on non-trust lands. (Walsh Dep. at 377-78.)

3. Enforcement of Federal Law in Indian Country

In late 2016, pursuant to TLOA, Pub. L. No. 111-211, 124 Stat. 2258, the Band and the Bureau of Indian Affairs ("BIA") entered into an agreement (the "Deputation Agreement") through which Band officers were deputized and issued Special Law Enforcement Commissions ("SLECs") to enforce federal law within the Band's Indian country, as defined by 18 U.S.C. § 1151. (Baldwin Decl., Ex. LL (DOJ Letter); *id.*, Ex. MM (Deputation Agmt.).) Pursuant to the Deputation Agreement, the BIA authorized Band officers to assist the BIA in enforcing all federal laws applicable within Indian country, including the authority "to make lawful arrests." (Deputation Agmt. at 1–2, ¶ 3.A.) In particular, the parties agreed to cooperate with each other "to provide comprehensive and thorough law enforcement protection, including but not limited to effecting arrests, responding to calls for assistance from all citizens and also from other law enforcement officers, performing investigations, providing technical and other assistance, dispatching, and detention." (*Id*. at 2 ("Purpose").)

The Deputation Agreement notes that "[l]awful actions pursuant to this federal Agreement and a commission issued under it supersede any contrary Tribal, State, or local law, ordinance, or practice." (*Id*. ¶ 3.C.) In addition, it states that "[i]rrespective of their location, officers holding SLECs may only respond to violations of exclusively State law to the extent consistent with that State's law. Officers carrying SLECs may respond to

concurrent violations of State and Tribal or Federal laws to the extent consistent with Tribal or Federal law." (*Id*. ¶ 6.E.)

The Deputation Agreement contains a general acknowledgement concerning the official determination of jurisdiction:

> Both parties to this Agreement recognize that when law enforcement officers arrest a criminal suspect, the officers may not know whether the suspect or the victim is an Indian or non-Indian or whether the arrest of the suspected crime has occurred in Indian country, . . . , and that therefore there is great difficulty in determining immediately the proper jurisdiction for the filing of charges. It is further recognized that the official jurisdictional determination will be made by a prosecutor or court from one of the various jurisdictions, not by cross-deputized arresting officers who may deliver the offender to the appropriate detention facility.

(*Id*. at 2.)

Despite the issuance of the SLECs, Walsh maintained that the Opinion and Protocol remained in force and that Band officers holding SLECs could not exercise SLEC authority on non-trust lands within the 1855 Treaty boundaries. (Walsh Dep. at 384–85.) Defendants asserted that "the only lands comprising Indian Country within Mille Lacs County [were] lands held in trust by the United States, and that the Band ha[d] no inherent *or* federally delegated law enforcement authority except on trust lands." (Jt. Mot. to Defer [Doc. No. 208] at 2.)

4. The 2018 Law Enforcement Agreement

After the Band filed this lawsuit in November 2017, the Band, County, and former Mille Lacs County Sheriff Brent Lindgren entered into an interim law enforcement agreement (the "2018 Agreement"). (Baldwin Decl., Ex. AAA (Mut. Aid/Coop. Agmt.).) On a temporary basis, the 2018 Agreement grants the Band concurrent jurisdiction with

the Sheriff over all persons on trust lands, all Band members within the boundaries of the 1855 Treaty, and any person who commits or attempts to commit a crime within the presence of a Band officer within the boundaries of the 1855 Treaty. (*Id.*) Under its own terms, the 2018 Agreement automatically terminates 90 days after the final resolution of this case. (*Id.*)

II. PROCEDURAL HISTORY

A. Early Summary Judgment Motions on Standing and Immunity

The parties proceeded to file early dispositive motions on several issues pertaining to standing and immunity. On December 21, 2020, the Court issued a ruling, granting Plaintiffs' Motion for Summary Judgment on Standing, Ripeness, and Mootness, and denying Defendants Walsh and Lorge's Motion for Summary Judgment.

In addition to the undisputed evidence on which the Court also relies here, *supra* at 1–19, as well as additional evidence submitted by the parties, the Court found that Plaintiffs had established standing and ripeness, and the case was not moot. (Dec. 21, 2020 Order at 29–36.) As to standing, the Court found that Defendants' enactment and enforcement of the Opinion and Protocol had injured Plaintiffs, citing County law enforcement officers' repeated interference with Band officers' law enforcement measures. (*Id.* at 6–13.) Specifically, the Court found that Defendants had interfered with the Band's authority by taking control of crime scenes, duplicating investigatory work performed by Band officers, and taking over in-progress interviews and vehicle searches. (*Id.*) In addition, the Court found that County Sheriffs' deputies had monitored Band officers' compliance with the Protocol and had tracked violations, (*id.*), and that Band officers could not effectively

perform their work because of fear of potential liability. (*Id*. at 13.) Furthermore, the Court found a decline in Band officers' morale and an increase in resignations, as well as a lack of law enforcement response to criminal activity on the Reservation. (*Id*. at 14–20.) The Court found these injuries were all "fairly traceable to the Defendants' challenged conduct," for which declaratory and injunctive relief were an appropriate remedy to the Band's alleged harm.[8] (*Id*. at 34.)

In Walsh and Lorge's summary judgment motion, the Court found that prosecutorial immunity under the Tenth Amendment was inapplicable, as were *Younger* abstention and related principles of federalism and comity. (*Id*. at 36–41.) In addition, the Court determined that Eleventh Amendment immunity did not bar Plaintiffs' claims against Walsh and Lorge, nor did prosecutorial immunity. (*Id*. at 41–46.) Finally, the Court declined to consider Walsh and Lorge's arguments seeking the dismissal of the Band's official-capacity claims and individual-capacity claims on certain bases, nor did the Court consider their qualified immunity arguments related to Plaintiffs' request for attorneys' fees. (*Id*. at 46.) Because the pretrial scheduling order did not authorize Walsh and Lorge to seek early dispositive relief on such issues, the Court did not address them, but noted that Walsh and Lorge could raise the arguments again, if appropriate. (*Id*.)

[8] For purposes of standing, the Court properly considered this evidence of instances of interference and deterrence—which Defendants were free to rebut. However, here, on the merits, the Band argues that because it seeks only declaratory and injunctive relief, it is unnecessary to revisit specific instances of interference and deterrence. (Jt. Letter [Doc. No. 343] at 20.) The Court discusses this issue its analysis of Plaintiffs' motion, *infra* at III.B.1.

B. Walsh and Lorge's Interlocutory Appeal to the Eighth Circuit

In January 2021, Walsh and Lorge filed an interlocutory appeal [Doc. No. 218] with the Eighth Circuit Court of Appeals, challenging certain aspects of the Court's December 21, 2020 ruling. Specifically, they argued that the Court lacked jurisdiction over Plaintiffs' claims under 28 U.S.C. § 1331, that Plaintiffs failed to state a "cause of action" against them, and that they were immune from suit pursuant to various immunity doctrines. (Baldwin Decl. [Doc. No. 309], Ex. B (W&L Opening 8th Cir. Brief).) After the parties filed their appellate briefs and were awaiting oral argument, Walsh and Lorge voluntarily moved to dismiss their appeal on mootness grounds, citing the Supreme Court's June 1, 2021 decision in *United States v. Cooley*, 141 S. Ct. 1638 (2021). (Baldwin Decl. [Doc. No. 309], Ex. C (W&L 8th Cir. Mot. to Dismiss) at 1.) The Eighth Circuit treated the motion as one for voluntary dismissal and summarily dismissed the appeal pursuant to Federal Rules of Appellate Procedure 42(b) and 39(a)(4).[9] (8th Cir. J. [Doc. No. 292]; Mar. 3, 2022 Order [Doc. No. 312] at 9–10.)

[9] After dismissal of the interlocutory appeal, and in response to Plaintiffs' memorandum in opposition, Walsh and Lorge filed a "reply" memorandum, stating that if the Eighth Circuit concluded that Plaintiffs' case was moot "it should say so[.]" (Baldwin Decl. [Doc. No. 309], Ex. E (W&L 8th Cir. Reply) at 2.) After the Eighth Circuit issued no response to Walsh & Lorge's reply memorandum, Walsh & Lorge moved to recall the mandate, and sought a ruling that *Cooley* mooted the case against them. (*Id*., Ex. F (W&L 8th Cir. Mot. to Recall Mandate).) In a one-sentence order, the Eighth Circuit denied the motion. (*Id*., Ex. H (Oct. 2021 8th Cir. Order).)

Because jurisdiction then returned to this Court, the parties addressed the procedural question of whether the Eighth Circuit had ruled on the merits of Defendants' mootness argument, and if it had not, whether the 2018 Agreement or the *Cooley* decision rendered the Band's claims against Walsh and Lorge moot. (Mar. 3, 2022 Order at 8–9.) The Court found the following: (1) the Eighth Circuit had not ruled on the merits of Walsh and

C. Cross-Motions for Partial Summary Judgment on Reservation Boundaries

At the parties' request, the December 2020 Order was limited as described and did not address whether Defendants' conduct was unlawful, nor did it resolve the "extent and scope of the Band's sovereign law enforcement authority." (*Id*. at 30–32.) The parties agreed that

> [i]f the Court were to determine that the 1855 Reservation has not been disestablished or diminished, the Band's inherent and federally delegated law enforcement authority [would] extend, at least to some extent, to all lands within the Reservation, including Band-owned and non-Band-owned fee lands, and it [would] be necessary to determine the precise extent of the Band's authority on such lands (as well as trust lands).

(Mem. Supp. Jt. Mot. [Doc. No. 208] at 3.)

Accordingly, in February 2021, in their Cross Motions for Partial Summary Judgment [Doc. Nos. 223 & 239], the parties addressed the question of the geographic scope of the Band's law enforcement authority. Ruling in the Band's favor, the Court held that the Mille Lacs Reservation's boundaries remain as they were under Article 2 of the Treaty of 1855, and Congress has never clearly expressed the intent to disestablish or

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Lorge's mootness argument; (2) their argument for mootness based on the 2018 Agreement was an untimely motion for reconsideration, but even if it were procedurally proper, the 2018 Agreement failed to establish mootness; (3) *Cooley* did not moot the Band's claims against Walsh and Lorge, particularly because it did not address the issue of reservation boundaries; and (4) it was not speculative for the Court to find the case was not moot. (*Id*. at 9–26.)

diminish the Reservation. (Mar. 4, 2022 Summ. J. Order on Geo. Boundaries [Doc. No. 313] at 92–93.)

D. Instant Cross-Motions for Summary Judgment

The parties now move for summary judgment, with Walsh and Lorge renewing their arguments for the dismissal of the Band's individual-capacity and official-capacity claims, and precluding the Band from obtaining attorneys' fees and costs from them, and Plaintiffs moving for summary judgment on the merits, seeking declaratory and injunctive relief regarding the extent of the Band's law enforcement authority.

III. DISCUSSION

Summary judgment is appropriate if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A fact is 'material' if it may affect the outcome of the lawsuit." *TCF Nat'l Bank v. Mkt. Intelligence, Inc.*, 812 F.3d 701, 707 (8th Cir. 2016). And a factual dispute is "genuine" only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In evaluating a motion for summary judgment, the Court must view the evidence and any reasonable inferences drawn from the evidence in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Although the moving party bears the burden of establishing the lack of a genuine issue of fact, the party opposing summary judgment may not "rest on mere allegations or denials but must demonstrate on the record the existence of specific facts which create a

genuine issue for trial." *Krenik v. Cnty. of Le Sueur*, 47 F.3d 953, 957 (8th Cir. 1995) (internal quotation marks omitted); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Moreover, summary judgment is properly entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322.

A. Walsh and Lorge's Motion for Summary Judgment [Doc. No. 322]

1. Individual Capacity Claims Against Walsh and Lorge

In their renewed argument, Walsh and Lorge assert that Plaintiffs lack standing to seek declaratory and injunctive relief against them in their individual capacities because (1) this case challenges only official-capacity conduct, therefore no harm is fairly traceable to Defendants' individual conduct; (2) claims for equitable relief against state officials in their individual capacities are nonjusticiable; and (3) Lorge is entitled to summary judgment in his individual capacity as no allegations in the Complaint refer to him. (Defs.' Walsh & Lorge's Mem. ("W&L's Mem.") [Doc. No. 321] at 11–13.)

Plaintiffs do not oppose the dismissal of their individual-capacity claims against Walsh and Lorge, provided the Band's official-capacity claims are sufficient to invoke the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). (Pls.' Opp'n [Doc. No. 326] at 1 (citing Pls.' July 29, 2020 Summ. J. Opp'n [Doc. No. 173] at 52).)

The Court finds that Plaintiffs' claims against Walsh and Lorge are based on actions taken in their official capacities. As the Band acknowledges, "[P]laintiffs' claims arise directly from the official actions of Walsh as County Attorney and Lorge's predecessor as

County Sheriff, and the relief plaintiffs seek is directed specifically to Walsh and Lorge as County Attorney and County Sheriff." (*Id*. at 3.) Also, the Band states that it has "made clear that they are not seeking attorneys' fees or costs from Walsh and Lorge in their individual capacities and, therefore, there is no dispute before the Court with respect to such claims." (*Id*. at 2.) Previously, when the Band addressed Defendants' Eleventh Amendment immunity argument in 2020, they acknowledged that the "individual-capacity claims against Walsh and Lorge arise under the *Ex parte Young* doctrine and were made to ensure that plaintiffs' request for declaratory and injunctive relief would survive an assertion of Eleventh Amendment immunity." (Pls.' July 29, 2020 Opp'n at 52.) Plaintiffs appear to have asserted the individual-capacity claims for strategic reasons, as opposed to the capacity in which Walsh and Lorge acted. Under these circumstances, the Court dismisses the Band's individual-capacity claims against Walsh and Lorge.

Because Walsh and Lorge are entitled to the dismissal of Plaintiffs' individual-capacity claims on this basis, the Court declines to address their additional arguments in support of dismissal, i.e., that these claims are non-justiciable and Lorge is not subject to any allegations in the Complaint.

For all of the foregoing reasons, the portion of Defendants' motion seeking to dismiss the individual-capacity claims against Walsh and Lorge is granted.

2. Official Capacity Claims Against Walsh and Lorge

a. Applicability of *Ex parte Young*

As noted, Plaintiffs did not oppose the dismissal of their individual-capacity claims against Walsh and Lorge, provided the *Ex parte Young* doctrine applies to the Band's

official-capacity claims against Walsh and Lorge. The Court need not reach this issue, however. *Ex parte Young* represents an exception to Eleventh Amendment immunity. 209 U.S. at 159–60. Under the doctrine, "a private party can sue a state officer in his official capacity to enjoin a prospective action that would violate federal law." *281 Care Comm. v. Arneson*, 638 F.3d 621, 632 (8th Cir. 2011). The state official must have "some connection with the enforcement of the [challenged] act." *Reprod. Health Servs. of Planned Parenthood v. Nixon*, 428 F.3d 1139, 1145 (8th Cir. 2005) (citing *Ex parte Young*, 209 U.S. at 157). "Sovereign immunity, however—as well as the *Ex parte Young* exception to it—generally applies only to state officials, not county officials. *Schultz v. Alabama*, 42 F.4th 1298, 1314 (11th Cir. 2022) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (noting that Eleventh Amendment immunity does not extend to counties and similar municipal corporations.)).

When ruling on the parties' earlier summary judgment motions in December 2020, the Court found Eleventh Amendment immunity was inapplicable to the official-capacity claims against Walsh and Lorge. (Dec. 21, 2020 Order at 41–42.) The Court noted that the Supreme Court has consistently declined to extend Eleventh Amendment immunity to counties, limiting its protection to "states and arms of the State." (*Id*. at 41 (citing *N. Ins. Co. v. Chatham Cnty*., 547 U.S. 189, 193 (2006)).) Finding that county officials Walsh and Large were not functioning as "arms of the state," the Court concluded they were not entitled to Eleventh Amendment immunity. (*Id*. at 43.)

The Court continues to hold that Walsh and Lorge (and Lorge's predecessor, Lindgren) are not acting as state officials or "arms of the state," for the reasons previously

identified. (*Id*.) Moreover, the Opinion and Protocol is a county policy, and Plaintiffs seek no monetary relief. *See Schultz*, 42 F.4th at 1314 (finding Eleventh Amendment immunity inapplicable to county sheriff where he was not acting as a state official with respect to county's bail system and arrestee was seeking injunctive relief, as opposed to monetary relief).

Because Walsh and Lorge "are not entitled to Eleventh Amendment immunity in the first instance, [the Court] need not reach the *Ex parte Young* analysis." *Id*. Plaintiffs acknowledge this corollary themselves. They observe that because the Court previously found Walsh and Lorge, as county officials, were not entitled to Eleventh Amendment immunity, "the Court did not need to address the applicability of *Young* or to decide whether plaintiffs' individual-capacity claims were necessary to invoke *Young*." (Pls.' Opp'n at 8–9 (citing Dec. 21, 2020 Order at 41–43).) Accordingly, because Defendants are not entitled to Eleventh Amendment immunity, the Court need not apply *Ex parte Young*.[10]

b. Redundancy

Walsh and Lorge also move to dismiss the official-capacity claims against them, arguing they are redundant of the Band's claims against the County. (W&L's Mem. at 11–

[10] However, if Walsh and Lorge could be viewed as state officials or "arms of the state," *Ex parte Young* would apply as an exception to sovereign immunity. Plaintiffs seek declaratory and prospective injunctive relief to prohibit Walsh and Lorge from violating federal law. *281 Care Comm*., 638 F.3d at 632. Moreover, both Walsh and Lorge, in their official capacities, have "some connection with the enforcement of the [challenged] act." *Reprod. Health Servs*., 428 F.3d 1139.

13 (stating, "Because a suit against a government official in his or her official capacity is a suit against the official's office, official-capacity claims against a government officer should be dismissed as redundant when the employing governmental entity is also a party.").) Pursuant to Rule 65(d)(2)(B), Walsh and Lorge contend that as "officers, agents, servants, employees, [or] attorneys" of a party, they would be bound to comply with any injunctive relief, even if they were dismissed as parties. (*Id.*)

The Band opposes the motion on several bases, including that dismissal of the official-capacity claims is discretionary; the claims against Walsh and Lorge are claims against independently elected officials rather than against the "County" or "County employees;" Walsh and Lorge exercise independent prosecutorial and law enforcement authority, free of the County's supervision or control; and Defendants' argument is untimely at this stage of the litigation. (Pls.' Opp'n at 13–16.)

The Eighth Circuit has observed that an official-capacity lawsuit against a government official is equivalent to a suit against the employing governmental entity, such that the official-capacity suit "should be dismissed as redundant if the employing entity is also named." *King v. City of Crestwood, Mo.*, 899 F.3d 643, 650 (8th Cir. 2018) (citing *Veatch v. Bartels Lutheran Home*, 627 F.3d 1254, 1257 (8th Cir. 2010)); *see also Banks v. Slay*, 875 F.3d 876, 878 (8th Cir. 2017) ("[A]n official-capacity suit is a suit against a government entity in all respects other than name[.]") (quotations omitted). Unlike this case, the dismissal of such official-capacity claims often arises in the context of § 1983 or

Monell claims for damages.[11] *See, e.g., Veatch*, 627 F.3d at 1257 (finding official-capacity § 1983 claim against arresting police officer redundant of claim against city/employer); *Artis v. Francis Howell N. Band Booster Ass'n, Inc.*, 161 F.3d 1178, 1182 (8th Cir. 1998) (affirming dismissal of official-capacity § 1983 racial discrimination claim against school band director as redundant of claim against school district); *Corrigan v. City of Savage*, No. 18-cv-2257 (ADM/BRT), 2019 WL 2030002, at *11 n.14 (D. Minn. Jan. 14, 2019) (dismissing official-capacity *Monell* claim against sheriff as redundant of claim against county). Under the unique facts here, however, the Band seeks declaratory and injunctive relief that would most directly come from Walsh and Lorge.

Relying on Federal Rule of Civil Procedure 65, Defendants argue that because Walsh and Lorge would be obliged to comply with any injunction the Court might issue, they should be dismissed as redundant defendants. (W&L's Mem. at 11–13.) Rule 65 concerns injunctions and restraining orders, and provides that the persons bound by such orders include "the parties' officers, agents, servants, employees, and attorneys," subject to receiving actual notice. Fed. R. Civ. P. 65(d)(2)(B). However, the only authority on which Defendants rely that actually involved Rule 65(d) in finding a defendant redundant and subject to dismissal, is *Anderson v. Indep. Sch. Dist. No. 97*, No. 98-cv-2217 (JRT RLE), 2001 WL 228424, at *2 (D. Minn. Feb. 21, 2001). That case involved the dismissal of an individual defendant because he was an employee of the governmental entity, a

[11] Under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978), a municipality can be liable under § 1983 if an "action pursuant to official municipal policy of some nature caused a constitutional tort."

school district, against whom any injunction could be adequately tailored to apply to the employee. *Id*. However neither that case, nor Rule 65(d) itself, mandate dismissal here.

Unlike the individual defendant in *Anderson* who was employed by the school-district defendant, it is not entirely clear whether Walsh and Lorge are "employees" of the County. While they self-identify as county employees for purposes of their redundancy argument, they have also argued, unsuccessfully, that they are state employees in order to invoke sovereign immunity.[12] (W&L July 8, 2020 Mem. Supp. Summ. J. [Doc. No. 164] at 39–42; W&L Aug. 12, 2020 Opp'n Mem. [Doc. No. 198] at 9.) Strictly speaking, Walsh and Lorge are elected public officials. Minn. Stat. § 382.01. They can only be removed from office through a voter-petition process, and the County lacks the authority to hire or fire them. Minn. Stat. §§ 351.15–.23; *id*. § 351.14, subd. 5. As elected law enforcement

[12] The Minnesota Supreme Court has addressed whether Walsh and Lorge are state employees in a state-court declaratory judgment action in which Walsh and Lorge sought indemnification and defense under Minnesota's State Tort Claims Act for the instant federal lawsuit. *Walsh v. State*, 975 N.W.2d 118, 123–30 (Minn. 2022). In that lawsuit, Walsh and Lorge distinguished the Band's claims against them from the Band's claims against the County, because the claims against the County were expressly not subject to state indemnification by statute, Minn. Stat. § 645.19. *Id*. at 124. In reaching its conclusion that Walsh and Lorge are not state employees for purposes of the State Tort Claims Act, the Minnesota Supreme Court compared the language of that statute with the Municipal Tort Claims Act, noting that Walsh and Lorge were indisputably covered "employees and officers of the County" under the terms of the latter statute. *Id*. at 127. Rejecting Walsh and Lorge's argument that they were state employees by virtue of their statutory authority to enforce state criminal laws, the Minnesota Supreme Court stated that "carrying out such duties is part of performing their role as a county official." *Id*. at 129. Further, the Minnesota Supreme Court considered the alleged conduct at issue in the instant lawsuit for which Walsh and Lorge sought indemnification, finding such conduct was "undertaken in their general roles as county attorney and county sheriff," rather than pursuant to a duty delegated by the state. *Id*. at 130.

officials, they maintain independent authority and discretion. Minn. Stat. § 387.03 ("sheriff shall keep and preserve the peace of the county"); *Gramke v Cass Cnty.*, 453 N.W.2d 22, 26 (Minn. 1990) (describing county sheriff's "broad grant of authority" to keep and preserve the peace); Minn. Stat. § 388.051, subd. 3 (granting county attorneys authority to adopt their own charging and plea negotiation policies and procedures). In other contexts under Minnesota law, courts have not treated county officials as employees. *Spaulding v. Bd. of Cnty. Comm'rs*, 238 N.W.2d 602, 604 (1976) (stating, in retired sheriff's case against county for accrued sick leave, "There is a well-recognized distinction between county employees and county officers. The sheriff is a county officer.") (citations omitted); *see also* Minn. Stat. § 179A.03, subd. 14(a)(1) (stating that elected public officials are not employees of a public entity for purposes of public employment labor relations); *but see* Minn. Stat. § 176.011, subd. 9(a)(3), (6) (listing as "employees" for purposes of state workers' compensation, a sheriff, if engaged in law enforcement or pursuit of a suspect, and "an elected [] official [] of a county," provided the county has adopted an ordinance or resolution to that effect).

Somewhat confusingly, Walsh and Lorge assert, on the one hand, "Plaintiffs have not asserted any claims directly against the County," and that "[a]ll of Plaintiffs' claims are asserted against the County Attorney and the County Sheriff." (W&L's Reply [Doc. No. 336] at 6.) On the other hand, they state, "Plaintiff's complaint asserts claims directly against Mille Lacs County and attributes to it all the allegations against Walsh and Lorge." (*Id*. at 7.)

Regardless of whether Plaintiffs' claims against the County are "direct" or whether Walsh and Lorge can be characterized as "employees," Defendants recognize the central role of the Individual Defendants in this case. As Plaintiffs note, their official-capacity claims against Walsh and Lorge "are best understood as claims against the County Attorney and County Sheriff as independently elected officials, not as claims against the County." (Pls.' Opp'n at 15.) Unlike typical cases in which individual defendants are dismissed for having limited involvement in the conduct in question, the Individual Defendants here are the primary actors—Walsh drafted the Opinion and Protocol, and Lorge, as the official-capacity replacement for former Sheriff Lindgren, enforced it. *See, e.g.*, *Corrigan*, 2019 WL 2030002, at *11 n.14 ("Because Corrigan has not alleged any specific act or omission against [Sheriff] Hennen, the [§ 1983] claim against Hennen in his official capacity should be dismissed as redundant[.]").

In *American Civil Liberties Union of Minnesota v. Tarek Ibn Ziyad Academy*, 788 F. Supp. 2d 950, 958–59 (D. Minn. 2011), the court declined to dismiss official capacity claims against the individual defendants on the basis of redundancy. The court pointed to evidence and allegations that the individuals there, not unlike the allegations against Walsh and Lorge here, had "taken actions as individuals that violate the law." Similarly, in *Chase v. City of Portsmouth*, 428 F. Supp. 2d 487, 490 (E.D. Va. 2006), the court observed that "[a]lthough it is well-settled that damages can only be assessed against the City of Portsmouth, the Council Members who are named in the Third Amended Complaint are ultimately responsible for denying the Use Permit Application." The court found that "where elected officials are alleged to have violated federal laws protecting a local

constituency," the official-capacity claims should remain in the case "even though damages cannot be obtained from [the elected officials] [.]" *Id.* Here, the Band does not seek money damages, but instead seeks declaratory and injunctive relief.

Based on the unique roles of Walsh and Lorge, the Court finds it appropriate that they should remain in the case. Accordingly, the Court denies this portion of Defendants' summary judgment motion.

3. Qualified Immunity for Attorneys' Fees

Walsh and Lorge also argue that they are entitled to qualified immunity from Plaintiffs' demand for attorneys' fees and costs for the claims asserted against them in their individual capacities.[13] Because the Court has dismissed Plaintiff's individual capacity claims, *see Pearson v. Callahan*. 555 U.S. 223, 231 (2009), and, in any event, Plaintiffs maintain that they seek no such relief from Walsh and Lorge, (Pls.' Opp'n at 7, 11), the Court denies this portion of Defendants' motion as moot.

B. Plaintiffs' Motion for Summary Judgment [Doc. No. 317]

1. Preliminary Dispute Regarding Factual Record

Because the Court found the Band had standing to pursue its claims in the December 2020 Order, and subsequently resolved the boundary dispute in the March 2022 Order, the Band argues that the Court may now rule on the merits of this case—that is, the extent of

[13] In the Complaint, Plaintiffs seek "an award of their costs and attorneys' fees in this action," (Compl. at 8), however, Plaintiffs cite no authority for such an award, nor do Plaintiffs seek such relief in their Motion for Summary Judgment. Accordingly, the Court does not address it.

the Band's law enforcement authority on all lands within the Reservation. (Pls.' Mem. [Doc. No. 319] at 4–5.)

However, after filing its response in opposition, and prior to the hearing on the instant motions, Defendants sought permission to file a supplemental response to Plaintiffs' motion "due to the peculiar procedural and substantive effect of Plaintiffs having established Article III standing by a motion for summary judgment." (Jt. Letter [Doc. No. 343] at 2.) Defendants argued that if the Court were to rely upon the same factual record from Plaintiffs' motion on standing to determine the merits of Plaintiffs' instant motion, the Court would lack an adequate factual basis to address the merits of the Band's claims of interference and deterrence. (*Id*. at 3.) Defendants asserted that the standard Plaintiffs met for purposes of establishing standing was far lower than the standard required "for proving the merits of a claim through summary judgment or at trial." (Aug. 11, 2022 Tr. [Doc. No. 340] at 27.) Defendants therefore requested the opportunity to present rebuttal evidence and supplemental briefing related to disputed instances of actual interference and deterrence. (*Id*.)

In response, the Band acknowledged that the Court's December 2020 Order was not a ruling on the merits, as the Court did not determine whether the Defendants' conduct was unlawful, nor did it resolve the boundary issue. (Pls.' Mem. at 4–5.) However, as the Court has now resolved the boundary dispute, and because the Band seeks only declaratory and injunctive relief regarding the scope of the Band's inherent law enforcement authority, as called into question by the Opinion and Protocol, and does not seek damages for any instance of interference or deterrence, the Band argues that the record relevant to the relief

sought on the merits is undisputed. (Jt. Letter at 20.) As the Band asserts, "Given the limited relief plaintiffs seek, the only question on the merits is whether the restrictions defendants imposed on plaintiffs' exercise of law enforcement authority were unlawful, a question that turns on the scope of plaintiffs' inherent and federally delegated law enforcement authority." (*Id*.)

Procedurally, Plaintiffs filed the summary judgment motion on standing in accordance with Rule 56. Rule 56 permits a party to move for summary judgment, "identifying each claim or defense—or part of each claim or defense—on which summary judgment is sought." Fed. R. Civ. P. 56(a). Standing is "an indispensable part of the plaintiff's case," *City of Clarkson Valley v. Mineta*, 495 F.3d 567, 569 (8th Cir. 2007) (citation omitted), and plaintiffs in other cases have moved for a summary judgment ruling on standing. *See, e.g.*, *Wieland v. HHS*, 196 F. Supp. 3d 1010, 1013, 1015–17 (E.D. Mo. 2016) (granting plaintiffs' motion on standing and the merits on parties' cross motions for summary judgment); *Schwendimann v. Arkwright Advanced Coating, Inc.*, No. 11-cv-820 (ADM/JSM), 2012 WL 3288487, at *3–9 (D. Minn. Aug. 10, 2012) (granting plaintiffs' stand-alone motion for standing on summary judgment) *Roe v. Milligan*, 479 F. Supp. 2d 995, 997–98 & n.1, 1002–05 (S.D. Iowa 2007) (finding that plaintiffs established standing on motion for summary judgment on the merits); *Americans United for Separation of Church & State v. Prison Fellowship*, No. 4:03-cv-90074, 2005 U.S. Dist. LEXIS 47991, at *9–32, 53–54 (S.D. Iowa 2005) (granting plaintiffs' motion for summary judgment on standing on parties' cross motions for summary judgment on standing and the merits); *DMJ Assocs., L.L.C. v. Capasso*, 288 F. Supp. 2d 262, 270–72 (E.D.N.Y. 2003) (granting

plaintiffs' stand-alone motion for summary judgment on standing). As a practical matter, because Defendants did not move to dismiss on the basis of standing, but stated that they did not waive the defense during discovery, (Jt. Letter at 21), Plaintiffs found it necessary and appropriate to resolve the issue and could only do so through a summary judgment motion.

At the November 2, 2022 status conference at which the parties addressed Defendants' request for supplemental briefing, the Court denied the request, finding that the record relevant to the merits of the Band's claims is undisputed. (Nov. 2, 2022 Tr. [Doc. No. 348] at 28–29.) The relevant and undisputed facts material to the question of the Defendants' restrictions on the Band's inherent law enforcement authority are tethered entirely to the Opinion and Protocol and its implementation and enforcement. There is no dispute on this record that Defendants placed restrictions on the Band's law enforcement authority as to geography and scope of authority. (Opinion at 14 (opining that Band's inherent tribal jurisdiction is limited to "Indian County," which is limited to tribal trust lands); Protocol at 1 (addressing Band's officers' authority to arrest, issue citations, and conduct investigations (including taking statements, making investigative stops and traffic stops, and gathering evidence)).) The restrictions on the Band's scope of authority further delineated between the persons subject to the Band's authority (Band members, non-member Indians, and non-members), and the Band's subject matter jurisdiction (specifically, the authority to enforce state law). (Opinion at 14 (opining that Band officers have inherent criminal jurisdiction over Band members and may have such jurisdiction over other Indians on trust lands, except for major or crimes or felonies); Protocol at 1

(providing that Band officers may not issue state law citations, apply for search warrants in state court, or conduct investigations of violations of state law)).)

It is undisputed that Defendants enforced the restrictions. Then-Sheriff Lindgren testified that he instructed his staff and deputies to follow the Opinion and Protocol and to document any perceived violations by Band police officers. (Lindgren Decl. ¶¶ 3, 4.) Lorge, an officer at the time, testified that they followed them. (Lorge Decl. ¶ 4.) Further, Walsh testified that following the Opinion and Protocol was not voluntary. (Walsh Dep. at 305.) None of these facts are in dispute, as evidenced by the Opinion and Protocol, the declarations of Walsh and Lorge (and Lorge's predecessor, Lindgren), and their deposition testimony. The Court will consider only these undisputed facts when analyzing the merits of Plaintiffs' claims for declaratory and injunctive relief.

Additional facts concerning specific incidents of interference and deterrence, some of which the Band relied upon to establish standing (and which Defendants had a full opportunity to rebut), are unnecessary to address the merits of Plaintiffs' claims for relief. Granted, facts relating to specific incidents of deterrence and interference may very well be in dispute. If the Band had sought damages for such incidents, incident-specific facts might be relevant on summary judgment. However, the Band seeks only declaratory and injunctive relief, for which the record of undisputed facts provides a sufficient basis for the Court to rule on the merits.

2. General Principles of Tribal Sovereignty

While the primary jurisdictional dispute here concerns tribal authority to enforce state criminal law, criminal jurisdiction in Indian country implicates three levels of

government: federal, state, and tribal. Attempting to determine which governing entity possesses law enforcement authority to investigate and prosecute crimes is a complicated matter, and the source of the parties' dispute here.

"A basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens." *Duro v. Reina*, 495 U.S. 676, 685 (1990). As a general principle, Indian tribes retain "attributes of sovereignty over both their members and their territory." *Cabazon Band*, 480 U.S. at 207 (citation omitted), *superseded on other grounds by* 25 U.S.C. § 2701; *see also Plains Commerce Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 330 (2008). At one time, Indian tribes "exercised virtually unlimited power over their own members as well as those who were permitted to join their communities." *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985). However, courts have long recognized the "unique and limited character" of Indian tribes' sovereignty due to the tribes' incorporation into the United States. *Cooley*, 141 S. Ct. at 1642 (citing *United Wheeler*, 435 U.S. at 323). Accordingly, tribes do not possess full attributes of sovereignty. *Wheeler*, 435 U.S. at 323 (citation omitted).

A prerequisite to the exercise of tribal law enforcement authority is the establishment of such authority. In *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1179 (9th Cir. 1975), the court stated, "[A]s a general proposition, we have little difficulty in concluding that an Indian tribe may employ police officers to aid in the enforcement of tribal law and in the exercise of tribal power." (citing, *inter alia*, 25 U.S.C. § 13 (providing that BIA may expend appropriations "for the benefit, care, and assistance of the Indians

throughout the United States for . . . the employment of [] Indian police."); *see also Restatement of the Law of Am. Indians* § 24 ("The power to establish law-enforcement agencies such as police is inherent in tribal nationhood, and is subject to enhancement or restriction by treaty or federal statute.")

As the Court discusses below, the Supreme Court has generally conditioned tribes' law enforcement authority based on issues of "who, what, and where," that is, (1) the status of the person over whom the tribe seeks to assert jurisdiction (e.g., member, nonmember, or non-Indian); (2) the type of authority that the tribe seeks to exert (e.g., civil/regulatory or criminal); and (3) the status of the land where the offense occurred (e.g., Indian country, portions of the reservation, or non-reservation land).

a. Tribal Law Enforcement Authority Over Indians

In terms of the actors involved—the "who" over whom a tribe may exercise law enforcement authority—"[a]n Indian tribe's power to punish members who commit crimes within Indian country is a fundamental attribute of the tribe's sovereignty." *Walker*, 898 F.2d at 674.

In *Duro*, 495 U.S. at 696–97, the Supreme Court held that an Indian tribe could not assert criminal jurisdiction over a nonmember Indian by requiring him to stand trial in tribal court. Nevertheless, the Court found that tribes possess certain preliminary types of law enforcement authority over "those who disturb public order on the reservation," stemming from tribes' "traditional and undisputed power to exclude persons whom they deem to be undesirable from public lands." 495 U.S. at 697. Thus, as to tribal authority over nonmembers, "[w]here jurisdiction to try and punish an offender rests outside the tribe,

tribal officers may exercise their power to detain the offender and transport him to the proper authorities." *Id*.

In response to *Duro*, Congress subsequently passed 25 U.S.C. § 1301—sometimes referred to as "the *Duro* fix." *United States v. Lara*, 541 U.S. 193, 215–15 (2004) (Thomas, J., concurring). The statute provides that tribes possess the inherent authority to exercise criminal jurisdiction over *all* Indians, including nonmembers of the tribe in question. 25 U.S.C. § 1301(2) (providing that "powers of self-government" means "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians").

By statute, prosecutorial authority for certain "major crimes" and felonies committed by Indians in Indian country falls within federal jurisdiction. 18 U.S.C. § 1153 (stating that any Indian who commits these offenses "shall be subject to the same law and penalties as all other persons committing any of [these] offenses, within the exclusive jurisdiction of the United States."). Major crimes include murder, manslaughter, kidnapping, maiming, incest, assault of a person under age 16, felony child abuse or neglect, arson, burglary, and robbery. *Id*. § 1153(a).

b. Tribal Law Enforcement Authority Over Non-Indians

While tribes generally possess law enforcement authority over Indians for offenses in Indian country, the Supreme Court has held that tribes lack the inherent sovereign authority to subject non-Indians to criminal tribal jurisdiction. *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 212 (1978). In other words, a tribe's inherent sovereign authority

does not generally permit it to try and punish non-Indian offenders for violations of tribal, state, or federal law, unless Congress authorizes such jurisdiction.[14] *Id*. at 210.

However, based on tribal law enforcement authority derived from the tribes' traditional power to exclude, *see, e.g.*, *Duro*, 495 U.S. at 697, courts have extended some forms of tribal law enforcement authority over non-Indians. In *United States v. Terry*, 400 F.3d 575, 580 (8th Cir. 2005), the Eighth Circuit considered whether the search of a non-Indian's vehicle by tribal officers on the Pine Ridge Indian Reservation violated the Fourth Amendment. Tribal officers responding to a report of domestic violence at a tribal member's private residence on the reservation found the defendant, Terry, sitting in a pickup truck parked outside the home. *Id*. at 578. Smelling alcohol on Terry's breath, tribal officers handcuffed him, and subsequently observed ammunition on the truck's dashboard. *Id*. A search of Terry's vehicle revealed a rifle and alcohol. *Id*. Tribal officers arrested Terry on tribal violations for driving while intoxicated, spousal abuse, liquor violations, and disorderly conduct. *Id*. When the officers determined that Terry was not an Indian, they promptly called the local county sheriff, and temporarily held Terry in the tribal jail until the sheriff could pick him up the following morning. *Id*. at 579.

In his subsequent federal prosecution for unlawful possession of a firearm, Terry argued that as a non-Indian, tribal officers lacked jurisdictional authority over him, rendering his search and seizure invalid. *Id.* Relying on *Duro*'s holding that tribal officers

[14] One such specific grant of congressionally-conferred authority arises under the Violence Against Women Act, 25 U.S.C. § 1304(b)(4)(B).

are authorized to detain and transport offenders based on the tribe's sovereign authority to exclude non-Indians from tribal lands, the Eighth Circuit reasoned, "because the power of tribal authorities to exclude non-Indian violators from the reservation would be meaningless if tribal police were not empowered to investigate such violations, tribal police must have such power." *Id*. (citing *Duro*, 495 U.S. at 697). However, the court cautioned that tribal officers' exercise of such investigative authority was subject to Fourth Amendment standards prohibiting unreasonable search or seizure. *Id*. (citing 25 U.S.C. § 1302(2)). Accordingly, the Eighth Circuit held that tribal officers had the authority to seize Terry and search him, and further found the search met Fourth Amendment standards. *Id*. at 580–81.

Relying on federal authority, including *Terry*, the Minnesota Supreme Court has also held that a tribal police officer is authorized to detain, investigate, and remove a non-Indian who violates state law on the reservation, based on the tribe's traditional power to exclude.[15] *State v. Thompson*, 937 N.W.2d 418, 421–22 (Minn. 2020). In *Thompson*, the tribal officer observed that the defendant, who had driven into a hospital parking lot, had watery and bloodshot eyes and slurred speech. *Id*. at 419. The tribal officer's "investigation" consisted of conducting preliminary breath tests and field sobriety tests with the defendant's consent. *Id*. at 419–22. After the defendant failed the tests, the tribal officer then contacted the county sheriff and arranged for transfer of custody. *Id.* Because

[15] Minnesota courts have recognized that "state court jurisdiction over matters involving Indians is governed by federal statute or case law." *Stone*, 572 N.W.2d at 728 (citing *Gavle v. Little Six, Inc*., 555 N.W.2d 284, 289 (Minn. 1996)).

the tribal officer was acting within his proper authority to detain and transport the defendant, the detention was lawful. *Id*. at 421–22 (citing *Terry*, 400 F.3d at 579–80).

In addition to tribal authority over non-Indians based on the traditional power to exclude, in *Montana v. United States*, the Supreme Court announced two exceptions to the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U.S. 544, 564–66 (1981) (citing *Oliphant*, 435 U.S. at 212). The second exception is relevant here.[16]

Under the second exception, a "tribe may . . . retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id*. at 566. While *Montana* concerned regulatory authority, it applies to both regulatory and adjudicatory tribal jurisdiction. *Att'y's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa*, 609 F.3d 927, 936 (8th Cir. 2010) ("*Montana*'s analytic framework now sets the outer limits of tribal civil jurisdiction—both regulatory and adjudicatory—over nonmember activities on tribal and nonmember land."). Additionally, while the second *Montana* exception refers to tribes' inherent power to exercise civil authority over non-Indians, in *Cooley* and other cases discussed herein, courts have applied the second *Montana* exception in the context of

[16] Under the first exception, a "tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 566.

tribes' law enforcement authority over potential violations of criminal law. *See, e.g.*, *Cooley*, 141 S. Ct. at 1641–44.

The Supreme Court's ruling in *Strate v. A-1 Contractors*, 520 U.S. 438, 456 (1997), involved the question of tribal jurisdiction over tort claims arising from an accident on a state highway running through a reservation, involving a non-Indian driver, who was the widow of a tribal member and mother of tribal members. *Strate* implicated the first *Montana* exception, which the Court found inapplicable, noting, among its reasons, that the right-of-way was open to the public and traffic on it was subject to the state's control. *Id*. at 455–56. In a footnote, however, the Court commented, "We do not here question the authority of tribal police to patrol roads within a reservation . . . and to detain and turn over to state officers nonmembers stopped on the highway for conduct violating state law." *Id*. at 456 n.11.

3. *United States v. Cooley*

In 2021, the Supreme Court considered the second *Montana* exception in *Cooley*, 141 S. Ct. at 1643, finding the exception fit the facts of the case "like a glove." In *Cooley*, a tribal police officer approached a truck parked on a public right-of-way within an Indian reservation, to determine whether the occupant required roadside assistance. *Id*. at 1641–42. The officer noticed that the driver had watery, bloodshot eyes, appeared to be non-native, and that two semiautomatic rifles were lying on the front seat. *Id*. at 1642. Fearing violence, the tribal officer ordered Cooley out of the truck, conducted a pat-down search, and called tribal and county officers for assistance. *Id*. As the tribal officer awaited back-up, he returned to the truck, where he further observed a glass pipe and plastic bag

containing methamphetamine. *Id*. When the other officers arrived, including a BIA officer, they directed the tribal officer to seize all contraband in plain view, which led the tribal officer to discover additional methamphetamine. *Id*. Cooley moved to suppress the drug evidence, which the district court granted, finding the tribal police officer lacked the authority to investigate "nonapparent violations of state or federal law by a non-Indian on a public right-of-way crossing the reservation." *Id*. The Ninth Circuit affirmed the suppression determination, prompting the government to appeal. *Id.*

On certiorari, the Supreme Court observed that in *Duro*, it had previously recognized that even where jurisdiction to try and punish an offender lies outside the tribe, tribal officers may still "detain the offender and transport him to the proper authorities." *Id*. at 1644 (citing *Duro*, 495 U.S. at 687–88). In *Cooley*, the Court found the authority to search a non-Indian prior to transport was ancillary to the authority it had previously recognized. *Id*. (citing *Ortiz-Barraza*, 512 F.2d at 1180–81). In fact, the Court observed that "several state courts and other federal courts have held that tribal officers possess the authority at issue here." *Id*. (citing, *inter alia*, *Terry*, 400 F.3d at 579–80).

The Court acknowledged that while it had traced the relevant tribal authority in *Duro* to a tribe's "right to exclude non-Indians from reservation land," it based its decision in *Cooley* on a tribe's "'inherent sovereignty independent of th[e] authority arising from their power to exclude'"—the authority to protect the health or welfare of the tribe. *Id*. at 1643–44 (citation omitted). The Court reasoned that to deny tribal police officers the authority to search and detain criminal suspects for a reasonable time "would make it difficult for tribes to protect themselves against ongoing threats." *Id*. at 1643. Examples

of such threats that the Court identified were "non-Indian drunk drivers, transporters of contraband, or other criminal offenders operating on roads within the boundaries of a tribal reservation." *Id.* (citing *State v. Schmuck*, 850 P.2d 1332, 1341 (Wash. 1993) ("Allowing a known drunk driver to get back in his or her car, careen off down the road, and possibly kill or injure Indians or non-Indians would certainly be detrimental to the health or welfare of the Tribe.")). Accordingly, the Court reaffirmed tribal authority to detain and transport non-Indian offenders, and held that, ancillary to that authority, the tribal officer was within his authority to conduct a limited pat-search of Cooley, while waiting for the appropriate authorities to arrive. *Id*. at 1644–45.

Although the Supreme Court issued *Cooley* relatively recently, some federal and state courts have since applied the decision in cases involving tribal law enforcement authority over non-Indians. For example, in *United States v. Metts*, No. 3:21-CR-91 (DRL-MGG), 2022 WL 1421370, at *4 (D.N.D. May 4, 2022), a non-Indian defendant charged with unlawful possession of a firearm moved to suppress evidence on several bases, including the tribal officer's jurisdictional authority. Relying on *Cooley*, the court found that tribal officers had the authority to investigate a state or federal crime committed on tribal land, to search and detain a suspect regardless of tribal status prior to transporting him or her to the proper authorities, and, pursuant to a federal cross-deputization agreement, make a warrantless arrest for a felony, supported by probable cause. *Id*. In particular, tribal officers had interviewed the defendant prior to transporting him to jail and conducted a search of his rented vehicle. *Id*. at *2–3.

Similarly, in *State v. Suelzle*, 965 N.W.2d 855, 859–60 (N.D. 2021), the North Dakota Supreme Court affirmed the denial of a suppression motion filed by a non-Indian defendant. There, a federal law enforcement officer who was working for a tribal drug enforcement agency had stopped the defendant within the exterior boundaries of the reservation, after observing the defendant's vehicle swerve across the road multiple times. *Id*. at 858. Citing *Cooley*, the court held that the officer had jurisdiction to detain the defendant for a reasonable time while awaiting a state officer with prosecutorial authority. *Id*. at 860.

However, the court in *Texas v. Astorga*, 642 S.W.3d 69, 81–83 (Tex. Ct. App. 2021), distinguished *Cooley* from the facts before it. In *Astorga*, a tribal police officer observed a traffic violation on tribal land. *Id*. The officer stopped the vehicle, at which time he observed open alcoholic beverage containers, also in violation of the tribe's traffic code. *Id*. Joined by another tribal officer, they performed a brief pat search of the non-Indian driver, Astorga, and, when retrieving the open containers from the car, discovered a clear glass pipe on the floorboard that appeared to contain methamphetamine, in violation of the tribe's peace code. *Id*. at 74. The officers then handcuffed Astorga, conducted a more thorough search of his person, read him and his passenger their *Miranda* rights, and transported them to tribal police headquarters for processing. *Id*. At the headquarters, officers conducted another search of Astorga's person before placing him in a cell. *Id*. Based on information provided by the passenger, officers later performed a strip search of Astorga and discovered a baggie containing a substance that tested positive for

methamphetamine. *Id*. Nearly five hours after the initial stop, the tribal officers contacted the El Paso Police Department and turned the matter over to it. *Id*. at 75.

Subsequently, Astorga was indicted in state court on a felony drug charge. *Id*. He successfully moved to suppress the evidence resulting from the traffic stop, arguing that it was illegal and he was unlawfully detained for longer than necessary. *Id*. On the government's appeal, the Texas Court of Appeals held that while the initial stop and pat-down search was authorized under *Cooley*, the tribal officers' subsequent actions were not. *Id*. at 80–81. The court noted that before the tribal officers discovered the glass pipe, they could have issued citations to Astorga and released him. *Id*. at 81. However, the court found that after the tribal officers found the pipe, they "could have contacted the [El Paso Police Department] or other state officers to determine if they wished to take custody of Astorga for the alleged drug paraphernalia offense." *Id*. at 82. The court noted that had they done so, "they would have neatly fit the fact pattern in *Cooley* by temporarily detaining Astorga at the scene until [El Paso Police Department] officers arrived. But this is not what happened." *Id*. Rather, the court found that because the tribal officers lacked the authority to arrest Astorga, "and because their actions went beyond their inherent 'policing authority' as contemplated by *Cooley*," Astorga's detention was unlawful. *Id*. at 83.

4. Questions Presented

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

controversies "that are justiciable under Article III." *Maytag Corp. v. Int'l Union, United Auto., Aero. & Agric. Implement Workers of Am.*, 687 F. 3d 1076, 1081 (8th Cir. 2012) (citation omitted); *see also Rosebud Sioux Tribe v. United States*, 9 F.4th 1018, 1025 (8th Cir. 2021) (stating that a claim under the Declaratory Judgment Act must involve a "substantial controversy" that presents a "concrete and specific question.") (citation omitted).

The Court has found that Plaintiffs' claims are justiciable under Article III, (Dec. 21, 2020 Order at 29–36), and they remain so. Among other things, the County continues to assert that the law enforcement authority recognized in *Cooley* is foreclosed by the Constitution and is inapplicable in a Public Law 280 state. (Defs.' Opp'n [Doc. No. 327] at 16–25.) Further, the Court finds that this case involves a "substantial controversy" that presents the following specific questions posed by the Band: (1) whether the Band's inherent and federally delegated law enforcement authority extends to all lands within the Mille Lacs Reservation; (2) whether such authority includes the authority to investigate violations of federal and state criminal law; and (3) whether, with respect to non-Indians, the Band has investigatory authority in addition to the authority to detain and turn over violators to jurisdictions with prosecutorial authority. (Pls.' Mem. at 4–5.)

Before turning to these questions, however, the Court briefly addresses two matters that are *not* at issue here. First, the parties do not appear to dispute the Band's authority to proscribe and enforce tribal laws applicable to Band members and nonmember Indians. *See* 25 U.S.C. § 1301(2) (recognizing Indian tribes' powers of self-government, and providing that "powers of self-government . . . means the inherent power of Indian tribes,

hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."); *Lara*, 541 U.S. at 210 (holding that tribes may prosecute nonmember Indians as an exercise of their inherent tribal authority); *Wheeler*, 435 U.S. at 324–25 (finding tribe's power to prosecute its own members is inherent); *Walker*, 898 F.2d at 674 ("An Indian tribe's power to punish members who commit crimes within Indian country is a fundamental attribute of the tribe's sovereignty."). In exercising such authority, tribes are subject, by statute, to several requirements identical to those found in the Bill of Rights, including, for example, prohibitions against unreasonable search and seizure, double jeopardy, and compelled testimony against oneself. 25 U.S.C. § 1302(a). In addition, Congress has generally limited tribes' authority to prosecute Indians for offenses subject to punishments of greater than one year of imprisonment, a fine of $5,000, or both. *Id*. § 1302(a)(7)(B).

Second, this case is not about the Band's authority to try and punish non-Indians in tribal court. Defendants contend that Plaintiffs' requested relief would constitute "a de facto overruling of *Oliphant* [], which held that '[b]y submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.'" (Defs.' Opp'n at 16.) Defendants mischaracterize the relief the Band seeks. The Band does not claim the general authority, absent congressionally conferred authority, to try and punish non-Indians for criminal violations in tribal court, nor has it sought declaratory and injunctive relief in this regard. Accordingly, Defendants' arguments concerning criminal jurisdiction to try and punish non-Indian offenders are moot. (*See id*. at 16.)

a. Whether the Band's Federally Delegated and Inherent Law Enforcement Authority Extends to All Lands Within the Mille Lacs Reservation

(i) Federally Delegated Law Enforcement Authority

As to the geographic scope of the Band's federally delegated law enforcement authority, the Deputation Agreement between the Band and the federal government makes clear that Band officers who are deputized as SLECs possess the authority "to enforce federal laws *in Indian country*," and are "authorized to assist the BIA in its duties to provide law enforcement services and to make lawful arrests *in Indian country* within the jurisdiction of the Tribe or as described in section 5." (Deputation Agmt. at 1–2 (emphasis added).) Section 5 of the Deputation Agreement provides that "[t]he ordinary duty stations of BIA police officers are *located within the boundaries of Indian country*." (*Id*. ¶ 5 (emphasis added).) The Deputation Agreement further refers to Indian country, "as defined by 18 U.S.C. § 1151." (*Id*. at 2.)

As applicable here, under 18 U.S.C. § 1151, "Indian country" consists of "all land within the limits of any Indian reservation." *See also Cabazon Band*, 480 U.S. at 208 n.5 (stating that definition of Indian country in 18 U.S.C. § 1151 applies to questions of both criminal and civil jurisdiction.") (citing *DeCoteau,* 420 U.S. at 427, n.2; *State v. Davis*, 773 N.W.2d 66, 68 n.2 (Minn. 2009) (applying definition of Indian country under 18 U.S.C. § 1151 to jurisdictional dispute involving tribal or state courts). Here, in the M-Opinion letter to Walsh, the DOI Solicitor stated that under federal law, "all of the Band's reservation is included [in Indian country], not just the trust lands." (M-Opinion at 2 n.1.)

In addition, this Court has ruled that "[o]ver the course of more than 160 years, Congress has never clearly expressed an intention to disestablish or diminish the Mille Lacs Reservation." (Mar. 4, 2022 Summ. J. Order on Geo. Boundaries at 92–93.) Thus, the Court has affirmed the Band's position that "the Mille Lacs Reservation's boundaries remain as they were under Article 2 of the Treaty of 1855." *Id*. Accordingly, pursuant to the Deputation Agreement, the Band's federally delegated law enforcement authority applies within Indian country, which consists of all lands within the boundaries of the Mille Lacs Indian Reservation, as established by the 1855 Treaty.[17]

(ii) Inherent Law Enforcement Authority

Turning to the geographic scope of the Band's *inherent* law enforcement authority, the Band argues that such authority encompasses the entire Reservation, and *Cooley*'s

[17] While the question the Band presents here concerns the geographic reach of its federally delegated authority, the Court briefly addresses the geographic scope of any state delegated authority. As noted earlier, under state law, Minn. Stat. § 626.90 contemplates that the Band and County will enter into a cooperative law enforcement agreement. Under such an agreement, and subject to certain preliminary requirements, the Band and County share concurrent law enforcement authority, under certain conditions. Minn. Stat. § 626.90, subd. 2(c). The scope of such authority is limited by geography. Under the statute, the Band has concurrent jurisdictional authority over all persons on trust lands, over all Band members within the boundaries of the 1855 Treaty, and over any person who commits a crime or attempts to do so in the presence of a Band officer within the boundaries of the 1855 Treaty. *Id.* However, the statute also provides that "[n]othing in this section shall be construed to restrict the band's authority under federal law." *Id*., subd. 7. Accordingly, if federal law holds that a tribe's inherent law enforcement authority over violations of state and federal law extends across all reservation lands, it would appear to control. *See Thompson*, 937 N.W.2d at 422 (affirming district court's finding that the state did not have the power to grant or deny law enforcement authority to Red Lake police officer where officer had inherent detain-and-remove authority to detain, investigate, eject, and transfer state-law offender to county sheriff).

recognition of tribal law enforcement authority is not specifically limited to "public rights-of-way within a reservation patrolled by tribal police." (Pls.' Mem. at 18 (distinguishing *Cooley*, 141 S. Ct. at 1646 (Alito, J., concurring)).) In support of its position, the Band asserts the following: (1) the *Montana* exception on which *Cooley* relies contains no such limitation; (2) criminal activity on non-Indian fee lands within a reservation threatens the health and welfare of a tribe just as criminal activity on public rights-of-way does; (3) the authority to investigate and detain non-Indians for violations of state or federal law does not unlawfully subject non-Indians to tribal law, which is just as true on non-Indian fee lands as on public rights-of-way; (4) in his concurring opinion, Justice Alito himself limited the reach of *Cooley* to public rights-of-way *patrolled by tribal police*, as any such limitation to roads patrolled by tribal police was not in the question presented to the Court, nor is it supported by *Montana*'s second exception, on which *Cooley* is grounded; and (5) any limitation based on a land's status as a public right-of way or fee land is impractical and contrary to congressional intent in defining Indian country to include all land within a reservation (*Id*. at 16–19.)

In response, Defendants argue that the Band overstates the reach of *Cooley*, asserting that the relief the Band seeks "would extend even in non-Indian homes on non-Indian owned fee lands." (Defs.' Opp'n at 12; *see also id*. at 14.) Defendants argue the Band's inherent law enforcement authority does not extend to non-Indian fee lands, asserting that *Cooley* affirmed inherent tribal authority in a specific set of circumstances, not present here. (*Id*. at 12.) For example, Defendants note that the stop in *Cooley* occurred on the Crow Reservation, a large Montana reservation spanning over two million acres; on

a public right-of-way primarily patrolled by tribal police, as Justice Alito observed; and it involved a tribal officer who was not cross-deputized with federal or state law enforcement authority. (*Id*. at 13.)

The Court recognizes that in *Cooley*, 141 S. Ct. at 1642–45, the Supreme Court held that a tribal police officer has the inherent authority, when the tribe's health or welfare is threatened, "to detain temporarily and to search non-Indians traveling on public rights-of-way running through a reservation for potential violations of state or federal law."

Because the Supreme Court found the facts of *Cooley* fit the second *Montana* exception "like a glove," 141 S. Ct. at 1643, this Court turns to *Montana*, to inform the geographic reach of *Cooley*. *Montana*'s second exception recognizes tribes' inherent civil authority over the conduct of non-Indians on non-Indian fee lands within a reservation. 450 U.S. at 566. That exception contains no limitation to public rights-of-way, and expressly provides that in response to threats to a tribe's health or welfare, and as a matter of inherent sovereign power, tribal authority even extends to the conduct of non-Indians on non-Indian fee lands within a reservation. *Id*. In fact, as Plaintiffs note, criminal conduct that constitutes a threat to tribal health or welfare is just as likely to occur on non-Indian fee lands as on public rights of way. (Pls.' Mem. at 16–19.) The second *Montana* exception also lacks Justice Alito's additional limitation in *Cooley* that the public right-of-way be primarily patrolled by tribal officers. *Cooley*, 141 S. Ct. at 1646 (Alito, J., concurring).

Defendants argue that the ownership status of the land is relevant to the question of inherent tribal law enforcement authority, asserting that *Montana*'s extension of tribal

authority has rarely been extended over nonmembers on non-Indian land. (Defs.' Opp'n at 15–16 (citing *Plains Commerce Bank*, 554 U.S. at 330; *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 654 (2001); *Nevada v. Hicks*, 533 U.S. 353, 360 (2001)).) But Defendants' legal authority involves *Montana*'s first exception, which grants tribes the authority to "regulate . . . the activities of nonmembers who enter into consensual relationships with the tribe or its members[.]" *Montana*, 450 U.S. at 565. These cases, where the ownership status of land or property was directly related to the regulatory authority at issue, are inapposite. *See Plains Commerce Bank*, 554 U.S. at 330 (involving sale of non-Indian fee land to non-Indians and adjudication of resulting lawsuit in tribal court); *Atkinson Trading Co.*, 532 U.S. at 647–48 (addressing imposition of hotel occupancy tax); *Hicks*, 533 U.S. at 356 (concerning question of tribal jurisdiction over tribal member's civil rights and tort action). Even in such cases, the Supreme Court has observed that "[t]he ownership status of land . . . is only one factor to consider in determining whether regulation of the activities of nonmembers is 'necessary to protect tribal self-government or to control internal relations.'" *Hicks*, 533 U.S. at 360 (quoting *Montana*, 450 U.S. at 564).

Notably, in *Duro*, the Supreme Court made no distinction as to whether the offending conduct occurred on non-Indian fee lands, Indian fee lands, or trust lands. *See* 495 U.S. at 697. Rather, it referred to tribal authority to restrain persons who disturb public order "on the reservation." *Id.* Nor did such distinctions factor into the Eighth Circuit's analysis in *Terry*, 400 F.3d at 580, a case on which the Supreme Court relied in *Cooley*. As noted, the Eighth Circuit found that tribal police officers possessed the authority to detain a non-Indian offender outside a private residence within Indian country and turn

over the offender to the proper authorities—with no discussion of trust lands, fee lands, or non-fee lands. *Id*. Rather, the Eighth Circuit based the tribe's authority on its "traditional and undisputed power" to exclude undesirable persons "from tribal lands," such that they have 'the power to restrain those who disturb public order *on the reservation*, and if necessary to eject them.'" *Id*. at 579 (quoting *Duro*, 495 U.S. at 696–97) (emphasis added). In *Ortiz-Barraza*, 512 F.2d at 1180, the court expressly rejected a limitation of tribal law enforcement authority to public rights-of-way, finding that it "avail[ed] the defendant nothing," explaining, "Rights of way running through a reservation remain part of the reservation and within the territorial jurisdiction of the tribal police."

In the underlying appellate decision in *Cooley*, the Ninth Circuit held that tribal police officers lacked the power to exclude non-Indians on public rights-of-way, and could only detain and investigate a non-Indian, provided the suspect's Indian status was unknown, on such lands if there was an apparent violation of state or federal law. 919 F.3d 1135, 1141–42 (9th Cir. 2019). However, the Supreme Court unanimously reversed such limitations. *Cooley*, 141 S. Ct. at 1644–45. It held that tribes have the authority to investigate and temporarily detain violators of state and federal law, without first determining the suspect's Indian status, even on public rights of way that cross tribal land, because of *Montana*'s health-or-welfare exception.

Further, the Court agrees with Plaintiffs that, from a practical standpoint, recognizing inherent tribal law enforcement authority on all lands within the Reservation would eliminate a patchwork approach to policing. (Pls.' Mem. at 19–20 (citing *Seymour v. Supt. of Wash. State Penitentiary*, 368 U.S. 351, 358 (1962)).)

Defendants assert that "[t]hat rationale does not apply in a [Public Law] 280 state, and it particularly does not apply in Mille Lacs County where the Cooperative Agreement sets forth the trust vs. non-trust lands based on maps." (Defs.' Opp'n at 30.) Subject to certain exceptions inapplicable here, through Public Law 280, Congress granted states such as Minnesota criminal jurisdiction over Indian country within the state. *Stone*, 572 N.W.2d at 728–29 (citing 18 U.S.C. § 1162, 25 U.S.C. §§ 1321–24, 28 U.S.C. § 1360). However, regardless of Minnesota's status as a Public Law 280 state, and the County's familiarity with Reservation trust lands versus non-trust lands, finding that the Band's inherent tribal authority encompasses the entire Reservation—which is supported by the statutory and legal authorities discussed above—would reduce unnecessary complications involved in a parcel-by-parcel approach to tribal law enforcement authority.

Accordingly, the Court finds that the inherent law enforcement authority that the Band possesses, discussed below, applies to all lands within the Mille Lacs Reservation.

b. Whether the Band's Federally Delegated and Inherent Law Enforcement Authority Encompasses the Authority to Investigate Violations of Federal and State Criminal Law, Including Violations by Non-Indian Offenders

The Court combines the Band's two remaining questions[18] into a single question, because courts generally address inherent tribal law enforcement authority in cases

[18] The two remaining questions the Band identifies are: (1) whether the Band's inherent and federally delegated law enforcement authority includes the authority to conduct investigations of federal and state criminal law; and (2) whether, with respect to non-Indians, the Band has investigatory authority in addition to the authority to detain and turn over violators to jurisdictions with prosecutorial authority. (Pls.' Mem. at 1.)

involving non-Indian offenders. The Court agrees with the Band that tribes' retained authority over Indians within their reservations is at least as broad as it is over non-Indians. (Pls.' Mem. at 9 (citing *Wheeler*, 435 U.S. at 326).) Accordingly, the extent of a tribe's law enforcement authority to investigate violations of federal and state law by non-Indians informs the extent of a tribe's authority over Indians. (*Id.*) Thus, the Court considers whether the Band's federally delegated and inherent law enforcement authority encompasses the authority to investigate violations of federal and state criminal law, including violations by non-Indian offenders.

(i) Federally Delegated Law Enforcement Authority

The Band argues that it maintains federally delegated authority to investigate violations of federal law within the Reservation, subject to the civil rights provisions of the Constitution, including the prohibition against unreasonable searches and seizures. (Pls.' Mem. at 28–29; Pls.' Proposed Order [Doc. No. 320] at 2–3.)

Indeed, the Deputation Agreement expressly authorizes the Band to investigate violations of federal criminal law. It provides,

> [B]oth parties to this Agreement shall cooperate with each other to provide comprehensive and thorough law enforcement protection, including but not limited to effecting arrests, responding to calls for assistance from all citizens and also from other law enforcement officers, *performing investigations*, providing technical and other assistance, dispatching and detention.

(Deputation Agmt. ¶ 1) (emphasis added). The Deputation Agreement also states, "Nothing in this Agreement limits, alters or conveys any judicial jurisdiction, including the authority to issue warrants for arrest or search and seizure or to issue service of process." (*Id.* ¶ 3.C.)

With regard to state law, the Deputation Agreement expressly provides that officers holding SLECs may only respond to violations of *exclusively* state law to the extent consistent with state law. (*Id.* ¶ 6 (emphasis added).) However, "Officers carrying SLECs may respond to *concurrent* violations of State and Tribal or Federal Laws to the extent consistent with Tribal or Federal law." (*Id.*) (emphasis added).

The Deputation Agreement does not distinguish between tribal law enforcement authority over Indians and non-Indians. Rather, it acknowledges that tribal officers may not immediately know whether a suspect or victim is Indian or non-Indian, or whether the conduct occurred in Indian country. (*Id.* at 2.) Accordingly, the Agreement recognizes that "there is great difficulty in determining immediately the proper jurisdiction for the filing of charges." (*Id.*) The Deputation Agreement therefore provides that "the official jurisdictional determination will be made by a prosecutor or court from one of the various jurisdictions, not by cross-deputized arresting officers who may deliver the offender to the appropriate detention facility." (*Id.*)

The Court finds that based on the clear language of the Deputation Agreement, the Band possesses federally delegated authority to investigate violations of federal law. The terms of the Deputation Agreement set forth the actions that tribal police officers may take in exercising that federally-delegated authority.

The Band's authority to investigate concurrent violations of state law depends upon its inherent tribal authority recognized under federal law, discussed below, and any terms in a cooperative law enforcement agreement to which the Band and the County have agreed to be bound.

(ii) Inherent Law Enforcement Authority

Pursuant to Supreme Court and other judicial authority, the Band asserts that it maintains inherent law enforcement authority to investigate violations of tribal, state, and federal law within the Reservation. (Pls.' Mem. at 29–30; Pls.' Proposed Order at 1.) However, with respect to non-Indians, it limits such authority to temporarily detaining and investigating a suspect for a reasonable time prior to conveying the suspect to the appropriate prosecutorial authority. (Pls.' Mem. at 29–30; Pls.' Proposed Order at 1.) The Band appears to assert that its general authority over Indians may include, among other things: (1) carrying and using a gun; (2) patrolling roads within the Reservation; (3) making traffic and investigative stops; (4) taking statements; (5) conducting searches and gathering and retaining evidence; and (6) detaining, investigating, and arresting suspects. (Pls.' Proposed Order at 2.)

In response, the County again contends that the Band overstates the holding of *Cooley*, expanding it beyond the unique circumstances of that case, and well beyond the limited second *Montana* exception. (Defs.' Opp'n at 13–15.) In addition, the County argues that neither the Constitution nor Congress permit the Court to grant the Band the authority to investigate state crimes committed by nonmembers. (*Id*. at 19.) Further, the County asserts that the Band's requested relief "exceed[s] this Court's Article III authority and will not provide the same protections for individual liberties as the Bill of Rights."[19] (*Id*. at 31.)

[19] The County reasserts some of these arguments, and also presents additional arguments in opposition to the Band's request for injunctive relief. The Court will address

(A) Interpretation of *Cooley*

As Defendants note, in *Cooley*, the Supreme Court observed that the "*Montana* exceptions are limited" and "cannot be construed in a manner that would swallow the rule." 141 S. Ct. at 1645 (quoting *Plains Commerce Bank*, 554 U.S. at 330). Yet the Supreme Court recognized that "we have also repeatedly acknowledged the existence of the exceptions and preserved the possibility that 'certain forms of nonmember behavior' may 'sufficiently affect the tribe as to justify tribal oversight.'" *Id*. at 1645 (citations omitted); *see also id*. at 1643 (noting that the two *Montana* exceptions demonstrate that *Montana*'s "general proposition" is "not an absolute rule.")

Grounded in the second *Montana* exception, *Cooley* reaffirmed the inherent tribal law enforcement authority to temporarily detain suspected violators of state and federal law, including non-Indians, and further recognized that such inherent authority includes the authority to search suspects. *Id*. at 1644–45. In terms of Supreme Court jurisprudence, the Supreme Court thus "expanded" the second *Montana* exception applicable to conduct that threatens the health or welfare of the tribe. *Id*. at 1643–44 (citing *Montana*, 450 U.S. at 566). The Supreme Court provided examples of such threats, including the risks posed by drunk drivers and transporters of contraband. *Id.* at 1643.

The County concedes that some types of criminal activity may threaten the health or welfare of the tribe, but argues that the health-or-welfare exception "cannot be the basis

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these arguments, to the extent necessary, in its discussion of injunctive relief, *supra* at III.B.6.

for the extraordinary expansion of authority sought by Plaintiffs under an *exception* to the general rule that tribes lack authority over non-Indians and on fee lands." (Defs.' Opp'n at 15.) The County provides examples of criminal activity that, in its opinion, does not rise to the threat-level sufficient to invoke *Montana*, e.g., non-Indian drug possession without distribution; domestic disputes within non-Indian households; child neglect in nonmember families; and theft by and against non-Indians. (*Id*. at 15 n.7.)

As to the type of conduct that might constitute a threat to a tribe's health or welfare, the examples in *Cooley* were not exclusive. 141 S. Ct. at 1643. ("Such threats may be posed by, for instance, ..."). The Supreme Court explained that "[t]o deny a tribal police officer authority to search and detain for a reasonable time any person he or she believes *may commit or has committed a crime* would make it difficult for tribes to protect themselves against ongoing threats." *Id*. (emphasis added). *Cooley* does not require crime-specific categorization of threatening criminal conduct—it requires a tribal officer's belief that a crime may be committed or has been committed. Moreover, Defendants' examples of allegedly non-threatening criminal conduct fail to account for the myriad circumstances in which criminal activity can develop and threaten a tribe's health or welfare.

(B) Constitutional Limitations

Citing two concurring opinions in *Lara*, 554 U.S. at 337 (Kennedy, J., concurring), *id.*, 554 U.S. at 219 (Thomas, J., concurring), Defendants argue that the Band's inherent law enforcement authority must be defined by Congress, and that "the Constitution does not allow the Court or Congress to recognize inherent tribal authority to investigate state

law crimes committed by nonmembers." (Defs.' Opp'n at 16–23.) But Defendants' argument cannot be reconciled with *Cooley*. 141 S. Ct. at 1643–45 (citing, *e.g.*, *Montana*, 450 U.S. at 566; *Duro*, 495 U.S. at 687–88). Moreover, as this Court observed in its December 21, 2020 Order, "Federal courts have often treated the scope of a tribe's sovereign authority as a matter of federal common law." (Dec. 21, 2020 Order at 26 (citing *Lara*, 541 U.S. at 205–07; *Oliphant*, 435 U.S. at 206, 212; *Terry*, 400 F.3d at 579–80).)

Again, the County contends that granting the Band its requested relief would violate principles of federalism. (Defs.' Opp'n at 19–20.) The Court has already rejected Defendants' arguments based on federalism principles, as well as Defendants' argument that the Court lacks subject matter jurisdiction, and will not repeat those rulings here, which are incorporated by reference. (Dec. 21, 2020 Order at 24–29, 39–41.)

The County also argues that the imposition of tribal law enforcement authority over non-Indians who have no voice in the election of tribal leadership would be unconstitutional, in violation of the Guarantee Clause. (Defs.' Opp'n at 19–22, 32–33.) Among other things, the County asserts that the application of such authority would impinge upon non-Indians' voting rights and "the right to ensure all [of the County's] citizens can participate in the political process that oversees law enforcement." (*Id*. at 19–21 (citing *New York v. United States*, 505 U.S. 144, 169 (1992)).) However, the Supreme Court rejected similar arguments in *Cooley*, recognizing that the inherent tribal authority to investigate violations of state law "do[es] not subsequently subject [non-Indians] to tribal law, but rather only to state and federal laws that apply" regardless of an individual's presence in Indian country. 141 S. Ct. at 1644–45.

The County also contends that "[i]f the Band wants its officers to have the power to investigate all state law violations, not just of its members, the Band should do what Minnesota law requires by ensuring its officers have that authority through the agreement required by Minn. Stat. § 626.90."[20] (Defs.' Opp'n at 23.) However, a cooperative agreement does not provide the sole source of the Band's authority to investigate violations of state law. As numerous cases make clear, based on a tribe's inherent authority, tribal officers may search and temporarily detain a suspected violator of state or federal law in Indian country, even where "jurisdiction to try and punish an offender rests outside the tribe." *Cooley*, 141 S. Ct. at 1644; *Terry*, 400 F.3d at 579–80; *Ortiz-Barraza*, 512 F.2d at 1180–81; *Metts*, 2022 WL 1421370, at *4; *Suelzle*, 965 N.W.2d at 860; *Schmuck*, 850 P.2d at 1341; *State v. Pamperien*, 967 P.2d 503, 504–06 (Or. Ct. App.); *State v. Ryder*, 649 P.2d 756, 759 (N.M. Ct. App. 1982). Recognizing such inherent authority, the Minnesota Supreme Court has held that a tribal police officer "d[oes] not need to be authorized under Minnesota law to detain or arrest [a suspected offender] to remove him from the reservation and transport him [to county authorities]." *Thompson*, 937 N.W.2d at 422.

Defendants also contend that because inherent tribal authority is "outside the Constitution," the "individual liberties granted therein are thus unavailable." (Defs.' Opp'n at 19.) However, the exercise of all such authority is subject to the provisions of the Indian Civil Rights Act, 25 U.S.C. §§ 1301–04, including the proscription against unreasonable

[20] The Court observes that, as a factual matter, it was the County that revoked the then-existing 2008 Cooperative Agreement with the Band. (Revocation & 2008 Coop. Agmt. at 5.)

searches and seizures in 25 U.S.C. § 1302(a)(2). Moreover, many courts have addressed inherent tribal law enforcement authority in the context of criminal suppression motions and then have proceeded to address the defendants' constitutional challenges. *See, e.g.*, *Lara*, 124 S. Ct. at 197; *Terry*, 400 F.3d at 580–82; *Metts*, 2022 WL 1421370, at *1; *Astorga*, 642 S.W.3d at 83–84.

(C) Public Law 280

The County asserts that Public Law 280 "overrides the Band's interests in self-government," and "grant[s] Minnesota primacy over criminal law enforcement jurisdiction throughout Indian country in Minnesota." (Defs.' Opp'n at 24 (citing *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022)).) But *Castro-Huerta*, on which the County relies, does not confer "primacy" on states. Rather, it holds that the federal government and states share concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country. *Castro-Huerta*, 142 S. Ct. at 2502–05. While the Supreme Court observed that Public Law 280 generally affords states broad criminal jurisdiction over state-law offenses committed by or against Indians in Indian country, *id*. at 2500, the case did not involve the issue of tribal law enforcement authority, much less Public Law 280's effect on such authority. While the Court commented that absent Public Law 280, state jurisdiction over Indian country crimes committed by Indians "could implicate principles of tribal self-government," *id*., it did not state that Public Law 280 grants states jurisdictional primacy or that it overrides a tribe's interests in self-government.

In fact, divesting tribes of tribal law enforcement authority would subvert Congress's goal in enacting Public Law 280 to improve law enforcement on reservations.

Schmuck, 850 P.2d at 1344 ("Given that one of the primary goals of Public Law 280 is to improve law enforcement on reservations, holding that Public Law 280 divested a tribe of its inherent authority to detain and deliver offenders would squarely conflict with that goal."). Courts have consistently held that Public Law 280 does not supplant tribal authority, including law enforcement authority. *See, e.g.*, *Walker*, 898 F.2d at 675 (holding that Public Law 280 contains no clear expression of congressional intent to divest tribes of their inherent law enforcement jurisdiction to try and punish their own members for violations of tribal criminal law); *TTEA v. Ysleta Del Sur Pueblo*, 181 F.3d 676, 685 (5th Cir. 1999) (finding that nothing in Public Law 280's text or legislative history precludes concurrent tribal court authority); *Confederated Tribes of the Colville Rsrv. v. Sup. Ct. of Okanogan Cnty.*, 945 F.2d 1138, 1140 n.4 (9th Cir. 1991) (same); *Cabazon Band of Mission Indians v. Smith*, 34 F. Supp.2d 1195, 1200 (C.D. Cal. 1998) (observing that Public Law 280 "is not a divestiture statute," but "was designed not to supplant tribal institutions, but to supplement them.") (quoting *Native Vill. of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 560 (9th Cir. 1991); *Schmuck*, 850 P.2d at 1344 (holding that Public Law 280 did not strip a tribe of its authority "to stop and detain non-Indian motorists allegedly violating state and tribal law while traveling on reservation roads.").

Accordingly, the Court finds that the Band's request for relief is not precluded simply because Minnesota is a Public Law 280 state.

5. Declaratory Relief

As the Court previously stated, the Declaratory Judgment Act provides that a federal court "may declare the rights and other legal relations of any interested party seeking such

declaration whether or not further relief is or could be sought." 28 U.S.C. § 2201. The Court finds that the Band is entitled to declaratory relief. With respect to the three questions posed by the Band, (Pls.' Mem. at 1), the Court finds as follows: (1) the Band's inherent and federally delegated law enforcement authority extends to all lands within the Mille Lacs Reservation; (2) such authority includes the authority to investigate violations of federal and state criminal law, consistent with *Cooley*, 141 S. Ct. at 1643–45, *Terry*, 400 F.3d at 579–80, related authority discussed herein, and this Order; and (3) with respect to non-Indians, in addition to the authority to detain and turn over violators to jurisdictions with prosecutorial authority, the Band has the authority to investigate violations of federal and state criminal law, consistent with *Cooley*, 141 S. Ct. at 1643–45, *Terry*, 400 F.3d at 579–80, related authority discussed herein, and this Order.

Courts have not identified all aspects of investigative authority that tribal police possess when exercising their inherent law enforcement authority, nor will this Court speculate and identify which specific acts may be "investigative." While the Deputation Agreement identifies several examples of the Tribe's federally delegated investigative authority, (Deputation Agmt. ¶ 1), typically, courts have only addressed a tribe's inherent investigative authority in response to specific facts involving the actual exercise of such authority. Accordingly, the Court declines to grant declaratory relief that itemizes various forms of investigative authority, and instead finds that the Band possesses the investigative authority recognized by *Cooley*, *Terry*, and related authority discussed herein.

The County's actions, particularly as reflected in the Opinion and Protocol, caused harm to the Band's tribal sovereignty. Many courts have recognized such an injury as

harmful, typically in the context of injunctive relief. *Ute Indian Tribe of the Uintah & Ouray Rsrv. v. Utah*, 790 F.3d 1000, 1005-06 (10th Cir. 2015) (Gorsuch, J.) (finding county prosecution of tribal member for on-reservation traffic offense irreparably harmed tribe as an "infringement on tribal sovereignty"); *Poarch Band of Creek Indians v. Hildreth*, 656 Fed App'x 934, 944 (11th Cir. 2016) (finding state tax assessment of Indian trust property "would amount to irreparable violation of tribal sovereignty"); *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006) ("an invasion of tribal sovereignty can constitute irreparable injury"); *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1077 (9th Cir. 2001) (observing that "the prejudice of subjecting the Tribe to a subpoena for which the agency does not have jurisdiction results in irreparable injury vis-a-vis the Tribe's sovereignty"); *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250–51 (10th Cir. 2001) (stating that interference with tribe's motor vehicle registration system threatened to interfere with tribal self-government and constituted irreparable injury); *Mashpee Wampanoag Tribe v. Bernhardt*, Civ. No. 18-2242 (PLF), 2020 WL 3034854, at *3 (D. D.C. June 5, 2020) ("The most obvious harm that the Tribe will suffer [absent injunctive relief] is the loss of sovereign authority over the Tribe's historic lands.").

Defendants' actions were unlawful. Among other things, the geographic scope of the Opinion and Protocol improperly limited the Band's inherent law enforcement authority to trust lands, having defined "Indian country" as such, (Opinion at 14), when Indian country is comprised of all land within the Reservation. 18 U.S.C. § 1151; *Cabazon Band*, 480 U.S. at 208 n.5. This Court has ruled that the Reservation's boundaries remain

as they were under Article 2 of the Treaty of 1855. (Mar. 4, 2022 Summ. J. Order on Geo. Boundaries at 92–93.)

Defendants also acted unlawfully in prohibiting band officers from investigating violations of state law, even on trust lands. (Opinion at 14; Protocol at 1.) Since at least 1975, federal and state courts have repeatedly recognized that tribes have inherent authority to investigate potential violations of state law within their reservations, including violations by non-Indians. *Ortiz-Barraza*, 512 F.2d at 1180–81; *see also Terry*, 400 F.3d at 579–80; *Thompson*, 937 N.W.2d at 421–22; *Schmuck*, 850 P.2d at 1341; *Pamperien*, 967 P.2d at 504–06; *Ryder*, 649 P.2d at 759. The Eighth Circuit's 2005 decision in *Terry*, 400 F.3d at 575, is one of the cases *Cooley* relied upon for the proposition that several state courts and other federal courts had *already* held that tribal officers possessed the authority at issue in *Cooley*. 141 S. Ct. at 1644.

The Opinion and Protocol also unlawfully stated that tribal police officers could be subject to certain criminal penalties for performing law enforcement duties that courts have recognized as lawful exercises of inherent tribal law enforcement authority. (Opinion at 12; Protocol at 1.) Again, the Band's police officers possess inherent law enforcement authority consistent with *Cooley*, *Duro*, *Montana*, *Terry*, and *Thompson*.

To the extent the temporary cooperative agreement currently in place limits the geographic scope of the Band's inherent law enforcement authority to only trust lands, it is also unlawful. Further, to the extent the temporary cooperative agreement limits the Band's inherent law enforcement authority inconsistent with this ruling, such limitations are also unlawful.

Accordingly, pursuant to 28 U.S.C. § 2201, and the records and files herein, the Court grants in part, and denies in part Plaintiffs' Motion for Summary Judgment as it relates to declaratory relief, and declares:

1. As a matter of federal law, the Mille Lacs Band of Ojibwe ("Band") possesses inherent sovereign law enforcement authority within the Mille Lacs Indian Reservation as established in Article 2 of the Treaty with the Chippewa, 10 Stat. 1165 (Feb. 22, 1855). This inherent sovereign law enforcement authority includes the authority of Band police officers to investigate violations of federal, state, and tribal law. With respect to non-Indian suspects (i.e., persons who are not Indians as defined in 25 U.S.C. § 1301(4)), except as otherwise authorized by the Violence Against Women Act, 25 U.S.C. § 1304, or other applicable federal law, the Band's inherent law enforcement authority to detain a suspect is limited to the authority to temporarily detain and investigate the suspect for a reasonable period of time until the suspect can be turned over to a jurisdiction with prosecutorial authority, and does not include the authority to arrest the suspect. The Band's investigative authority is the authority recognized by the courts in *Cooley*, *Terry*, *Thompson*, and their progeny. The exercise of all such authority is subject to the provisions of the Indian Civil Rights Act, 25 U.S.C. §§ 1301–04, including the proscription against unreasonable searches and seizures in 25 U.S.C. § 1302(a)(2).
2. Pursuant to 18 U.S.C. § 1162(d), 25 U.S.C. §§ 2801 and 2804, the Deputation Agreement between the Band and the Bureau of Indian Affairs, and the Special

> Law Enforcement Commissions ("SLECs") issued to Band police officers by the Bureau of Indian Affairs, Band police officers holding SLECs have federal authority to investigate violations of applicable federal law within the Mille Lacs Indian Reservation as established in Article 2 of the Treaty with the Chippewa, 10 Stat. 1165 (Feb. 22, 1855), and may exercise such authority as defined in the Deputation Agreement. The exercise of all such authority is subject to the provisions of the United States Constitution, including the Fourth Amendment's proscription against unreasonable searches and seizures, other applicable provisions of federal law, and the Deputation Agreement, including any successor agreement.

6. Injunctive Relief

"An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). Where a less drastic remedy is sufficient to redress an injury, injunctive relief is unwarranted. *Id.* The Supreme Court has observed that "Congress plainly intended declaratory relief to act as an alternative to the strong medicine of the injunction[.]" *Steffel v. Thompson*, 415 U.S. 452, 466 (1974).

The County argues that a permanent injunction is unnecessary to prevent future irreparable harm, accusing the Band of "look[ing] backward[]" to prior injuries. (Defs.' Opp'n at 36–37.) The County also contends that Plaintiffs' Proposed Order "contains sweeping, advisory declarations of rights unconnected to any specific, concrete fact in this case." (*Id.* at 36.)

The Court finds that while Plaintiffs have been harmed by Defendants' conduct, prospective injunctive relief is unwarranted, as the Court has granted, in part, the less drastic remedy of declaratory relief. *Monsanto*, 561 U.S. at 165; *Steffel*, 415 U.S. at 466. The Band does not argue that Defendants will violate the declaratory judgment that the Band seeks. Moreover, Defendants raise valid concerns about the scope of the Band's requested injunctive relief. The declaratory judgment carefully limits the scope of the Band's relief to the law enforcement authority recognized by the Supreme Court and other federal courts.

This Court declines the invitation to permanently enjoin Defendants' conduct because, on this record, any specific terms would be advisory as to the specifics of any given scenario, not present in this record. However, in the future, if the Band's law enforcement authority is disputed in a situation in which Band officers believe there is a threat to the health or welfare of the tribe, the Band may certainly seek relief, if appropriate, from the Court. Accordingly, the Court denies without prejudice the Band's request for permanent injunctive relief.

IV. CONCLUSION

Based on the submissions and the entire file and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Plaintiffs' Motion for Summary Judgment Awarding Declaratory and Injunctive Relief [Doc. No. 317] is **GRANTED IN PART** and **DENIED IN PART** as to declaratory relief; and **DENIED IN PART WITHOUT PREJUDICE** as to injunctive relief.

2. With respect to Plaintiffs' declaratory judgment, the Court declares:

a. As a matter of federal law, the Mille Lacs Band of Ojibwe ("Band") possesses inherent sovereign law enforcement authority within the Mille Lacs Indian Reservation as established in Article 2 of the Treaty with the Chippewa, 10 Stat. 1165 (Feb. 22, 1855). This inherent sovereign law enforcement authority includes the authority of Band police officers to investigate violations of federal, state, and tribal law. With respect to non-Indian suspects (i.e., persons who are not Indians as defined in 25 U.S.C. § 1301(4)), except as otherwise authorized by the Violence Against Women Act, 25 U.S.C. § 1304, or other applicable federal law, the Band's inherent law enforcement authority to detain a suspect is limited to the authority to temporarily detain and investigate the suspect for a reasonable period of time until the suspect can be turned over to a jurisdiction with prosecutorial authority, and does not include the authority to arrest the suspect. The Band's investigative authority is the authority recognized by the courts in *Cooley*, *Terry*, *Thompson*, and their progeny. The exercise of all such authority is subject to the provisions of the Indian Civil Rights Act, 25 U.S.C. §§ 1301–04, including the proscription against unreasonable searches and seizures in 25 U.S.C. § 1302(a)(2).

b. Pursuant to 18 U.S.C. § 1162(d), 25 U.S.C. §§ 2801 and 2804, the Deputation Agreement between the Band and the Bureau of Indian Affairs, and the Special Law Enforcement Commissions ("SLECs") issued to Band police officers by the Bureau of Indian Affairs, Band police officers holding SLECs have federal authority to investigate violations of applicable federal law within the Mille Lacs Indian Reservation as established in Article 2 of the Treaty with the Chippewa, 10 Stat. 1165 (Feb. 22, 1855), and may exercise such authority as defined in the Deputation Agreement. The exercise of all such authority is subject to the provisions of the United States Constitution, including the Fourth Amendment's proscription against unreasonable searches and seizures, other applicable provisions of federal law, and the Deputation Agreement, including any successor agreement.

3. Defendants Walsh and Lorge's Motion for Summary Judgment [Doc. No. 322] is **GRANTED IN PART, DENIED IN PART**, and **DENIED AS MOOT IN PART**.

4. Plaintiffs' individual capacity claims against Defendants Walsh and Lorge are **DISMISSED**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: January 10, 2023

s/Susan Richard Nelson
SUSAN RICHARD NELSON
United States District Judge

UNITED STATES DISTRICT COURT

District of Minnesota

Mille Lacs Band of Ojibwe, Sara Rice, Derrick Naumann,

Plaintiffs,

v.

County of Mille Lacs, Minnesota, Joseph Walsh, Donald J Lorge,

Defendants.

JUDGMENT IN A CIVIL CASE

Case Number: 17-cv-5155 SRN/LIB

☐ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT:

1. Plaintiffs' Motion for Summary Judgment Awarding Declaratory and Injunctive Relief [Doc. No. 317] is **GRANTED IN PART** and **DENIED IN PART** as to declaratory relief; and **DENIED IN PART WITHOUT PREJUDICE** as to injunctive relief.

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a. As a matter of federal law, the Mille Lacs Band of Ojibwe ("Band") possesses inherent sovereign law enforcement authority within the Mille Lacs Indian Reservation as established in Article 2 of the Treaty with the Chippewa, 10 Stat. 1165 (Feb. 22, 1855). This inherent sovereign law enforcement authority includes the authority of Band police officers to investigate violations of federal, state, and tribal law. With respect to non-Indian suspects (i.e., persons who are not Indians as defined in 25 U.S.C. § 1301(4)), except as otherwise authorized by the Violence Against Women Act, 25 U.S.C. § 1304, or other applicable federal law, the Band's inherent law enforcement authority to detain a suspect is limited to the authority to temporarily detain and investigate the suspect for a reasonable period of time until the suspect can be turned over to a jurisdiction with prosecutorial authority, and does not include the authority to arrest the suspect. The Band's investigative authority is the authority recognized by the

courts in *Cooley*, *Terry*, *Thompson*, and their progeny. The exercise of all such authority is subject to the provisions of the Indian Civil Rights Act, 25 U.S.C. §§ 1301–04, including the proscription against unreasonable searches and seizures in 25 U.S.C. § 1302(a)(2).

b. Pursuant to 18 U.S.C. § 1162(d), 25 U.S.C. §§ 2801 and 2804, the Deputation Agreement between the Band and the Bureau of Indian Affairs, and the Special Law Enforcement Commissions ("SLECs") issued to Band police officers by the Bureau of Indian Affairs, Band police officers holding SLECs have federal authority to investigate violations of applicable federal law within the Mille Lacs Indian Reservation as established in Article 2 of the Treaty with the Chippewa, 10 Stat. 1165 (Feb. 22, 1855), and may exercise such authority as defined in the Deputation Agreement. The exercise of all such authority is subject to the provisions of the United States Constitution, including the Fourth Amendment's proscription against unreasonable searches and seizures, other applicable provisions of federal law, and the Deputation Agreement, including any successor agreement.

3. Defendants Walsh and Lorge's Motion for Summary Judgment [Doc. No. 322] is **GRANTED IN PART, DENIED IN PART**, and **DENIED AS MOOT IN PART**.

4. Plaintiffs' individual capacity claims against Defendants Walsh and Lorge are **DISMISSED**.

Date: 1/10/2023 KATE M. FOGARTY, CLERK

Minnesota Session Laws - 2023, Regular Session

Authenticate

This document represents the act as presented to the governor. The version passed by the legislature is the final engrossment. It does not represent the official 2023 session law, which will be available here summer 2023.

Key: (1) ~~language to be deleted~~ (2) new language

CHAPTER 52--S.F.No. 2909

An act relating to state government; providing law for judiciary, public safety, crime, sentencing, evidence, courts, law enforcement, firearms, controlled substances, corrections, clemency, expungement, rehabilitation and reinvestment, civil law, community supervision, supervised release, and human rights; providing for rulemaking; providing for reports; providing for criminal and civil penalties; appropriating money for judiciary, Guardian ad Litem Board, Uniform Laws Commission, Board on Judicial Standards, human rights, sentencing guidelines, public safety, fire marshal, Office of Justice programs, emergency communication, Peace Officer Standards and Training Board, Private Detective Board, corrections, Ombudsperson for Corrections, Board of Public Defense, juvenile justice, and law enforcement education and training; amending Minnesota Statutes 2022, sections 13.072, subdivision 1; 13.32, subdivisions 3, 5; 13.643, subdivision 6; 13.72, subdivision 19, by adding a subdivision; 13.825, subdivisions 2, 3; 13.871, subdivisions 8, 14; 13A.02, subdivisions 1, 2; 15.0597, subdivisions 1, 4, 5, 6; 51A.14; 82B.195, subdivision 3; 121A.28; 144.6586, subdivision 2; 145.4712; 145A.061, subdivision 3; 146A.08, subdivision 1; 151.01, by adding a subdivision; 151.40, subdivisions 1, 2; 152.01, subdivisions 12a, 18, by adding a subdivision; 152.02, subdivisions 2, 3, 5, 6; 152.021, subdivisions 1, 2; 152.022, subdivisions 1, 2; 152.023, subdivision 2; 152.025, subdivision 2; 152.093; 152.18, subdivision 1; 152.205; 168B.07, subdivision 3, by adding subdivisions; 169A.276, subdivision 1; 169A.40, subdivision 3; 169A.41, subdivisions 1, 2; 169A.44; 169A.60, subdivision 2; 169A.63, subdivision 8; 171.306, by adding a subdivision; 181.981, subdivision 1; 214.10, subdivision 10; 241.01, subdivision 3a; 241.021, subdivisions 1d, 2a, 2b, by adding a subdivision; 241.025, subdivisions 1, 2, 3; 241.90; 242.18; 243.05, subdivision 1; 243.1606; 243.166, subdivision 1b; 243.58; 244.03; 244.05, subdivisions 1b, 3, 4, 5, 6, 8, by adding subdivisions; 244.0513, subdivisions 2, 4; 244.09, subdivisions 2, 3, by adding a subdivision; 244.101, subdivision 1; 244.17, subdivision 3; 244.171, subdivision 4; 244.172, subdivision 1; 244.18; 244.19; 244.195; 244.197; 244.198; 244.199; 244.1995; 244.20; 244.21; 244.24; 245C.08, subdivisions 1, 2; 245C.15, subdivisions 1, 2, 4a; 245C.24, subdivision 3; 245I.12, subdivision 1; 253B.02, subdivision 4e; 253D.02, subdivision 8; 256I.04, subdivision 2g; 259.11; 259.13, subdivisions 1, 5; 260.515; 260B.171, subdivision 3; 260B.176, by adding a subdivision; 297I.06, subdivision 1; 299A.296; 299A.38; 299A.41, subdivisions 3, 4, by adding a subdivision; 299A.48; 299A.49; 299A.50; 299A.51; 299A.52; 299A.642, subdivision 15; 299A.73, by adding a subdivision; 299A.783, subdivision 1; 299A.85, subdivision 6; 299C.063; 299C.10, subdivision 1; 299C.105, subdivision 1; 299C.106, subdivision 3; 299C.11, subdivisions 1, 3; 299C.111; 299C.17; 299C.46, subdivision 1; 299C.53, subdivision 3; 299C.65, subdivisions 1a, 3a; 299C.67, subdivision 2; 299F.362; 299F.46, subdivision 1; 299F.50, by adding subdivisions; 299F.51, subdivisions 1, 2, 5, by adding a subdivision; 325F.70, by adding a subdivision; 325F.992, subdivision 3; 326.32, subdivision 10; 326.3311; 326.336, subdivision 2; 326.3361, subdivision 2; 326.3381, subdivision 3; 326.3387, subdivision 1; 336.9-601; 351.01, subdivision 2; 357.021, subdivision 2; 363A.02, subdivision 1; 363A.03, subdivisions 23, 44, by adding a subdivision; 363A.04; 363A.06, subdivision 1; 363A.07, subdivision 2; 363A.08, subdivisions 1, 2, 3, 4, by adding a subdivision; 363A.09, subdivisions 1, 2, 3, 4; 363A.11, subdivisions 1, 2; 363A.12, subdivision 1; 363A.13, subdivisions 1, 2, 3, 4; 363A.15; 363A.16, subdivision 1; 363A.17; 363A.21, subdivision 1; 364.021; 364.06, subdivision 1; 401.01; 401.02; 401.025; 401.03; 401.04; 401.05, subdivision 1; 401.06; 401.08; 401.09; 401.10; 401.11; 401.12; 401.14; 401.15; 401.16; 473.387, subdivision 4; 484.014, subdivisions 2, 3; 484.85; 504B.135; 504B.161, subdivision 1; 504B.171, by adding a subdivision; 504B.172; 504B.178, subdivision 4; 504B.211, subdivisions 2, 6; 504B.285, subdivision 5; 504B.291, subdivision 1; 504B.301; 504B.321; 504B.331; 504B.335; 504B.345, subdivision 1, by adding a subdivision; 504B.361, subdivision 1; 504B.371, subdivisions 3, 4, 5, 7; 504B.375, subdivision 1; 504B.381, subdivisions 1, 5, by adding a subdivision; 507.07; 508.52; 517.04; 517.08, subdivisions 1a, 1b; 518.191, subdivisions 1, 3; 541.023, subdivision 6; 550.365, subdivision 2; 559.209, subdivision 2; 573.01; 573.02, subdivisions 1, 2; 582.039, subdivision 2; 583.25; 583.26, subdivision 2; 600.23; 609.02, subdivisions 2, 16; 609.03; 609.05, by adding a subdivision; 609.066, subdivision 2; 609.102; 609.105, subdivisions 1, 3; 609.1055; 609.106, subdivision 2, by adding a subdivision; 609.1095, subdivision 1; 609.11, subdivision 9; 609.135, subdivisions 1a, 1c, 2;

609.14, subdivision 1, by adding a subdivision; 609.185; 609.2231, subdivision 4; 609.2233; 609.25, subdivision 2; 609.2661; 609.269; 609.341, subdivision 22; 609.3455, subdivisions 2, 5; 609.35; 609.52, subdivision 3; 609.526, subdivision 2; 609.527, subdivision 1, by adding a subdivision; 609.531, subdivision 1; 609.5314, subdivision 3; 609.582, subdivisions 3, 4; 609.595, subdivisions 1a, 2; 609.631, subdivision 4; 609.632, subdivision 4; 609.67, subdivisions 1, 2; 609.746, subdivision 1; 609.749, subdivision 3; 609.78, subdivision 2a; 609.821, subdivision 3; 609.87, by adding a subdivision; 609.89; 609A.01; 609A.02, subdivision 3; 609A.03, subdivisions 5, 7a, 9; 609B.161; 611.215, subdivision 1; 611.23; 611.58, as amended; 611A.03, subdivision 1; 611A.031; 611A.033; 611A.036, subdivision 7; 611A.039, subdivision 1; 611A.08, subdivision 6; 611A.211, subdivision 1; 611A.31, subdivisions 2, 3, by adding a subdivision; 611A.32; 611A.51; 611A.52, subdivisions 3, 4, 5; 611A.53; 611A.54; 611A.55; 611A.56; 611A.57, subdivisions 5, 6; 611A.60; 611A.61; 611A.612; 611A.66; 611A.68, subdivisions 2a, 4, 4b, 4c; 617.22; 617.26; 624.712, subdivision 5; 624.713, subdivision 1; 624.7131; 624.7132; 626.14, subdivisions 2, 3, by adding a subdivision; 626.15; 626.21; 626.5531, subdivision 1; 626.843, by adding a subdivision; 626.8432, subdivision 1; 626.8451, subdivision 1; 626.8452, by adding subdivisions; 626.8457, by adding subdivisions; 626.8469, subdivision 1; 626.8473, subdivision 3; 626.87, subdivisions 2, 3, 5, by adding a subdivision; 626.89, subdivision 17; 626.90, subdivision 2; 626.91, subdivisions 2, 4; 626.92, subdivisions 2, 3; 626.93, subdivisions 3, 4; 626A.05, subdivision 2; 626A.35, by adding a subdivision; 628.26; 629.292, subdivision 2; 629.341, subdivisions 3, 4; 629.361; 629.72, subdivision 6; 638.01; 641.15, subdivision 2; 641.155; Laws 1961, chapter 108, section 1, as amended; Laws 2021, First Special Session chapter 11, article 1, section 15, subdivision 3; Laws 2022, chapter 99, article 1, section 50; article 3, section 1, as amended; proposing coding for new law in Minnesota Statutes, chapters 13; 145; 241; 243; 244; 259; 260C; 299A; 299C; 401; 484; 504B; 573; 609; 609A; 624; 626; 638; 641; repealing Minnesota Statutes 2022, sections 152.092; 241.272; 244.14; 244.15; 244.196; 244.22; 244.32; 299C.80, subdivision 7; 346.02; 363A.20, subdivision 3; 363A.27; 401.07; 504B.305; 504B.341; 518B.02, subdivision 3; 582.14; 609.293, subdivisions 1, 5; 609.34; 609.36; 617.20; 617.201; 617.202; 617.21; 617.28; 617.29; 626.93, subdivision 7; 638.02; 638.03; 638.04; 638.05; 638.06; 638.07; 638.075; 638.08.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

ARTICLE 1

JUDICIARY APPROPRIATIONS

Section 1. **APPROPRIATIONS.**

The sums shown in the columns marked "Appropriations" are appropriated to the agencies and for the purposes specified in this article. The appropriations are from the general fund, or another named fund, and are available for the fiscal years indicated for each purpose. The figures "2024" and "2025" used in this article mean that the appropriations listed under them are available for the fiscal year ending June 30, 2024, or June 30, 2025, respectively. "The first year" is fiscal year 2024. "The second year" is fiscal year 2025. "The biennium" is fiscal years 2024 and 2025.

	APPROPRIATIONS Available for the Year Ending June 30	
	2024	**2025**

Sec. 2. **SUPREME COURT**

Subdivision 1. **Total Appropriation**	**$ 80,141,000**	**$ 82,624,000**

The amounts that may be spent for each purpose are specified in the following subdivisions.

Subd. 2. **Supreme Court Operations**	46,581,000	49,064,000

(a) **Contingent Account**

$5,000 each year is for a contingent account for expenses necessary for the normal operation of the court for which no other reimbursement is provided.

(b) **Justices' Compensation**

Justices' compensation is increased by eight percent in the first year and four percent in the second year.

Subd. 3. **Civil Legal Services**	33,560,000	33,560,000

The general fund base is $34,167,000 beginning in fiscal year 2026.

Legal Services to Low-Income Clients in Family Law Matters

Articles 1-9 omitted

Subdivision 1. **Definition.** For purposes of this section, "carjacking" means a violation of section 609.247.

Subd. 2. **Use of information collected.** (a) The head of a local law enforcement agency or state law enforcement department that employs peace officers, as defined in section 626.84, subdivision 1, paragraph (c), must forward the following carjacking information from the agency's or department's jurisdiction for the previous year to the commissioner of public safety by January 15 each year:

(1) the number of carjacking attempts;

(2) the number of carjackings;

(3) the ages of the offenders;

(4) the number of persons injured in each offense;

(5) the number of persons killed in each offense; and

(6) weapons used in each offense, if any.

(b) The commissioner of public safety must include the data received under paragraph (a) in a separate carjacking category in the department's annual uniform crime report.

Sec. 11. Minnesota Statutes 2022, section 626A.35, is amended by adding a subdivision to read:

Subd. 2b. **Exception; stolen motor vehicles.** (a) The prohibition under subdivision 1 does not apply to the use of a mobile tracking device on a stolen motor vehicle when:

(1) the consent of the owner of the vehicle has been obtained; or

(2) the owner of the motor vehicle has reported to law enforcement that the vehicle is stolen, and the vehicle is occupied when the tracking device is installed.

(b) Within 24 hours of a tracking device being attached to a vehicle pursuant to the authority granted in paragraph (a), clause (2), an officer employed by the agency that attached the tracking device to the vehicle must remove the device, disable the device, or obtain a search warrant granting approval to continue to use the device in the investigation.

(c) A peace officer employed by the agency that attached a tracking device to a stolen motor vehicle must remove the tracking device if the vehicle is recovered and returned to the owner.

(d) Any tracking device evidence collected after the motor vehicle is returned to the owner is inadmissible.

(e) By August 1, 2024, and each year thereafter, the chief law enforcement officer of an agency that obtains a search warrant under paragraph (b), must provide notice to the superintendent of the Bureau of Criminal Apprehension of the number of search warrants the agency obtained under this subdivision in the preceding 12 months. The superintendent must provide a summary of the data received pursuant to this paragraph in the bureau's biennial report to the legislature required under section 299C.18.

EFFECTIVE DATE. This section is effective the day following final enactment.

ARTICLE 10

POLICING AND PRIVATE SECURITY

Section 1. Minnesota Statutes 2022, section 13.825, subdivision 2, is amended to read:

Subd. 2. **Data classification; court-authorized disclosure.** (a) Data collected by a portable recording system are private data on individuals or nonpublic data, subject to the following:

(1) data that record, describe, or otherwise document actions and circumstances surrounding either the discharge of a firearm by a peace officer in the course of duty, if a notice is required under section 626.553, subdivision 2, or the use of force by a peace officer that results in substantial bodily harm, as defined in section 609.02, subdivision 7a, are public;

(2) data are public if a subject of the data requests it be made accessible to the public, except that, if practicable, (i) data on a subject who is not a peace officer and who does not consent to the release must be redacted, and (ii) data on a peace officer whose identity is protected under section 13.82, subdivision 17, clause (a), must be redacted;

(3) subject to paragraphs (b) to (d), portable recording system data that are active criminal investigative data are governed by section 13.82, subdivision 7, and portable recording system data that are inactive criminal investigative data are governed by this section;

(4) portable recording system data that are public personnel data under section 13.43, subdivision 2, clause (5), are public; and

(5) data that are not public data under other provisions of this chapter retain that classification.

Sections 2-24 omitted

The initiation of a background investigation does not include the submission of an application for employment. Initiation of a background investigation occurs when the law enforcement agency begins its determination of whether an applicant meets the agency's standards for employment as a law enforcement employee.

Sec. 25. Minnesota Statutes 2022, section 626.89, subdivision 17, is amended to read:

Subd. 17. **Civilian review.** (a) As used in this subdivision, the following terms have the meanings given:

(1) "civilian oversight council" means a civilian review board, commission, or other oversight body established by a local unit of government to provide civilian oversight of a law enforcement agency and officers employed by the agency; and

(2) "misconduct" means a violation of law, standards promulgated by the Peace Officer Standards and Training Board, or agency policy.

(b) A local unit of government may establish a civilian ~~review board, commission, or other~~ oversight ~~body shall not have~~ council and grant the council the authority to make a finding of fact or determination regarding a complaint against an officer ~~or impose~~ and recommend discipline ~~on~~ for an officer. ~~A civilian review board, commission, or other oversight body may make a recommendation regarding the merits of a complaint, however, the recommendation shall be advisory only and shall not be binding on nor limit the authority of the chief law enforcement officer of any unit of government.~~

(c) At the conclusion of any criminal investigation or prosecution, if any, a civilian oversight council may conduct an investigation into allegations of peace officer misconduct and retain an investigator to facilitate an investigation. Subject to other applicable law, a council may subpoena or compel testimony and documents in an investigation. Upon completion of an investigation, a council may make a finding of misconduct and recommend appropriate discipline against peace officers employed by the agency. A council must submit investigation reports that contain findings of peace officer misconduct to the chief law enforcement officer and the Peace Officer Standards and Training Board's complaint committee. A council may also make policy recommendations to the chief law enforcement officer and the Peace Officer Standards and Training Board.

(d) The chief law enforcement officer of a law enforcement agency under the jurisdiction of a civilian oversight council shall cooperate with the council and facilitate the council's achievement of its goals. However, the officer is under no obligation to agree with individual recommendations of the council and may oppose a recommendation. If the officer elects to not implement a recommendation that is within the officer's authority, the officer shall inform the council of the decision along with the officer's underlying reasons.

(e) Data collected, created, received, maintained, or disseminated by a civilian oversight council related to an investigation of a peace officer are personnel data as defined by section 13.43, subdivision 1, and are governed by that section.

Sec. 26. Minnesota Statutes 2022, section 626.90, subdivision 2, is amended to read:

Subd. 2. **Law enforcement agency.** (a) The band has the powers of a law enforcement agency, as defined in section 626.84, subdivision 1, paragraph (f), if all of the requirements of clauses (1) to (4) are met:

(1) the band agrees to be subject to liability for its torts and those of its officers, employees, and agents acting within the scope of their employment or duties arising out of a law enforcement agency function conferred by this section, to the same extent as a municipality under chapter 466, and the band further agrees, notwithstanding section 16C.05, subdivision 7, to waive its sovereign immunity for purposes of claims of this liability;

(2) the band files with the Board of Peace Officer Standards and Training a bond or certificate of insurance for liability coverage with the maximum single occurrence amounts set forth in section 466.04 and an annual cap for all occurrences within a year of three times the single occurrence amount;

(3) the band files with the Board of Peace Officer Standards and Training a certificate of insurance for liability of its law enforcement officers, employees, and agents for lawsuits under the United States Constitution; and

(4) the band agrees to be subject to section 13.82 and any other laws of the state relating to data practices of law enforcement agencies.

(b) The band ~~shall~~ may enter into mutual aid/cooperative agreements with the Mille Lacs County sheriff under section 471.59 to define and regulate the provision of law enforcement services under this section. ~~The agreements must define the trust property involved in the joint powers agreement.~~

(c) Only if the requirements of paragraph (a) are met, the band shall have concurrent jurisdictional authority under this section with the Mille Lacs County Sheriff's Department ~~only if the requirements of paragraph (a) are met and under the following circumstances:~~

~~(1)~~ over all persons in the geographical boundaries of the ~~property held by the United States in trust for the Mille Lacs Band or the Minnesota Chippewa tribe;~~

~~(2) over all Minnesota Chippewa tribal members within the boundaries of the~~ Treaty of February 22, 1855, 10 Stat. 1165, in Mille Lacs County, Minnesota~~; and~~.

~~(3) concurrent jurisdiction over any person who commits or attempts to commit a crime in the presence of an appointed band peace officer within the boundaries of the Treaty of February 22, 1855, 10 Stat. 1165, in Mille Lacs County, Minnesota.~~

Sec. 27. Minnesota Statutes 2022, section 626.91, subdivision 2, is amended to read:

Subd. 2. **Law enforcement agency.** (a) The community has the powers of a law enforcement agency, as defined in section 626.84, subdivision 1, paragraph (f), if all of the requirements of clauses (1) to (4) are met:

(1) the community agrees to be subject to liability for its torts and those of its officers, employees, and agents acting within the scope of their employment or duties arising out of the law enforcement agency powers conferred by this section to the same extent as a municipality under chapter 466, and the community further agrees, notwithstanding section 16C.05, subdivision 7, to waive its sovereign immunity with respect to claims arising from this liability;

(2) the community files with the Board of Peace Officer Standards and Training a bond or certificate of insurance for liability coverage with the maximum single occurrence amounts set forth in section 466.04 and an annual cap for all occurrences within a year of three times the single occurrence amount;

(3) the community files with the Board of Peace Officer Standards and Training a certificate of insurance for liability of its law enforcement officers, employees, and agents for lawsuits under the United States Constitution; and

(4) the community agrees to be subject to section 13.82 and any other laws of the state relating to data practices of law enforcement agencies.

(b) The community ~~shall~~ may enter into an agreement under section 471.59 with the Redwood County sheriff to define and regulate the provision of law enforcement services under this section and to provide for mutual aid and cooperation. If entered, the agreement must identify and describe the trust property involved in the agreement. For purposes of entering into this agreement, the community shall be considered a "governmental unit" as that term is defined in section 471.59, subdivision 1.

Sec. 28. Minnesota Statutes 2022, section 626.91, subdivision 4, is amended to read:

Subd. 4. **Peace officers.** If the community complies with the requirements set forth in subdivision 2, paragraph (a), the community is authorized to appoint peace officers, as defined in section 626.84, subdivision 1, paragraph (c), who have the same powers as peace officers employed by the Redwood County sheriff over the persons and the geographic areas described in subdivision 3.

Sec. 29. Minnesota Statutes 2022, section 626.92, subdivision 2, is amended to read:

Subd. 2. **Law enforcement agency.** (a) The band has the powers of a law enforcement agency, as defined in section 626.84, subdivision 1, paragraph (f), if all of the requirements of clauses (1) to (4) and paragraph (b) are met:

(1) the band agrees to be subject to liability for its torts and those of its officers, employees, and agents acting within the scope of their employment or duties arising out of the law enforcement agency powers conferred by this section to the same extent as a municipality under chapter 466, and the band further agrees, notwithstanding section 16C.05, subdivision 7, to waive its sovereign immunity for purposes of claims arising out of this liability;

(2) the band files with the Board of Peace Officer Standards and Training a bond or certificate of insurance for liability coverage with the maximum single occurrence amounts set forth in section 466.04 and an annual cap for all occurrences within a year of three times the single occurrence amount or establishes that liability coverage exists under the Federal Torts Claims Act, United States Code, title 28, section 1346(b), et al., as extended to the band pursuant to the Indian Self-Determination and Education Assistance Act of 1975, United States Code, title 25, section 450f(c);

(3) the band files with the Board of Peace Officer Standards and Training a certificate of insurance for liability of its law enforcement officers, employees, and agents for lawsuits under the United States Constitution or establishes that liability coverage exists under the Federal Torts Claims Act, United States Code, title 28, section 1346(b) et al., as extended to the band pursuant to the Indian Self-Determination and Education Assistance Act of 1975, United States Code, title 25, section 450F(c); and

(4) the band agrees to be subject to section 13.82 and any other laws of the state relating to data practices of law enforcement agencies.

(b) ~~By July 1, 1998,~~ The band ~~shall~~ may enter into written mutual aid or cooperative agreements with the Carlton County sheriff, the St. Louis County sheriff, and the city of Cloquet under section 471.59 to define and regulate the provision of law enforcement services under this section. If entered, the agreements must define the following:

(1) the trust property involved in the joint powers agreement;

(2) the responsibilities of the county sheriffs;

(3) the responsibilities of the county attorneys; and

(4) the responsibilities of the city of Cloquet city attorney and police department.

Sec. 30. Minnesota Statutes 2022, section 626.92, subdivision 3, is amended to read:

Subd. 3. **Concurrent jurisdiction.** The band shall have concurrent jurisdictional authority under this section with the Carlton County and St. Louis County Sheriffs' Departments over crimes committed within the boundaries of the Fond du Lac Reservation ~~as indicated by the mutual aid or cooperative agreements entered into under subdivision 2, paragraph (b), and any exhibits or attachments to those agreements~~ if the requirements of subdivision 2, paragraph (a), are met, regardless of whether a cooperative agreement pursuant to subdivision 2, paragraph (b), is entered into.

Sec. 31. Minnesota Statutes 2022, section 626.93, subdivision 3, is amended to read:

Subd. 3. **Concurrent jurisdiction.** If the requirements of subdivision 2 are met ~~and the tribe enters into a cooperative agreement pursuant to subdivision 4~~, the Tribe ~~shall have~~ has concurrent jurisdictional authority under this section with the local county sheriff within the geographical boundaries of the Tribe's reservation to enforce state criminal law.

Sec. 32. Minnesota Statutes 2022, section 626.93, subdivision 4, is amended to read:

Subd. 4. **Cooperative agreements.** In order to coordinate, define, and regulate the provision of law enforcement services and to provide for mutual aid and cooperation, governmental units and the Tribe ~~shall~~ may enter into agreements under section 471.59. For the purposes of entering into these agreements, the Tribe ~~shall be~~ is considered a "governmental unit" as that term is defined in section 471.59, subdivision 1.

Sec. 33. Laws 1961, chapter 108, section 1, as amended by Laws 1969, chapter 604, section 1, and Laws 1978, chapter 580, section 1, is amended to read:

Sec. 1. **MINNEAPOLIS, CITY OF; POLICE DEPARTMENT.** Notwithstanding any provisions of the Minneapolis city charter, veterans' preference, or civil service law, rule, or regulation to the contrary, the superintendent of police of the city of Minneapolis shall after the effective date of this act have the title and be designated as chief of police of the city of Minneapolis and may appoint ~~three~~ deputy chiefs of police, ~~five~~ inspectors of police, the supervisor of the morals and narcotics section, the supervisor of the internal affairs unit, and the supervisor of license inspection, such personnel to be appointed from among the members of the Minneapolis police department holding at least the rank of ~~patrolman~~ patrol officer.

EFFECTIVE DATE. This section is effective the day after the governing body of the city of Minneapolis and its chief clerical officer comply with Minnesota Statutes, section 645.021, subdivisions 2 and 3.

Sec. 34. **REPEALER.**

Minnesota Statutes 2022, section 626.93, subdivision 7, is repealed.

ARTICLE 11

CORRECTIONS POLICY

Section 1. Minnesota Statutes 2022, section 169A.276, subdivision 1, is amended to read:

Subdivision 1. **Mandatory prison sentence.** (a) The court shall sentence a person who is convicted of a violation of section 169A.20 (driving while impaired) under the circumstances described in section 169A.24 (first-degree driving while impaired) to imprisonment for not less than three years. In addition, the court may order the person to pay a fine of not more than $14,000.

(b) The court may stay execution of this mandatory sentence as provided in subdivision 2 (stay of mandatory sentence), but may not stay imposition or adjudication of the sentence or impose a sentence that has a duration of less than three years.

(c) An offender committed to the custody of the commissioner of corrections under this subdivision is not eligible for release as provided in section 241.26, 244.065, 244.12, or 244.17, unless the offender has successfully completed ~~a chemical dependency treatment program while in prison~~ treatment recommendations as determined by a comprehensive substance use disorder assessment while incarcerated.

(d) Notwithstanding the statutory maximum sentence provided in section 169A.24 (first-degree driving while impaired), when the court commits a person to the custody of the commissioner of corrections under this subdivision, it shall provide that after the person has been released from prison the commissioner shall place the person on conditional release for five years. The commissioner shall impose any conditions of release that the commissioner deems appropriate including, but not limited to, successful completion of an intensive probation program as described in section 169A.74 (pilot programs of intensive probation for repeat DWI offenders). If the person fails to comply with any condition of release, the commissioner may revoke the person's conditional release and order the person to serve all or part of the remaining portion of the conditional release term in prison. The commissioner may not dismiss the person from supervision before the conditional release term expires. Except as otherwise provided in this section, conditional release is governed by provisions relating to supervised release. The failure of a court to direct the commissioner of corrections to place the person on conditional release, as required in this paragraph, does not affect the applicability of the conditional release provisions to the person.

(e) The commissioner shall require persons placed on supervised or conditional release under this subdivision to pay as much of the costs of the supervision as possible. The commissioner shall develop appropriate standards for this.

Articles 11-20 omitted

and promotion of prostitution; sex trafficking); 609.342 (criminal sexual conduct in the first degree); 609.343 (criminal sexual conduct in the second degree); 609.344 (criminal sexual conduct in the third degree); 609.345 (criminal sexual conduct in the fourth degree); 609.377 (malicious punishment of a child); 609.378 (neglect or endangerment of a child); 609.486 (commission of crime while wearing or possessing a bullet-resistant vest); 609.52 (involving theft of a firearm and theft involving the theft of a controlled substance, an explosive, or an incendiary device); 609.561 (arson in the first degree); 609.562 (arson in the second degree); 609.582, subdivision 1 or 2 (burglary in the first and second degrees); 609.66, subdivision 1e (drive-by shooting); 609.67 (unlawfully owning, possessing, operating a machine gun or short-barreled shotgun); 609.71 (riot); 609.713 (terroristic threats); 609.749 (harassment); 609.855, subdivision 5 (shooting at a public transit vehicle or facility); and chapter 152 (drugs, controlled substances); and an attempt to commit any of these offenses.

Sec. 32. Minnesota Statutes 2022, section 626A.05, subdivision 2, is amended to read:

Subd. 2. **Offenses for which interception of wire or oral communication may be authorized.** A warrant authorizing interception of wire, electronic, or oral communications by investigative or law enforcement officers may only be issued when the interception may provide evidence of the commission of, or of an attempt or conspiracy to commit, any of the following offenses:

(1) a felony offense involving murder, manslaughter, assault in the first, second, and third degrees, aggravated robbery, carjacking in the first or second degree, kidnapping, criminal sexual conduct in the first, second, and third degrees, prostitution, bribery, perjury, escape from custody, theft, receiving stolen property, embezzlement, burglary in the first, second, and third degrees, forgery, aggravated forgery, check forgery, or financial transaction card fraud, as punishable under sections 609.185, 609.19, 609.195, 609.20, 609.221, 609.222, 609.223, 609.2231, 609.245, 609.247, subdivision 2 or 3, 609.25, 609.321 to 609.324, 609.342, 609.343, 609.344, 609.42, 609.48, 609.485, subdivision 4, paragraph (a), clause (1), 609.52, 609.53, 609.54, 609.582, 609.625, 609.63, 609.631, 609.821, and 609.825;

(2) an offense relating to gambling or controlled substances, as punishable under section 609.76 or chapter 152; or

(3) an offense relating to restraint of trade defined in section 325D.53, subdivision 1 or 2, as punishable under section 325D.56, subdivision 2.

Sec. 33. Minnesota Statutes 2022, section 629.361, is amended to read:

629.361 PEACE OFFICERS RESPONSIBLE FOR CUSTODY OF STOLEN PROPERTY.

A peace officer arresting a person charged with committing or aiding in the committing of a robbery, aggravated robbery, carjacking, or theft shall use reasonable diligence to secure the property alleged to have been stolen. After seizure of the property, the officer shall be answerable for it while it remains in the officer's custody. The officer shall annex a schedule of the property to the return of the warrant. Upon request of the county attorney, the law enforcement agency that has custody of the property alleged to have been stolen shall deliver the property to the custody of the county attorney for use as evidence at an omnibus hearing or at trial. The county attorney shall make a receipt for the property and be responsible for the property while it is in the county attorney's custody. When the offender is convicted, whoever has custody of the property shall turn it over to the owner.

Sec. 34. **EFFECTIVE DATE.** This article is effective August 1, 2023.

Presented to the governor May 18, 2023

Signed by the governor May 19, 2023, 12:32 p.m.

Official Publication of the State of Minnesota
Revisor of Statutes

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Senate

State of Minnesota

S.F. No. 2251 – Modifying Law Enforcement of Mille Lacs Band of Chippewa Indians; Modifying Requirements for Tribes to Exercise Concurrent Law Enforcement Jurisdictional Authority

Author: Senator Mary Kunesh

Prepared by: Chris Turner, Fiscal Analyst (651/296-4350)

Date: March 16, 2023

The bill provides that Tribal law enforcement agencies are not required to enter cooperative agreements with the local sheriff as a condition of exercising concurrent jurisdiction within the boundaries of their reservations. It also expands the law enforcement jurisdiction of the Mille Lacs band to include all persons within the geographical boundaries of the Treaty of 1855, as opposed to all persons on land held in trust by the United States for the band.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

Plaintiffs,

vs.

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

Defendants.

Case No. 0:17-cv-5155 (SRN/LIB)

AMICUS CURIAE BRIEF OF THE STATE OF MINNESOTA

BALDWIN DECLARATION - EXHIBIT V

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IDENTITY AND INTEREST OF AMICI CURIAE

The State of Minnesota ("State") files this amicus brief in support of the Plaintiffs' Motion For Partial Summary Judgment That The Boundaries Of The Mille Lacs Indian Reservation, As Established In An 1855 Treaty, Remain Intact. The State had no role in the events leading to the initiation of this lawsuit, but this Court's decision on the reservation boundaries will impact the State's sovereign interests and the activities of state agencies in the disputed area. The State files this brief to provide its position on the boundary issue and information on the practical impact of the Court's decision in this matter.

INTRODUCTION

After careful review of recent federal case law, the State of Minnesota files this brief in support of the Mille Lacs Band of Ojibwe's (the "Band") position that the Mille Lacs Indian Reservation has never been diminished or disestablished. The State offers arguments on two issues: Recent developments in federal law conclusively establish that the Band is correct, and the State will not be adversely affected by this Court's confirmation that the boundaries of the reservation remain as described in an 1855 treaty.

First, the U.S. Supreme Court's recent decision in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020) is dispositive. In *McGirt*, the Supreme Court clarified that courts must rely solely on statutory text to determine congressional intent; contemporaneous usages, customs, and practices should only be examined to the extent necessary to clear up an ambiguity in the text of the law. No congressional action clearly diminishes the Mille

Lacs Reservation boundaries. *McGirt* is therefore dispositive on the question of whether the boundaries of the Mille Lacs Reservation were diminished: they were not.

Second, the State notes that it has and will continue to work cooperatively with the Band's tribal government to ensure efficient governance should this Court determine that the reservation has never been diminished. Thus, the State respectfully requests that the Court grant the Plaintiffs' motion for partial summary judgment on the boundary issue.

ARGUMENT

I. *McGirt* Is Dispositive; The Reservation Boundaries Remain Intact.

The question of whether the Mille Lacs Indian Reservation has been diminished was, for a long period, an open question. Indeed, State officials at various points weighed in on this contentious legal question. But an emerging body of case law, culminating in *McGirt*, has now laid this question to rest. Federal courts have long held that reservations may only be diminished through express acts of Congress. It was unresolved, however, how to best ascertain congressional intent. *McGirt* clarifies that the analysis of congressional intent begins and ends with statutory language.

A. *McGirt* Adjustment to *Solem* Framework

"'[O]nly Congress can divest a reservation of its land and diminish its boundaries,' and its intent to do so must be clear." *Nebraska v. Parker*, 136 S. Ct. 1072, 1078–79 (2016) (quoting *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)). For nearly three decades, courts applied a three-part analysis to assess whether Congress had diminished a reservation. *Solem*, 465 U.S. at 470-472. First and "most probative" was the statutory language used to open the Indian lands. *Id*. at 470. Second was consideration of the

historical context surrounding passage of the relevant treaties and laws, being careful "to distinguish between evidence of the contemporaneous understanding of the particular Act and matters occurring subsequent to the Act's passage." *Id*. at 471. Third was subsequent events, including an examination of who moved onto reservation lands that were opened to settlement. *Id*.

The Supreme Court adjusted this framework in *McGirt* by making statutory text determinative. 140 S.Ct. at 2468. The second and third factors—circumstances surrounding legislative passage and subsequent events—are only relevant to the extent the statutes are ambiguous. *Id*.

McGirt, an enrolled member of the Seminole Nation of Oklahoma, was convicted in an Oklahoma state court of sexual assault. *Id*. at 2459. The issue before the Supreme Court was whether McGirt committed his crimes in Indian country, depriving Oklahoma state courts of jurisdiction. *Id*. McGirt asserted that his crimes took place on the Creek Reservation while the State of Oklahoma argued the Creek Reservation no longer existed. *Id*. at 2460. The Supreme Court agreed with McGirt. *Id*. at 2482.

In concluding that the Creek Reservation has never been disestablished, the *McGirt* court focused exclusively on textual analysis, relying on the lack of any Act of Congress clearly disestablishing the reservation. *Id*. at 2460. The court emphasized that "States have no authority to reduce federal reservations lying within their borders," as that not only would violate the constitutional mandate that federal treaties and statutes are the "supreme Law of the Land" but also would "leave tribal rights in the hands of the

very neighbors who might be least inclined to respect them." *Id*. at 2462 (*citing* U.S. Constitution, Art. I, § 8; Art VI, cl. 2).

The *McGirt* court acknowledged that during the so-called "allotment era" much of the Creek Reservation was broken into parcels and sold to individual Indians and non-Indians. 140 S.Ct. at 2463. But the Creek Reservation survived allotment because there was no statute "evincing anything like the present and total surrender of all tribal interests in the affected lands." *Id*. at 2464 (internal quotation marks omitted). And while Congress intruded on the Creek's right to self-governance many times, including eliminating tribal courts and giving Congress power to remove and replace the Creek's principal chief, Congress never completely withdrew recognition of the tribal government. *Id*. at 2465-66.

Significantly, the court said it would be error to rely on historical practices and demographics, both around the time of, and long after, the enactment of all the relevant legislation, to prove disestablishment. *Id*. at 2468. After *McGirt*, "the only 'step' proper for a court of law" is to ascertain and follow the original meaning of the law. *Id*. Contemporaneous usages, customs, and practices should only be examined to the extent necessary to clear up an ambiguity in the text of the law. *See Oneida Nation v. Vill. of Hobart*, 968 F.3d 664, 685-86 (7th Cir. 2020) *reh'g denied* (Sept. 18, 2020) (discussing *McGirt*).

McGirt's reminder that a court's primary job is to "ascertain and follow the original meaning of the law," 140 S.Ct. at 2468, makes it even more difficult to establish the requisite congressional intent to disestablish or diminish a reservation. That is

particularly true given specific rules of construction, known as the Indian canons, courts must apply when determining the original meaning of Indian treaties and agreements. Namely, "Indian treaties must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians, and the words of a treaty must be construed in the sense in which they would naturally be understood by the Indians. *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019) (internal quotation marks and citations omitted). Post-*McGirt*, these rules of construction continue to be the standard by which courts determine congressional intent to dimmish a reservation. *See Oneida Nation*, 968 F.3d at 674-675 (post-*McGirt* discussion of the standard for diminishment, including application of the Indian canons).

B. *McGirt* Applied to Mille Lacs Reservation

McGirt dictates that the language of each congressional action related to a reservation must be examined to determine whether Congress intended its action to diminish the reservation boundaries. For the Mille Lacs Indian Reservation, established in 1855, that means assessing the language of treaties entered into in 1863 and 1864 as well as the Nelson Act of 1889. Thus, this section: (1) discusses establishment of the reservation in 1855; (2) assesses the treaty language of the 1863 and 1864 treaties; and, (3) examines the Nelson Act.

1. Mille Lacs Reservation established by 1855 Treaty

The Mille Lacs Reservation was first established by Article II of the Treaty of 1855, which "reserved and set apart" tracts of land "for the permanent homes" of the Mississippi Bands of Chippewa Indians, which included the Mille Lacs Band. *Treaty*

with the Chippewa, art. 2, February 22, 1855, 10 Stat. 1165. The 1855 reservation encompassed approximately 61,000 acres around Kathio, South Harbor, and Isle Harbor townships in Minnesota. *Cty of Mille Lacs v. Benjamin*, 262 F. Supp. 2d 990, 992 (D. Minn. 2003).

2. 1863 and 1864 Treaties

Assessing congressional intent for the boundaries of the Mille Lacs Reservation begins with treaties in 1863 and 1864, both of which have been understood to assure the Band it could keep its reservation because of its good conduct. Article 1 of the 1863 treaty provided that the Chippewa "hereby cede" the "reservations known as Gull Lake, Mille Lac, Sandy Lake, Rabbit Lake, Pokagomin Lake, and Rice Lake" to the United States. *Treaty with the Chippewa of the Mississippi and the Pillager and Lake Winnibigoshish Bands, 1863*, art. 1, March 11, 1863, 12 Stat. 1249. Article 2 established a new reservation in northwestern Minnesota, later known as the White Earth Reservation, to which all the Chippewa were supposed to remove. *Id*., art. 2.

The treaty made an exception, however, for the Mille Lacs Band:

> [O]wing to the heretofore good conduct of the Mille Lacs Indians, they shall not be compelled to remove so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites.

Id., art. 12.

The removal exception for the Band was in acknowledgment of their loyalty to the United States during a Sioux uprising that took place in Minnesota in the years between the 1855 and 1863 treaties. Some Chippewa attempted to join the Sioux in the uprising,

but the Mille Lacs Band "took 800 men to the defense" of the United States, which "thwarted the attempted union and caused the band to remain at peace with the United States." *Minn. Chippewa Tribe v. United States*, 11 Cl. Ct. 221, 225 (1986).

The 1864 treaty repeated the relevant langue from the 1863 treaty. *Treaty with Chippewa, Mississippi, and Pillager and Lake Winnibigoshish Bands, 1864*, art. 12, May 7, 1864, 13 Stat. 693. Far from expressly disestablishing the reservation, the plain language of the 1863 and 1864 treaties demonstrates Congress' understanding that the reservation would continue to exist so long as the Band continued its "good conduct." *Cf. McGirt*, 140 S.Ct. at 2469 (reiterating that once "a reservation is established, it retains that status until Congress explicitly indicates otherwise," and cautioning against judicial abrogation of treaties) (internal quotations omitted).

Even in the early 1900s, the language in the 1863 and 1864 treaties was understood as unambiguously ensuring the Band could keep its reservation. *See Mille Lac Band of Chippewas v. United States*, 47 Ct. Cl. 415, 443, 457 (1912) *rev'd on other grounds* 229 U.S. 498 (1913) (noting the "language of article 12 [of the 1864 treaty] is not ambiguous and if considered apart from the context of the whole instrument could convey but one meaning," which was that the "treaties of 1863 and 1864 reserved to the [Band] the Mille Lac Reservation.").

3. The Nelson Act

In 1889, Congress enacted the Act of January 14, 1889, 25 Stat. 642, also known as the Nelson Act, which established a process to negotiate with the Chippewa the "complete cession and relinquishment in writing of all their title and interest in and to all

the reservations of said Indians," except for portions of the White Earth and Red Lake Reservations. 25 Stat. 642, ch. 24., s.1. The Nelson Act was designed to concentrate the Chippewa population on the White Earth Reservation, but the Act provided an exception for those Indians who selected allotments on the reservation on which they were then living. *Id*. at s.3.

The Band, accordingly, entered into an agreement to relinquish to the United States "the right of occupancy" on the reservation, but statements during and after the negotiations indicated that the Band planned to take allotments and remain on the reservation. *See United States v. Mille Lacs Band of Chippewa Indians*, 229 U.S. 498, 504-05 (1913); H.R. Ex. Doc. 247, 51st Cong., 1st Sess., at 171, 174. Indeed, the Court of Claims found that following passage of the Nelson Act the Band "persisted in their right of occupancy and approved agreements with the distinct understanding that all claims under the former treaties should be preserved," and the Band's understanding that their reservation remained intact was manifested not only by their words but also "by the dogged persistence with which they retained their residence on the Mille Lac Reservation." *Mille Lac Band*, 47 Ct. Cl. at 446.

Courts previously analyzing the Nelson Act's impact on other Chippewa reservations in Minnesota have concluded that the Act's "purpose was not to terminate the reservation or end federal responsibility for the Indian but rather to permit the sale of certain of his lands to homesteaders and others." *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001, 1004-1005 (D. Minn. 1971); *see also State v. Clark*, 282 N.W.2d 902, 907-908 (Minn. 1979) (holding Nelson Act did not disestablish the White

Earth Reservation but did diminish it by explicitly ceding four townships); *State v. Forge*, 262 N.W.2d 341, 347 (Minn. 1977) (concluding Nelson Act did not clearly manifest an intent to disestablish the Leech Lake Reservation); *State v. Jackson*, 16 N.W.2d 752, 757 (Minn. 1944) ("The 'complete extinguishment of the Indian title,' referred to in the Nelson Act, was 'effective only as to the residue' of the Leech Lake Reservation remaining after the Indians residing thereon had taken their allotments in severalty.").

Even the Supreme Court has acknowledged that Congress, when enacting the Nelson Act, did not unilaterally diminish or disestablish reservations but instead established a process for negotiations, with the hope of gaining the assent of the Indians to willingly remove from their reservations. *Mille Lacs Band of Chippewa Indians*, 229 U.S. at 506 ("A manifest purpose of the [Nelson Act] was to bring about the removal to the White Earth Reservation of all the scattered bands residing elsewhere than on the Red Lake Reservation, the Mille Lacs as well as the others; and *this was to be accomplished, not through the exertion of the plenary power of Congress, but through negotiations with and the assent of the Indians*.") (emphasis added).

Previous courts' analyses of the Nelson Act are equally applicable to that Act's impact on the Mille Lacs Indian Reservation, leading to the conclusion that the Nelson Act did not disestablish the Mille Lacs Reservation. Moreover, all prior interpretations of the Nelson Act are in keeping with *McGirt's* observation that "[f]or years, States have sought to suggest that allotments automatically ended reservations, and for years courts have rejected the argument." 140 S.Ct. at 2464.

After *McGirt*, the inquiry ends here. If the relevant law is not ambiguous, there is no need to consider other context or subsequent history. No congressional act provides a clear expression of congressional intent to diminish or evidences the "present and total surrender of all tribal interests." 140 S.Ct. at 2463 (quotation omitted). Thus, the Mille Lacs Indian Reservation continues to consist of the approximately 61,000 acres identified in the 1855 treaty.

II. THE STATE CAN ACCOMMODATE A FEDERAL COURT DECISION RECOGNIZING THE 1855 RESERVATION BOUNDARIES.

A decision by this Court granting the Band's motion for summary judgment—confirming that the boundaries of the Mille Lacs Indian Reservation remain as described in the 1855 treaty—will not have an outsized impact on the State. Indeed, in Minnesota state courts the State itself has taken the position that the Mille Lacs Reservation has never been diminished. Respondent's Brief at 18, *Joseph Walsh, et al. v. State of Minnesota*, No. A20-1083 (Minn. Ct. App. Dec. 8, 2020); State's Memorandum of Law in Support of Motion to Dismiss at 7-10, *Joseph Walsh, et al. v. State of Minnesota*, No. 62-cv-19-8709 (Ramsey Cty Dist. Ct., February 19, 2020). Similarly, Minnesota state agencies recently have taken actions recognizing the reservation boundaries as remaining intact since 1855, with the most obvious of such actions being Minnesota Department of Transportation's installation of road signs that read "Misi-zaaga'iganiing/Mille Lacs Reservation/Established in 1855 Treaty" on highways on the outer edges of the reservation as spelled out in the treaty. *See* Tim Harlow, *Highway signs don't resolve dispute over Mille Lacs Band reservation boundary*, Star Trib. (Minneapolis), Feb. 1,

2021, https://www.startribune.com/highway-signs-don-t-resolve-dispute-over-mille-lacs-band-reservation-boundary/600017404/?refresh=true.

Moreover, the Supreme Court's holding in *McGirt* had a much greater impact on Oklahoma in terms of land and population. 140 S.Ct. at 2479 (scope of the Creek Reservation swept in "most of Tulsa and certain neighboring communities," and "the affected population [t]here is large and many of its residents will be surprised to find out that they have been living in Indian country this whole time"). But as the *McGirt* court pointed out, there are many examples of "significant non-Indian populations . . . liv[ing] successfully in or near reservations today." *Id*. at 2479. This is certainly true in the State of Minnesota where we have seven Anishinaabe (Chippewa, Ojibwe) reservations.[1] Also, just as *McGirt* noted Oklahoma and its Tribes had proven they could "work successfully together as partners," *id*. at 2481, the same is true of Minnesota and its Tribes. In fact, the Mille Lacs Band and various state agencies have intergovernmental cooperative agreements already in place to clarify and guide regulatory responsibilities in the 1855 treaty area. Ongoing intergovernmental cooperation can be relied upon to ensure continuity and efficient governance.

Finally, state agencies with missions that overlap with federal agencies will benefit from the clarity provided by a federal court decision on the reservation boundaries. For example, federal agencies like the U.S. Environmental Protection Agency and the Federal Highway Administration already recognize the 1855 reservation boundaries. In the past,

[1] Minnesota website, "Minnesota Indian Tribes," https://mn.gov/portal/government/tribal/mn-indian-tribes/, last visited February 8, 2021.

the Minnesota Pollution Control Agency and Minnesota Department of Transportation had to navigate boundary-related issues in working with the federal agencies, although more recently—after the State acknowledged it agrees with the federal government regarding the reservation boundaries—state agencies have been able to work with their federal partner agencies more efficiently. A decision from this Court, recognizing the 1855 treaty boundaries and at long last ending the dispute between Mille Lacs County and the Band, will allow state and federal agencies to work unimpeded in their shared missions.

CONCLUSION

For the foregoing reasons, the State of Minnesota respectfully requests this Court grant the Band's motion for partial summary judgment.

Dated: February 8, 2021

Respectfully submitted,

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ATTORNEY FOR THE STATE OF MINNESOTA

AMICUS CURIAE CERTIFICATE OF COMPLIANCE WITH LIMITS OF L.R. 7.1

Consistent with the Local Rule 7.1, the undersigned hereby certifies and affirms that the foregoing Amicus Curiae Brief of the State of Minnesota complies with the limits in Local Rule 7.1(f) and with the type-size limits of Local Rule 7.1(h). The memorandum contains 3,058 words, as measured by the word-count function of Microsoft Word 2010 applied specifically to include all text, including headings, footnotes, and quotations.

Dated: February 8, 2021

Respectfully submitted,

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ATTORNEY FOR THE STATE OF MINNESOTA

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Mille Lacs Band of Ojibwe, et al., Appellees, v. Erica Madore, County of Mille Lacs, Kyle Burton, Appellants.	Nos. 23-1257 23-1261 23-1265 **DECLARATION OF CALEB DOGEAGLE IN SUPPORT OF APPELLEES' MOTION TO DISMISS APPEALS AS MOOT**

I, Caleb Dogeagle, declare:

1. I am the Solicitor General of the Mille Lacs Band of Ojibwe ("Band"). As Solicitor General, I am responsible for ensuring the enforcement of Band laws and have supervisory and administrative control of the Band's law enforcement officers. *See* 24 Mille Lacs Band Statutes Annotated (MLBSA) § 1054(c) & (g).

2. Minnesota Statutes §§ 626.90 through 626.93 authorize federally recognized Indian tribes within the State of Minnesota to exercise certain law enforcement authority under state law under certain conditions. As originally enacted, each of these statutes requires the tribe in question to enter into a cooperative agreement with a county sheriff. In 2019, the Minnesota Legislature

amended § 626.93 to exempt the Prairie Island Indian Community from the cooperative agreement requirement. *See* Minn. Stat. § 626.93, subd. 7.

3. Minnesota Statute § 626.90 addresses the law enforcement authority of the Mille Lacs Band in Mille Lacs County. As originally enacted in 1991, § 626.90, subdivision 2, paragraph a, provided that the Band has the powers of a law enforcement agency as defined in Minn. Stat. § 626.84, subdivision 1, paragraph f, if four requirements were met. Specifically, the Band was required: (1) to agree to be subject to liability for its torts and those of its officers, employees and agents under certain circumstances and to waive its sovereign immunity for purposes of claims of such liability; (2) to file with the Board of Peace Officer Standards and Training ("POST Board") a bond or certificate of insurance for liability coverage in specified amounts; (3) to file with the POST Board a certificate of insurance for liability of its law enforcement officers, employees, and agents for lawsuits under the United States Constitution; and (4) to agree to be subject to Minn. Stat. § 13.82 and any other laws of the state relating to data practices of law enforcement agencies. The Band has continuously satisfied each of these requirements since 1991.

4. As originally enacted, Minn. Stat. § 626.90, subdivision 2, paragraph b, provided that the Band "shall enter into mutual aid/cooperative agreements with the Mille Lacs County sheriff under section 471.59 to define and regulate the provision of law enforcement services under this section." Subdivision 2, paragraph b, further

provided that "[t]he agreements must define the trust property involved in the joint powers agreement."

5. As originally enacted, Minn. Stat. § 626.90, subdivision 2, paragraph c, provided:

> The band shall have concurrent jurisdictional authority under this section with the Mille Lacs County Sheriff's Department only if the requirements of paragraph (a) are met and under the following circumstances:
>
> (1) over all persons in the geographical boundaries of the property held by the United States in trust for the Mille Lacs Band or the Minnesota Chippewa tribe;
>
> (2) over all Minnesota Chippewa tribal members within the boundaries of the Treaty of February 22, 1855, 10 Stat. 1165, in Mille Lacs County, Minnesota; and
>
> (3) concurrent jurisdiction over any person who commits or attempts to commit a crime in the presence of an appointed band peace officer within the boundaries of the Treaty of February 22, 1855, 10 Stat. 1165, in Mille Lacs County, Minnesota.

6. As originally enacted, Minn. Stat. § 626.90, subdivision 3, provided that, "[i]f the band complies with the requirements set forth in subdivision 2, the band is authorized to appoint peace officers, as defined in section 626.84, subdivision 1, paragraph (c), who have the same powers as peace officers employed by local units of government.

7. In 2023, bills were introduced in the Minnesota Legislature to amend Minn. Stat. §§ 626.90 through 626.93 to eliminate the requirement that the tribes

enter into a cooperative agreement with the local sheriff. For example, the bills provided that Minn. Stat. § 626.90, subdivision 2, paragraph b, would be amended by replacing the provision that the Band "shall" enter into a cooperative agreement with a provision that the Band "may" enter into a cooperative agreement. Similar amendments were made for every other tribe. I am attaching a copy of the first engrossment of each bill as **Exhibit 1** (Senate Bill 2251) and **Exhibit 2** (House Bill 2173), hereto.

8. The bills also provided that Minn. Stat. § 626.90 would be amended by: (1) eliminating the requirement in subdivision 2, paragraph b that the cooperative agreement define the trust property involved in the agreement; and (2) revising subdivision c to simplify and broaden the Band's law enforcement authority as follows:

> Only if the requirements of paragraph (a) are met, the band shall have concurrent jurisdictional authority under this section with the Mille Lacs County Sheriff's Department over all persons in the geographical boundaries of the Treaty of February 22, 1855, 10 Stat. 1165, in Mille Lacs County, Minnesota.

9. I, along with the Band's Chief Law Enforcement Officer, James West, and other tribal representatives testified in support of the bills. All tribal representatives supported the bills because they placed tribal police departments on an equal footing with municipal and other police departments in the State, none of which is required to have a cooperative agreement with a county sheriff to exercise

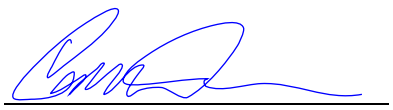
law enforcement authority. The Mille Lacs Band also supported the bills to prevent a repetition of its experience after Mille Lacs County terminated the Band's cooperative agreement in 2016.

10. The bills were enacted as part of omnibus legislation and signed by Minnesota Governor Tim Walz on May 19, 2023.

11. Following the enactment of the bills, the Band adopted Resolution 20-03-23-23 confirming its compliance with the four requirements in Minn. Stat. § 626.90, subdivision 2, paragraph a. I attach a true and correct copy of Resolution 20-03-23-23 as **Exhibit 3**.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed June 2, 2023.



Caleb Dogeagle

SENATE
STATE OF MINNESOTA
NINETY-THIRD SESSION

S.F. No. 2251

(SENATE AUTHORS: KUNESH, Latz, Oumou Verbeten, Rarick and Abeler)

DATE	D-PG	OFFICIAL STATUS
03/01/2023	1186	Introduction and first reading Referred to Judiciary and Public Safety
03/22/2023	2132a	Comm report: To pass as amended
	2199	Second reading

A bill for an act

relating to public safety; modifying law enforcement of Mille Lacs Band of Chippewa Indians; modifying requirements for Tribes to exercise concurrent law enforcement jurisdictional authority; amending Minnesota Statutes 2022, sections 626.90, subdivision 2; 626.91, subdivisions 2, 4; 626.92, subdivisions 2, 3; 626.93, subdivisions 3, 4; repealing Minnesota Statutes 2022, section 626.93, subdivision 7.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. Minnesota Statutes 2022, section 626.90, subdivision 2, is amended to read:

Subd. 2. **Law enforcement agency.** (a) The band has the powers of a law enforcement agency, as defined in section 626.84, subdivision 1, paragraph (f), if all of the requirements of clauses (1) to (4) are met:

(1) the band agrees to be subject to liability for its torts and those of its officers, employees, and agents acting within the scope of their employment or duties arising out of a law enforcement agency function conferred by this section, to the same extent as a municipality under chapter 466, and the band further agrees, notwithstanding section 16C.05, subdivision 7, to waive its sovereign immunity for purposes of claims of this liability;

(2) the band files with the Board of Peace Officer Standards and Training a bond or certificate of insurance for liability coverage with the maximum single occurrence amounts set forth in section 466.04 and an annual cap for all occurrences within a year of three times the single occurrence amount;

(3) the band files with the Board of Peace Officer Standards and Training a certificate of insurance for liability of its law enforcement officers, employees, and agents for lawsuits under the United States Constitution; and

(4) the band agrees to be subject to section 13.82 and any other laws of the state relating to data practices of law enforcement agencies.

(b) The band ~~shall~~ may enter into mutual aid/cooperative agreements with the Mille Lacs County sheriff under section 471.59 to define and regulate the provision of law enforcement services under this section. ~~The agreements must define the trust property involved in the joint powers agreement.~~

(c) Only if the requirements of paragraph (a) are met, the band shall have concurrent jurisdictional authority under this section with the Mille Lacs County Sheriff's Department ~~only if the requirements of paragraph (a) are met and under the following circumstances:~~

~~(1)~~ over all persons in the geographical boundaries of the ~~property held by the United States in trust for the Mille Lacs Band or the Minnesota Chippewa tribe;~~

~~(2) over all Minnesota Chippewa tribal members within the boundaries of the~~ Treaty of February 22, 1855, 10 Stat. 1165, in Mille Lacs County, Minnesota~~; and~~.

~~(3) concurrent jurisdiction over any person who commits or attempts to commit a crime in the presence of an appointed band peace officer within the boundaries of the Treaty of February 22, 1855, 10 Stat. 1165, in Mille Lacs County, Minnesota.~~

Sec. 2. Minnesota Statutes 2022, section 626.91, subdivision 2, is amended to read:

Subd. 2. **Law enforcement agency.** (a) The community has the powers of a law enforcement agency, as defined in section 626.84, subdivision 1, paragraph (f), if all of the requirements of clauses (1) to (4) are met:

(1) the community agrees to be subject to liability for its torts and those of its officers, employees, and agents acting within the scope of their employment or duties arising out of the law enforcement agency powers conferred by this section to the same extent as a municipality under chapter 466, and the community further agrees, notwithstanding section 16C.05, subdivision 7, to waive its sovereign immunity with respect to claims arising from this liability;

(2) the community files with the Board of Peace Officer Standards and Training a bond or certificate of insurance for liability coverage with the maximum single occurrence amounts set forth in section 466.04 and an annual cap for all occurrences within a year of three times the single occurrence amount;

(3) the community files with the Board of Peace Officer Standards and Training a certificate of insurance for liability of its law enforcement officers, employees, and agents for lawsuits under the United States Constitution; and

(4) the community agrees to be subject to section 13.82 and any other laws of the state relating to data practices of law enforcement agencies.

(b) The community ~~shall~~ may enter into an agreement under section 471.59 with the Redwood County sheriff to define and regulate the provision of law enforcement services under this section and to provide for mutual aid and cooperation. If entered, the agreement must identify and describe the trust property involved in the agreement. For purposes of entering into this agreement, the community shall be considered a "governmental unit" as that term is defined in section 471.59, subdivision 1.

Sec. 3. Minnesota Statutes 2022, section 626.91, subdivision 4, is amended to read:

Subd. 4. **Peace officers.** If the community complies with the requirements set forth in subdivision 2, paragraph (a), the community is authorized to appoint peace officers, as defined in section 626.84, subdivision 1, paragraph (c), who have the same powers as peace officers employed by the Redwood County sheriff over the persons and the geographic areas described in subdivision 3.

Sec. 4. Minnesota Statutes 2022, section 626.92, subdivision 2, is amended to read:

Subd. 2. **Law enforcement agency.** (a) The band has the powers of a law enforcement agency, as defined in section 626.84, subdivision 1, paragraph (f), if all of the requirements of clauses (1) to (4) and paragraph (b) are met:

(1) the band agrees to be subject to liability for its torts and those of its officers, employees, and agents acting within the scope of their employment or duties arising out of the law enforcement agency powers conferred by this section to the same extent as a municipality under chapter 466, and the band further agrees, notwithstanding section 16C.05, subdivision 7, to waive its sovereign immunity for purposes of claims arising out of this liability;

(2) the band files with the Board of Peace Officer Standards and Training a bond or certificate of insurance for liability coverage with the maximum single occurrence amounts set forth in section 466.04 and an annual cap for all occurrences within a year of three times the single occurrence amount or establishes that liability coverage exists under the Federal Torts Claims Act, United States Code, title 28, section 1346(b), et al., as extended to the

band pursuant to the Indian Self-Determination and Education Assistance Act of 1975, United States Code, title 25, section 450f(c);

(3) the band files with the Board of Peace Officer Standards and Training a certificate of insurance for liability of its law enforcement officers, employees, and agents for lawsuits under the United States Constitution or establishes that liability coverage exists under the Federal Torts Claims Act, United States Code, title 28, section 1346(b) et al., as extended to the band pursuant to the Indian Self-Determination and Education Assistance Act of 1975, United States Code, title 25, section 450F(c); and

(4) the band agrees to be subject to section 13.82 and any other laws of the state relating to data practices of law enforcement agencies.

(b) ~~By July 1, 1998,~~ The band ~~shall~~ may enter into written mutual aid or cooperative agreements with the Carlton County sheriff, the St. Louis County sheriff, and the city of Cloquet under section 471.59 to define and regulate the provision of law enforcement services under this section. If entered, the agreements must define the following:

(1) the trust property involved in the joint powers agreement;

(2) the responsibilities of the county sheriffs;

(3) the responsibilities of the county attorneys; and

(4) the responsibilities of the city of Cloquet city attorney and police department.

Sec. 5. Minnesota Statutes 2022, section 626.92, subdivision 3, is amended to read:

Subd. 3. **Concurrent jurisdiction.** The band shall have concurrent jurisdictional authority under this section with the Carlton County and St. Louis County Sheriffs' Departments over crimes committed within the boundaries of the Fond du Lac Reservation ~~as indicated by the mutual aid or cooperative agreements entered into under subdivision 2, paragraph (b), and any exhibits or attachments to those agreements~~ if the requirements of subdivision 2, paragraph (a), are met, regardless of whether a cooperative agreement pursuant to subdivision 2, paragraph (b), is entered into.

Sec. 6. Minnesota Statutes 2022, section 626.93, subdivision 3, is amended to read:

Subd. 3. **Concurrent jurisdiction.** If the requirements of subdivision 2 are met ~~and the tribe enters into a cooperative agreement pursuant to subdivision 4~~, the Tribe ~~shall have~~ has concurrent jurisdictional authority under this section with the local county sheriff within the geographical boundaries of the Tribe's reservation to enforce state criminal law.

Sec. 7. Minnesota Statutes 2022, section 626.93, subdivision 4, is amended to read:

Subd. 4. **Cooperative agreements.** In order to coordinate, define, and regulate the provision of law enforcement services and to provide for mutual aid and cooperation, governmental units and the Tribe ~~shall~~ may enter into agreements under section 471.59. For the purposes of entering into these agreements, the Tribe ~~shall be~~ is considered a "governmental unit" as that term is defined in section 471.59, subdivision 1.

Sec. 8. **REPEALER.**

Minnesota Statutes 2022, section 626.93, subdivision 7, is repealed.

626.93 LAW ENFORCEMENT AUTHORITY; TRIBAL PEACE OFFICERS.

Subd. 7. **Exception; Prairie Island Indian Community.** Notwithstanding any contrary provision in subdivision 3 or 4, the Prairie Island Indian Community of the Mdewakanton Dakota tribe has concurrent jurisdictional authority under this section with the local county sheriff within the geographical boundaries of the community's reservation to enforce state criminal law if the requirements of subdivision 2 are met, regardless of whether a cooperative agreement pursuant to subdivision 4 is entered into.

State of Minnesota

HOUSE OF REPRESENTATIVES

NINETY-THIRD SESSION

H. F. No. 2173

02/21/2023 Authored by Becker-Finn, Keeler, Kozlowski, Moller, Frazier and others
The bill was read for the first time and referred to the Committee on Public Safety Finance and Policy
03/20/2023 Adoption of Report: Placed on the General Register as Amended
Read for the Second Time

A bill for an act

relating to public safety; modifying law enforcement of Mille Lacs Band of Chippewa Indians; modifying requirements for Tribes to exercise concurrent law enforcement jurisdictional authority; amending Minnesota Statutes 2022, sections 626.90, subdivision 2; 626.91, subdivisions 2, 4; 626.92, subdivisions 2, 3; 626.93, subdivisions 3, 4; repealing Minnesota Statutes 2022, section 626.93, subdivision 7.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. Minnesota Statutes 2022, section 626.90, subdivision 2, is amended to read:

Subd. 2. **Law enforcement agency.** (a) The band has the powers of a law enforcement agency, as defined in section 626.84, subdivision 1, paragraph (f), if all of the requirements of clauses (1) to (4) are met:

(1) the band agrees to be subject to liability for its torts and those of its officers, employees, and agents acting within the scope of their employment or duties arising out of a law enforcement agency function conferred by this section, to the same extent as a municipality under chapter 466, and the band further agrees, notwithstanding section 16C.05, subdivision 7, to waive its sovereign immunity for purposes of claims of this liability;

(2) the band files with the Board of Peace Officer Standards and Training a bond or certificate of insurance for liability coverage with the maximum single occurrence amounts set forth in section 466.04 and an annual cap for all occurrences within a year of three times the single occurrence amount;

(3) the band files with the Board of Peace Officer Standards and Training a certificate of insurance for liability of its law enforcement officers, employees, and agents for lawsuits under the United States Constitution and

(4) the band agrees to be subject to section 13.82 and any other laws of the state relating to data practices of law enforcement agencies.

(b) The band ~~shall~~ may enter into mutual aid/cooperative agreements with the Mille Lacs County sheriff under section 471.59 to define and regulate the provision of law enforcement services under this section. ~~The agreements must define the trust property involved in the joint powers agreement.~~

(c) Only if the requirements of paragraph (a) are met, the band shall have concurrent jurisdictional authority under this section with the Mille Lacs County Sheriff's Department ~~only if the requirements of paragraph (a) are met and under the following circumstances:~~

~~(1)~~ over all persons in the geographical boundaries of the ~~property held by the United States in trust for the Mille Lacs Band or the Minnesota Chippewa tribe;~~

~~(2) over all Minnesota Chippewa tribal members within the boundaries of the~~ Treaty of February 22, 1855, 10 Stat. 1165, in Mille Lacs County, Minnesota~~; and~~.

~~(3) concurrent jurisdiction over any person who commits or attempts to commit a crime in the presence of an appointed band peace officer within the boundaries of the Treaty of February 22, 1855, 10 Stat. 1165, in Mille Lacs County, Minnesota.~~

Sec. 2. Minnesota Statutes 2022, section 626.91, subdivision 2, is amended to read:

Subd. 2. **Law enforcement agency.** (a) The community has the powers of a law enforcement agency, as defined in section 626.84, subdivision 1, paragraph (f), if all of the requirements of clauses (1) to (4) are met:

(1) the community agrees to be subject to liability for its torts and those of its officers, employees, and agents acting within the scope of their employment or duties arising out of the law enforcement agency powers conferred by this section to the same extent as a municipality under chapter 466, and the community further agrees, notwithstanding section 16C.05, subdivision 7, to waive its sovereign immunity with respect to claims arising from this liability;

(2) the community files with the Board of Peace Officer Standards and Training a bond or certificate of insurance for liability coverage with the maximum single occurrence amounts set forth in section 466.04 and an annual cap for all occurrences within a year of three times the single occurrence amount;

DOGEAGLE DECLARATION - EXHIBIT 2

(3) the community files with the Board of Peace Officer Standards and Training a certificate of insurance for liability of its law enforcement officers, employees, and agents for lawsuits under the United States Constitution; and

(4) the community agrees to be subject to section 13.82 and any other laws of the state relating to data practices of law enforcement agencies.

(b) The community ~~shall~~ may enter into an agreement under section 471.59 with the Redwood County sheriff to define and regulate the provision of law enforcement services under this section and to provide for mutual aid and cooperation. If entered, the agreement must identify and describe the trust property involved in the agreement. For purposes of entering into this agreement, the community shall be considered a "governmental unit" as that term is defined in section 471.59, subdivision 1.

Sec. 3. Minnesota Statutes 2022, section 626.91, subdivision 4, is amended to read:

Subd. 4. **Peace officers.** If the community complies with the requirements set forth in subdivision 2, paragraph (a), the community is authorized to appoint peace officers, as defined in section 626.84, subdivision 1, paragraph (c), who have the same powers as peace officers employed by the Redwood County sheriff over the persons and the geographic areas described in subdivision 3.

Sec. 4. Minnesota Statutes 2022, section 626.92, subdivision 2, is amended to read:

Subd. 2. **Law enforcement agency.** (a) The band has the powers of a law enforcement agency, as defined in section 626.84, subdivision 1, paragraph (f), if all of the requirements of clauses (1) to (4) and paragraph (b) are met:

(1) the band agrees to be subject to liability for its torts and those of its officers, employees, and agents acting within the scope of their employment or duties arising out of the law enforcement agency powers conferred by this section to the same extent as a municipality under chapter 466, and the band further agrees, notwithstanding section 16C.05, subdivision 7, to waive its sovereign immunity for purposes of claims arising out of this liability;

(2) the band files with the Board of Peace Officer Standards and Training a bond or certificate of insurance for liability coverage with the maximum single occurrence amounts set forth in section 466.04 and an annual cap for all occurrences within a year of three times the single occurrence amount or establishes that liability coverage exists under the Federal Torts Claims Act, United States Code, title 28, section 1346(b), et al., as extended to the

band pursuant to the Indian Self-Determination and Education Assistance Act of 1975, United States Code, title 25, section 450f(c);

(3) the band files with the Board of Peace Officer Standards and Training a certificate of insurance for liability of its law enforcement officers, employees, and agents for lawsuits under the United States Constitution or establishes that liability coverage exists under the Federal Torts Claims Act, United States Code, title 28, section 1346(b) et al., as extended to the band pursuant to the Indian Self-Determination and Education Assistance Act of 1975, United States Code, title 25, section 450F(c); and

(4) the band agrees to be subject to section 13.82 and any other laws of the state relating to data practices of law enforcement agencies.

(b) ~~By July 1, 1998,~~ The band ~~shall~~ may enter into written mutual aid or cooperative agreements with the Carlton County sheriff, the St. Louis County sheriff, and the city of Cloquet under section 471.59 to define and regulate the provision of law enforcement services under this section. If entered, the agreements must define the following:

(1) the trust property involved in the joint powers agreement;

(2) the responsibilities of the county sheriffs;

(3) the responsibilities of the county attorneys; and

(4) the responsibilities of the city of Cloquet city attorney and police department.

Sec. 5. Minnesota Statutes 2022, section 626.92, subdivision 3, is amended to read:

Subd. 3. **Concurrent jurisdiction.** The band shall have concurrent jurisdictional authority under this section with the Carlton County and St. Louis County Sheriffs' Departments over crimes committed within the boundaries of the Fond du Lac Reservation ~~as indicated by the mutual aid or cooperative agreements entered into under subdivision 2, paragraph (b), and any exhibits or attachments to those agreements~~ if the requirements of subdivision 2, paragraph (a), are met, regardless of whether a cooperative agreement pursuant to subdivision 2, paragraph (b), is entered into.

Sec. 6. Minnesota Statutes 2022, section 626.93, subdivision 3, is amended to read:

Subd. 3. **Concurrent jurisdiction.** If the requirements of subdivision 2 are met ~~and the tribe enters into a cooperative agreement pursuant to subdivision 4~~, the Tribe ~~shall have~~ has concurrent jurisdictional authority under this section with the local county sheriff within the geographical boundaries of the Tribe's reservation to enforce state criminal law.

Sec. 7. Minnesota Statutes 2022, section 626.93, subdivision 4, is amended to read:

Subd. 4. **Cooperative agreements.** In order to coordinate, define, and regulate the provision of law enforcement services and to provide for mutual aid and cooperation, governmental units and the Tribe ~~shall~~ may enter into agreements under section 471.59. For the purposes of entering into these agreements, the Tribe ~~shall be~~ is considered a "governmental unit" as that term is defined in section 471.59, subdivision 1.

Sec. 8. **REPEALER.**

Minnesota Statutes 2022, section 626.93, subdivision 7, is repealed.

626.93 LAW ENFORCEMENT AUTHORITY; TRIBAL PEACE OFFICERS.

Subd. 7. **Exception; Prairie Island Indian Community.** Notwithstanding any contrary provision in subdivision 3 or 4, the Prairie Island Indian Community of the Mdewakanton Dakota tribe has concurrent jurisdictional authority under this section with the local county sheriff within the geographical boundaries of the community's reservation to enforce state criminal law if the requirements of subdivision 2 are met, regardless of whether a cooperative agreement pursuant to subdivision 4 is entered into.

RESOLUTION 20-03-23-23

A RESOLUTION ACCEPTING AND MEETING THE REQUIREMENTS FOR THE MILLE LACS BAND OF OJIBWE TO HAVE THE LAW ENFORCEMENT POWERS AND AUTHORITIES SPECIFIED IN MINN. STAT. SECTIONS 626.90 AND 626.93

WHEREAS, the Mille Lacs Band Assembly ("Band Assembly") is the duly elected legislative body of the Non-Removable Mille Lacs Band of Ojibwe ("Band"), a federally recognized Indian Tribe; and

WHEREAS, pursuant to 3 MLBS §§ 3(d) and 3(f), the Band Assembly is empowered to adopt resolutions to promote the general welfare of the people of the Band and to ratify agreements, contracts, cooperative and reciprocity agreements, and memoranda of understanding; and

WHEREAS, the improvement of the spiritual, physical, mental, social, and economic wellbeing of the people of the Band requires that the Band provide effective law enforcement to all people on all lands within the Band's jurisdiction; and

WHEREAS, Minn. Stat. Section 626.90, subdivision 2, paragraph (a) provides that the Band has the powers of a law enforcement agency, as defined in Minn. Stat. Section 626.84, subdivision 1, paragraph (f), if all of the requirements of clauses (1) to (4) of Section 626.90, subdivision 2, paragraph (a) are met; and

WHEREAS, as recently amended, Minn. Stat. Section 626.90, subdivision 2(c), provides that if the requirements of Minn. Stat. Section 626.90, subdivision 2, paragraph (a) are met, the Band shall have concurrent jurisdictional authority with the Mille Lacs County Sheriff's Department over all persons in the geographical boundaries of the Treaty of February 22, 1855, 10 Stat. 1165, in Mille Lacs County, Minnesota; and

WHEREAS, as recently amended, Minn. Stat. Section 626.93 provides that, outside of Mille Lacs County, if the Band satisfies the requirements of Minn. Stat. Section 626.93, subdivision 2, clauses (1) through (4), the Band shall have concurrent jurisdictional authority under Minn. Stat. Section 626.93 with the local county sheriff within the geographical boundaries of the Band's reservation to enforce state criminal law; and

WHEREAS, the requirements of Minn. Stat. Section 626.90, subdivision 2, paragraph (a), clauses (1) through (4) and the requirements of Minn. Stat. Section 626.93, subdivision 2, clauses (1) through (4) are identical; and

WHEREAS, the Band has long satisfied the requirements of Minn. Stat. Section 626.90, subdivision 2, paragraph (a), clauses (1) through (4) and the identical requirements of Minn. Stat. Section 626.93, subdivision 2, clauses (1) through (4), as documented in cooperative agreements with Mille Lacs and Pine Counties and the Mille Lacs and Pine County Sheriffs; and

WHEREAS, as recently amended, Minn. Stat. Section 626.90 and Minn. Stat. Section 626.93 no longer require the Band to enter into a cooperative agreement to have the law enforcement powers and authorities specified in those sections.

WHEREAS, the Band Assembly finds that, in addition to the law enforcement powers and authorities possessed by the Band and the Band's Police Department by virtue of the Band's inherent sovereign authority and the law enforcement powers and authorities delegated to the Band and/or its police officers by the Federal Government, it is in the best interests of the people of the Band for the Band to possess and exercise the law enforcement powers and authorities specified in Minn. Stat. Sections 626.90 and 626.93 regardless of the existence of a cooperative agreement with Mille Lacs, Pine or any other County or County Sheriff.

NOW THEREFORE BE IT RESOLVED that the Band Assembly hereby affirms that the Band meets all of the requirements of Minn. Stat. Section 626.90, subdivision 2(a), clauses (1) through (4) and all of the requirements of Minn. Stat. Section 626.93, subdivision 2, clauses (1) through (4), and, in particular:

1. The Band agrees to be subject to liability for its torts and those of its police officers, employees, and agents acting within the scope of their employment or duties arising out a law enforcement agency function conferred by Minn. Stat. Section 626.84, subdivision 1, paragraph (f), Minn. Stat. Section 626.90 or Minn. Stat. Section 626.93, to the same extent as a municipality under Minn. Stat. chapter 466, and the Band further agrees, notwithstanding Minn. Stat. Section 16C.06, subdivision 7, to waive its sovereign immunity for purposes of claims of this liability;

2. The Band has filed and will maintain on file with the Minnesota Board of Peace Officer Standards and Training a bond or certificate of insurance for liability coverage with the maximum single occurrence amounts set forth in Minn. Stat. Section 466.04 and an annual cap for all occurrences within a year of three times the single occurrence amount;

3. The Band has filed and will maintain on file with the Minnesota Board of Peace Officer Standards and Training a certificate of insurance for liability of its law enforcement officers, employees, and agents for lawsuits under the United States Constitution; and

4. The Band agrees to be subject to Minn. Stat. Section 13.82 and any other laws of the State relating to data practices of law enforcement agencies.

WE DO HEREBY CERTIFY that the foregoing resolution was duly concurred with and adopted at a special session of the Band Assembly, in Legislative Council assembled, a quorum of legislators being present, held on the 1st day of June, 2023, at Nayahshing, Minnesota, by a vote of 3 FOR, 0 AGAINST, 0 SILENT.

IN WITNESS WHEREOF, we, the Band Assembly, hereunto cause to have set the signature of the Speaker of the Assembly.

Sheldon Boyd, Speaker of the Assembly

OFFICIAL SEAL OF THE BAND

Sponsor: District II Representative

DOGEAGLE DECLARATION - EXHIBIT 3